International rights of the child

Section C: Children and the justice system

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Contents

Chapter 1  Introduction  1
  1.1  International rights of the child  1
  1.2  How to use the study guide  2
  1.3  Allocating your time  3
  1.4  The examination  3

Chapter 2  What is international law?  5
  2.1  What is international law?  5
  2.2  How was international law developed?  6
  2.3  Who are the subjects of international law?  7

Chapter 3  The administration of child criminal justice  11
  3.1  The definitions of 'child' and 'juvenile'  13
  3.2  The aims of a child criminal justice system  14
  3.3  The prevention of juvenile delinquency and status offence  18

Chapter 4  The rights of children and criminal charges  21
  4.1  The rights of children prior to the determination of criminal charges  21
  4.2  The rights of children during the determination of criminal charges  23
  4.3  The aims, restrictions and prohibition on sentencing  25

Chapter 5  Moving towards a democratic and human rights-based family  25
  5.1  Physical punishment within the family  25
  5.2  Children and education decision-making within the family  29
  5.3  Children and religious decision-making within the family  29
Chapter 3: The administration of child criminal justice

Introduction

Paradoxically children are often at their most vulnerable when in a system which is designed to protect them: in the child criminal justice system. So it is important to focus on the administration of child criminal justice to find areas where international law requires improvement.

The reality is that the child criminal justice system is not one system, but a series of overlapping systems concerned with the:

- prevention of delinquency
- development of diversionary measures away from judicial proceedings wherever appropriate
- establishment of child-orientated fair trial rights
- protection of children upon arrest, remand or imprisonment
- promotion of the child's reintegration into society.

The Committee on the Rights of the Child devoted 13 November 1995 as a ‘Discussion Day’ on the administration of child criminal justice. This initiative reflected the Committee's concern that the general principles of the Convention on the Rights of the Child were not being adequately reflected in national legislation or practice.

The Committee's request for a holistic approach to be taken to child criminal justice was highlighted in the Guidelines for Action on Children in the Criminal Justice System 1997. The Guidelines call on those involved in child criminal justice to act in accordance with four of the general principles of the Convention:

- non-discrimination (including gender sensitivity)
- the best interests of the child
- the child's right to life, survival and development
- respect for the views of the child.

The Guidelines also refer to the need to adopt a:

- rights-based orientation to child criminal justice
- holistic approach to implementation through maximisation of resources and efforts.

Articles 37 and 40 are the key child criminal justice provisions in the Convention. In addition, the Committee has continually emphasised the importance of article 39. It concluded that insufficient attention was being paid to the need to promote an effective system of physical and psychological recovery for children.
who have been imprisoned in an environment that fosters the child’s health, self respect and dignity.

The inclusion of article 39 alongside articles 37 and 40 is an indication of the increasing importance that is being attached to this provision. When Norway submitted the draft text towards the end of the Convention’s drafting process, its aim was to provide rehabilitation for child victims of exploitation or abuse. The provision had been based on text put forward by the NGO Ad Hoc Group at a previous session. During its consideration by the Working Group, the Argentine representative suggested that the words ‘or imprisonment’ be added after the word ‘punishment’. He was supported by the representatives of Canada and Venezuela on the basis that it referred to improper detention rather than imprisonment pursuant to due process of law.

However, the representatives of Norway and the Inter-American Organisation took the view that the words ‘any other form of cruel inhuman or degrading treatment or punishment’ should meet the concerns of the Argentine representative and the amendment was withdrawn.

The application of article 39 ought not to be limited to situations where the child has suffered improper detention or been subjected to any other cruel, inhuman or degrading treatment or punishment. Arguably, its inclusion reflects a greater awareness of the vulnerability of children who find themselves within the child criminal justice system. This may be:

- because of the conditions within the prison environment
- because children who end up in criminal justice system often have needs requiring special consideration which have been overlooked or ignored.

The Guidelines for Action on Children in the Criminal Justice System set out its aims and obligations as being to:

- implement the Convention on the Rights of the Child
- use and apply other international standards and norms
- facilitate their effective implementation.

In order to ensure effective use of the 1997 Guidelines, it included the further aim of improving co-operation between:

- governments
- relevant UN bodies
- NGOs and all professional groups
- media
- academic institutions
- children and other members of civil society.

The Guidelines state that the effective implementation of the Convention on the Rights of the Child as well as the use and application of international standards through technical co-operation and advisory service programmes should be ensured by giving attention to the following:

- (a) assistance in legal reform; (b) strengthening national capacities and infrastructures; (c) training programmes for all officials concerned with juvenile justice; (d) preparation in training manuals; (e) preparation of information and education material to inform children about their rights in
juvenile justice; and (f) assistance with development of information and management systems.’

Learning outcomes

By the end of this chapter and the relevant readings you should be able to:

- distinguish between the definitions in international law of child and juvenile
- discuss what is meant by ‘the quiet revolution’
- explain the principal goals of a child justice system
- explain how states are encouraged to reduce juvenile delinquency
- analyse how status offences conflict with the ‘quiet revolution’.

Essential reading


You are expected to have read Chapters 7 and 8 of Van Bueren, before reading what follows.

3.1 The definitions of ‘child’ and ‘juvenile’

The United Nations Committee on the Rights of the Child states repeatedly that it regards the reporting on child criminal justice to extend to all those in a state party’s jurisdiction under the age of 18. This has been an extraordinarily successful approach, as surprisingly no state has challenged the self-extension of the mandate of the Committee to require such an approach.

It is also surprising as the Beijing Rules, for example, are not age related, but system related, the definition of juvenile being circular. Someone is a juvenile if he is tried as a juvenile. It is because of the obvious loopholes of such a definition that the Committee uses the age of 18. As this is a practice it is now entrenched in the practice of the Committee, although it originally had no basis in law. A state would therefore arguably now be regarded as acquiescing to the extension of mandate.

There are many examples of the acceptance of the self-expanded mandate of the Committee. Although legislation in Sierra Leone
states that any person aged 17 or above will be treated as an adult, the representatives reporting to the Committee insisted that children under eighteen were brought before a children’s court.

Some states apply the child criminal justice provisions to those over 18:

- in South Korea the youth justice system applies to 20 year-olds
- in Austria it is 19 years
- in Germany it extends to the age of 21.

This recognition of youth criminal justice is significant because it appreciates that maturity is not conditional on age alone. In the South African case of *S v Blaauw* (Case No. SS 159/2000, unreported), the Court took this factor into consideration when sentencing the accused who was six weeks over the age of 18 when he committed his offence. He therefore only just qualified for a so-called minimum sentence which the Court believed would have violated South Africa’s obligations under the UN Convention if it had been applied uniformly to a child just under eighteen. The Court considered this as a valid reason for providing a lesser sentence than the life sentence prescribed.

### 3.2 The aims of a child criminal justice system

The Beijing Rules highlight the importance of maintaining the relationship with the child’s family so that the child is not treated in isolation from the family. The Guidelines for Action on Children in the Criminal Justice System refer to the importance of ensuring easy access by relatives and persons who have a legitimate interest in the child where children are deprived of their liberty, unless the best interests of the child suggest otherwise. In its concluding observations on the report of China, the Committee on the Rights of the Child expressed concern over the lack of access afforded to parents during the pre-trial detention of their children.

#### 3.2.1 Ensuring the well-being of the child

It is noticeable that the 1997 Guidelines give consideration to relationships over and above the family, referring to ‘those with a legitimate interest in the child’. It also makes the proviso that such contact will only be justifiable if it is in the best interests of the child. This is in line with the approach of Article 9(3) of the UN Convention.

The Committee on the Rights of the Child also recognises the importance of encouraging families to have closer and more frequent contact with children placed in institutions and also to participate in how the child is treated. One of the conclusions from the Day of Discussion was that ‘the child’s socialisation should be promoted through increasing the involvement of families in children’s programmes and through facilitating the release of children for home visit’.

Another facet of promoting the child’s sense of well-being is that in all cases where children are ‘alleged as, accused of, or recognised as having infringed the penal law’ they should, according to the Convention on the Rights of the Child, be treated in a manner consistent with promoting their sense of dignity and worth, and which reinforces their respect for human rights. Any treatment should take into account the child’s age and the desirability of
promoting their ‘reintegration’ and their assumption of ‘a constructive role in society’.

After an intervention by the representative of the United Nations Centre for Social Development and Humanitarian Affairs during the second reading of the Convention, article 40 does not incorporate the concept of a child’s ‘rehabilitation’. This is defined as an aim of the administration of juvenile justice by article 14(4) of the International Covenant on Civil and Political Rights. The representative drew the attention of states to the revision of thought which had occurred since the adoption of the International Covenant and he highlighted the risk of states abusing rehabilitation as an undesirable form of social control. It is also because the concept of rehabilitation implies that responsibility rests solely with an individual who can be removed from society for treatment and once restored, released. Arguably the use of ‘Boot Camps’ in the US, which adopt paramilitary style rehabilitation programmes focusing on rehabilitation rather than reintegration, appears to run contrary to the objectives of institutional treatment set out in the Beijing Rules.

**Relevant case-law**

The Committee may be also be able to gain some assistance from approaches put forward in two of the regional human rights tribunals. In the case of *Villagran Morales and others v Guatemala*, the Inter-American Court stated that:

> ‘when the state apparatus has to intervene in offences committed by minors, it should make substantial efforts to guarantee their rehabilitation in order to allow them to play a constructive and productive role in society.’

In his concurring opinion in the case of *Nortier v Netherlands*, Judge Morenilla of the European Court, quoted from both the preamble and article 40(3) of the Convention on the Rights of the Child in order to state that the child criminal justice system should afford children the ‘necessary protection and assistance so that they can fully assume their responsibilities within the community’, and prepare them ‘to live an individual life in society’ by promoting ‘the establishment of laws, procedures, authorities and institutions applicable to children alleged as, accused of, or recognised as having infringed the penal law’.

### 3.2.2 Establishing a minimum age of criminal responsibility

In addition to constructive reintegration, another aim of the child criminal justice system is that children who are too young and insufficiently mature should not be brought within it. Paradoxically, although there is an arbitrariness in setting a minimum age, the choice must not be arbitrary. The Committee on the Rights of the Child has called upon countries to raise the minimum age of responsibility. It has also on occasion recommended that certain countries give serious consideration to reviewing their minimum ages with a view to raising them.

The Committee has not taken the initiative of establishing a universal minimum age of criminal responsibility. The Committee may well feel inhibited by the lack of consensus with respect to the appropriate minimum age, in addition to a reluctance to impose on the religious
or cultural traditions that may have influenced the setting of the age. However, there does appear to be a lack of consistency in the Committee’s approach. It criticised the United Kingdom’s minimum age of 10 as being unlawful (after it had effectively reduced the minimum age from 14), whereas only recommending that Ireland, which had just raised the minimum age from 7 to 10, consider reviewing the age with a view to increasing it.

At present there is a wide disparity in the minimum age, not only globally but in the same continent.

Within Europe, criminal responsibility begins at:

- 8 in Scotland
- 10 in Ireland
- 13 in France
- 15 in Sweden
- 16 in Spain
- 18 in Luxembourg.

Such a range raises the question of whether children mature at such different paces even within the same continent.

However, the opportunity to limit the arbitrariness of the minimum age of criminal responsibility for member states of the Council of Europe was passed up by the majority of the European Court of Human Rights in the case of *V v UK*.

The Court was faced with the argument that the low minimum age of responsibility amounted to inhuman and degrading treatment under article 3 of the European Convention. The European Court of Human Rights appreciated that it is well-established in its case-law that the Convention is a living instrument and must take account of the standards prevailing amongst member states of the Council of Europe.

It was also highlighted that the Committee on the Rights of the Child had been very critical of the age set by the UK. However, the Court also observed that there was no commonly-accepted minimum age for the imposition of criminal responsibility in relevant international texts or in Europe. While the age set by the UK was at the low end of the scale, other countries in Europe had adopted a younger age of criminal responsibility. Accordingly, the Court did not consider that there was at this stage any clear common standard among member states of the Council of Europe.

### 3.2.3 Diverting children away from the criminal system

Another important aim of the child criminal justice system set by international law is diverting children away from the system. The Guidelines for Action on Children in Criminal Justice System 1997 state that:

‘A review of existing procedures should be undertaken and, where possible, diversion or other alternative initiatives should be developed to avoid recourse to the criminal justice system for young persons.’

As diversions depend on the consent of the individual, Beijing Rule 11(3) recommends that consent to a diversion should be subject to review by a competent authority upon application. The provision
Chapter 3: The administration of child criminal justice

for such a safeguard is to protect children from consenting to a diversion because they feel coerced and wish to avoid a court appearance.

The Beijing Rules also provide guidance to states seeking to make diversions an effective and attractive option. The police and prosecution agencies should be empowered to dispose of such cases at their discretion in accordance both with their legal systems and with the principles contained in the Beijing Rules.

The development of minimum standards and guidelines for diversion programmes would assist in raising the profile of diversionary measures among states. Whereas the discretion to use diversionary measures would remain with prosecution agencies, the establishment of minimum standards might assist in ensuring that the measures are not used in an arbitrary manner. States are recommended to make efforts to provide for community programmes, such as:

- temporary supervision and guidance
- restitution and compensation of victims.

The Beijing Rules recommend that states should make efforts to provide for community programmes such as temporary supervision and guidance, restitution and compensation of victims.

**Restorative justice programmes**

A partial consequence of the promotion of diversion has been the increasing emphasis being placed on the value of restorative justice programmes with respect to child offenders. Restorative justice is a process by which the parties affected by a specific offence can meet to try and establish a way to repair the harm that has been done. For example, through:

- monetary repayment
- an apology
- community service.

The restorative justice process has a number of potential benefits – it is cheap and eases the burden on criminal justice systems and provides a way in which a young offender has to face the victim of the crime and recognise the effect that his actions have had on another.

It also means that the offender will not have the stigma of a conviction on his record. The process also has considerable advantages for the victim of the crime. It allows a person the opportunity to play a central role in determining the punishment for a crime which may be more empowering than attending court where the victim’s role is often limited to that of a witness.

The victim may also feel that restorative justice helps them to re-establish their dignity and to bring their ‘victim’ status to an end. The United Nations Handbook on Justice for Victims highlights that ‘the framework for restorative justice involves, the offender, the victim and the entire community in efforts to create a balanced approach that is offender-directed and, at the same time, victim-centred’.

Family Group Conferencing programmes may be particularly beneficial in bringing the offender, the victim and their families into the diversion process. Family members’ involvement will
usually be encouraged, as long as it is of benefit to the child offender. The Guidelines for Action on Children in the Criminal Justice System refer to the use of the family in diversion mechanisms. The Committee on the Rights of the Child has also acknowledged the importance attached by traditional systems to the family (including the extended family) as well as to the community in the process of ensuring social reintegration and promoting their active participation in society.

The Guidelines for Action on Children in the Criminal Justice System also assert that efforts should be made to establish and apply programmes aimed at strengthening social assistance which would allow for diversion. The Committee on the Rights of the Child has endorsed the value of diversionary mechanisms when urging the Russian Federation to make wider use of alternatives to deprivation of liberty and to make the necessary resources available for administering such alternatives.

### 3.3 The prevention of juvenile delinquency and status offence

The Committee on the Rights of the Child has commented that state party reports rarely address social factors leading to the involvement of juveniles with the system of administering justice or the social consequences of the decisions taken in that context. It also recognised that the child should be seen as a victim in situations of sex abuse, child prostitution and child pornography. Criminal responsibility should be based on objective criteria, excluding situations where the child is confronted with poverty and social exclusion.

Article 31 of the UN Convention Against Transnational Organised Crime realises the vulnerability of young people (either directly or indirectly) to organised crime. Further, s.xii of the Vienna Declaration on Crime and Justice: Plan of Action for Juvenile Justice, calls on states to support the development of juvenile specific crime prevention practices that take into account the vulnerability of juveniles to criminal recruitment, including the need for timely assistance to juveniles in difficult circumstances. It also calls for the strengthening juvenile justice systems and promoting the re-education and rehabilitation of juvenile offenders.

One way of reducing children coming into conflict with the law is to eradicate status offences. In its concluding observations on the Barbados state report, the Committee on the Rights of the Child took issue with the possibility of a child being brought before the juvenile court for the ‘offences’ of ‘talking back’ and ‘wandering without proper guardianship’.

### 3.3.1 Reforming the current child criminal systems

An analysis of the concluding observations to the Committee on the Rights of the Child with respect to child criminal justice between 1993–2000 revealed that out of the 141 reports considered, 21 states were asked to undertake a comprehensive reform of their child criminal justice system.
Despite the welcome progress which the Convention and other international laws represent, none of the standards on juvenile justice and deprivation of liberty have faced what is considered a fundamental problem. How can states which regard themselves as being unable to afford universal child education and health services devote scarce resources to improving a juvenile justice system which affects only a minority of the child population? Until this issue is confronted, universal improvement in the administration of juvenile justice will remain only a distant goal.

While the Committee on the Rights of the Child recognises the limited resources of states, it is also aware of the threat that this presents to the development of an effective child criminal justice system. In its concluding observations on the report of Sierra Leone the Committee, while recognising the limited resources available, expressed concern over the lack of clear policy on the allocation of resources in favour of children. With particular regard to child criminal justice, it called on the state party to make every effort to gather information on the numbers of children in detention and to make use of alternatives to imprisonment.

**The Co-ordination Panel on Technical Advice and Assistance on Juvenile Justice**

States risk losing public confidence if they seek to attain the standards set out in the relevant international instruments on the administration of child criminal justice without appreciating the social costs of implementation. It is for this reason that the Committee on the Rights of the Child has consistently recommended that state parties seek technical assistance from those international and non-governmental organisations which make up the Co-ordination Panel on Technical Advice and Assistance on Juvenile Justice. The stress which the Committee places on international co-operation and technical assistance reflects the priority which the UN system has placed on child criminal justice.

The Panel symbolises the need for different international, regional and non-governmental organisations to co-operate in areas of research, training, dissemination and exchange of information, implementation and monitoring of existing systems, as well as in specific programmes of technical assistance. The Co-ordination Panel has the considerable task of ensuring that finite resources are used in the most effective manner.

The Guidelines for Action on Children in the Criminal Justice System called for a strategy to set out how the Panel should be used to activate further international co-operation in the field of child criminal justice.

The Panel's aim is to assist in identifying common problems, compile examples of good practice and analyse shared experience. In doing so, it is foreseen that it will help to develop a more strategic approach to needs assessment and to effective proposals for action. Projects taken on by the bodies making up the Co-ordination Panel were referred to in the report of the Secretary-General on the ‘Use and application of the United Nations standards and norms, especially concerning juvenile justice and penal reform’.

Reminder of learning outcomes

By this stage you should be able to:

- distinguish between the definitions in international law of child and juvenile
- discuss what is meant by ‘the quiet revolution’
- explain the principal goals of a child justice system
- explain how states are encouraged to reduce juvenile delinquency
- analyse how status offences conflict with the ‘quiet revolution’.