

# Article 40

THE DYNAMICS OF YOUTH JUSTICE & THE CONVENTION  
ON THE RIGHTS OF THE CHILD IN SOUTH AFRICA

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## Article 40(2)(a)

*“No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;”*

## ***Thirteen Year Old Boy Implicated in Gang Rape of Seventeen Year Old Mentally Disabled Girl from Soweto – A Case of Criminal Capacity***

*“A deep social anxiety is provoked when a child’s acts violate normative regularities to such an extent that our incompatible frames for understanding childhood conformity and aberrance collide”<sup>1</sup>*

By Leon Holtzhausen

<sup>1</sup> Titus J.J. ‘Juvenile Transfers as Ritual Sacrifice: Legally Constructing the Child Scapegoat’ *Youth Violence and Juvenile Justice* (2005) 3 at 116.

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# EDITORIAL

Welcome to the second edition of Article 40 for 2012!

This edition contains three interesting articles for your reading pleasure. In the first article Dr Leon Holtzhausen, a lecturer in the probation studies department at the University of Cape Town, discusses the interesting theoretical basis for the assessment of criminal capacity within children between the ages of 10 and 14 years. He does by way of speaking to the 13 year old boy that was charged with taking part in the gang-rape of a girl with a mental disability in Soweto.

The second and third articles look at developments in child justice on the African continent and at a UN level. Tegan Clark, a final year LL.B student at UWC, does an analysis of the recently published "Guidelines on Action for Children in the Justice System in Africa". Lorenzo Wakefield, a researcher in the Children's Rights Project at the Community Law Centre, writes about the Day of General Discussion on children and the administration of justice at the 19th United Nations Human Rights Council session.

This is the last edition of Article 40 in print format. Further editions will only be available electronically. You would be able to download this from the following websites: [www.communitylawcentre.org.za](http://www.communitylawcentre.org.za) and [www.childjustice.org.za](http://www.childjustice.org.za). Please send us your e mail address in order for us to distribute Article 40 electronically to you. You can write to Crystal Erskine at: [cerskine@uwc.ac.za](mailto:cerskine@uwc.ac.za).

Regards,  
Editorial Team

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Recent events surrounding the horrific rape of a 17-year old girl with a mental disability by four boys and three men in Soweto left South Africa deeply shocked and disturbed. In April 2012, graphic footage of the rape went viral on social networking sites. The video showed seven people, including four minors, taking turns to rape a 17-year-old Soweto teenager. The rape victim then went missing and was later found in the company of a 37-year-old man. The assailants face several counts of rape, sexual assault, engaging the sexual service of a minor for reward, using a minor to create child pornography, committing a sexual act in the presence of a minor and committing a sexual act in the presence of an adult. It has now been established that one of the alleged perpetrators is a boy of 13 years. In terms of the Child Justice Act 75 of 2008, it is imperative to determine if the 13-year old has criminal capacity. Criminal capacity is the ability to know the difference between right and wrong and to act in accordance with that knowledge.

In many countries, under the common law, children under the age of 7 years were irrefutably presumed to lack the necessary criminal capacity and could thus never be prosecuted. Children 7 years or older but under 14 years of age were refutably presumed to lack the necessary criminal capacity and in order to prosecute such children the State had to present evidence to rebut this presumption. In the case of the 13-year old boy, the state prosecution will have to prove that the child, at the time of the commission of the offence, had the ability: a) to appreciate the wrongfulness of his or her act; and b) to conduct himself or herself in accordance with his or her appreciation of the wrongfulness of his or her act at the time of the commission of the offence.

**Table 1 – Minimum age of criminal responsibility in selected countries<sup>2</sup>**

COUNTRY	AGE
Singapore, India, Nigeria, Thailand, USA (some States)	7
Kenya	8
Ethiopia, Bangladesh	9
Australia, Switzerland, South Africa, Malawi, UK (England, Wales and Northern Ireland),	10
UK (Scotland), Canada, Ireland, Japan, South Korea, Netherlands, Uganda	12
France, Algeria	13
China, Italy, Germany, New Zealand, Russia, Ukraine, Slovenia, Estonia, Denmark	14
Finland, Norway, Sweden, Egypt	15
Portugal	16
Brazil, Argentina, Colombia, DRC, Belgium	18

<sup>2</sup> Child Justice Alliance Workshop Report on Criminal Capacity of Children (2011).

## **Establishment of criminal capacity in terms of the Act**

In terms of section 7(2) of the Act a child, 10 years or older but under the age of 14 years is presumed to lack criminal capacity, unless the Prosecution proves, beyond reasonable doubt, that the child had the capacity to:

- Appreciate the difference between right and wrong at the time of the commission of an alleged offence; and
- Act in accordance with that appreciation.<sup>3</sup>

From the provisions in the Act governing the establishment of the criminal capacity of a child, it is clear that it is the intention of the legislature to ensure that the criminal capacity of the child (10 years or older but under the age of 14 years) is considered at the earliest possible point (within 48 hours where the child has been arrested) in the child justice process and thereby ensuring that the child is afforded the protection that the rebuttable presumption clearly offers children between the applicable ages.<sup>4</sup>

To achieve this, the Act provides that every child who is alleged to have committed an offence must be assessed by a probation officer unless assessment has been dispensed with by the prosecutor, and the reasons for such dispensing have been recorded by the inquiry magistrate.<sup>5</sup> Assessment is fundamental process in professional probation practice. It goes to the heart of understanding why people engage in criminal behaviour and what needs to be done to address and manage offender risks and needs in an integrated systematic approach. We know that assessment in general is the accurate identification and understanding of problems, people and situations as well as their interrelations. But in the case of the 13-year old boy, the purposes of the assessment, is to express a view on whether expert evidence on the criminal capacity of such a child would be required. For the probation officer, assessment relates to the collection of detailed information about the offender's crime, contributing factors of crime, offending behaviour, emotional and physical health, social roles and other factors bearing upon the offender's problem situation. It is important to assess the offender-in-situation in relation to the systems perspectives. Information about the offender system falls into three major categories; micro, mezzo and macro aspects:

### **Micro aspects**

Micro aspects refer to the characteristics and facets of the individual offender that contributes to offending behaviour. Here the probation officers needs to explore biological/physical and psychological/mental aspects of the child's offending behaviour. Asking the questions 'what causes crime?' or 'why do people commit crimes?' and expecting to find an absolute or conclusive answer is like searching for the proverbial pot of gold at the end of a rainbow. There is no definite and agreed upon explanation as to why people – some more than others – commit criminal offences. There are, however, varied explanations including economic, physical and genetic, biochemical, psychological, sociological

and conflict theories of crime and deviance that can be utilised to explore the micro aspects in the offender's life that contribute to offending behaviour. Violent behaviour (e.g. fighting & aggression) is relatively common in childhood or early adulthood because of the developmental stages that children go through. It is natural for them to take risks.

These explanations only partially account for key etiological processes. A number of theories propose multiple pathways to antisocial behaviour. The challenge is between typing and process. Currently, the focus in the criminal justice system is primarily on typing individuals according to patterns of involvement in problem behaviour. If you just say the boy has criminal capacity, that is typing, but probation officers are interested in the process by which individuals enter those pathways and the individual changes within that happen over time. Moral development is not a once-off but a lifelong process. Children learn patterns of behaviour from the socialising institutions like the family. Therefore, it is not enough to assess the child only but also the family of origin.

### **Mezzo aspects**

Mezzo aspects refer to the characteristics and facets of the family, anti-social peer-group and significant other groups in the life of the offender that contribute to offending behaviour. *The Family Systems Theory* as related to crime and deviance emphasises the role that the family and/or peer group plays in the development and maintenance of the dysfunctional behaviour of the offender. External forces (i.e. relationships with other human beings) and context (i.e. environment) are used to explain the child's behaviour.

### **A developmental perspective of violence**

The Social Development Model (SDM)<sup>6</sup> is a synthesis of control theory, social learning theory and differential association theory.

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3 Skelton, A., Badenhorst, C. (2011). *The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review*. The Child Justice Alliance.

4 Ibid.

5 Ibid.

6 Huang *et al*, 'Modeling Mediation in the Aetiology of Violent Behavior in Adolescence: A Test of the Social Development Mode' *Criminology* (2001) 39(1) at 80.



*Asking the questions 'what causes crime?' or 'why do people commit crimes?' and expecting to find an absolute or conclusive answer is like searching for the proverbial pot of gold at the end of a rainbow.*

It acknowledges multiple biological, psychological and social factors at multiple levels in different social domains that lead to the development of problems e.g. drug use, delinquency and violence. There are four constructs of socialization which make up the identity of self:

1. Opportunities for involvement with others
2. Degree of involvement and interaction
3. Skills to participate in interactions
4. Reinforcement from performance in activities & interaction

Children learn patterns of behaviour (pro-social or antisocial) from the socialising agents of family, school, religious and other community institutions and peers. Social development theory suggests that individuals are steered toward anti-social behaviour through the influence of risk factors. Risk or "at risk" factors are "any personal or situational characteristics that increase a person's chances of criminal activity." Empirical evidence proposes that multiple negative biological, psychological and social factors acting at multiple levels – individual, family, school, community, individual - contribute at some level in predisposing an individual to criminal behaviour.

For example, risk factors for drug use might include availability of drugs in the community, a family history of drug use (social learning) and delinquent peer association (differential association). The theory argues that risk factors can be countered by protective factors which are hypothesised to mediate or moderate the effects of risk exposure. This aims to explain why not all individuals who are exposed to similar risk factors will engage in offending behaviour. Protective factors can include strong positive social bonds or a belief in moral norms and rules for example, as suggested by social control theory. Various important aspects related to role and importance of the family, peer group and significant others need to be covered during the assessment.

The following questions, amongst others, could be asked by the probation officer: does the child have family and/or a peer-group? What is their relationship? Is there regular contact? Is the family and/or peer-group a positive influence in the life of the offender? Or, is the family or peer-group anti-social and thus a negative influence in the life of the child? What was the involvement of the family and/or peer group before, during and after the commissioning of the crime?

### **Macro aspects**

What crime causation factors are located in the community of origin (where the child comes from and/or the community the child is returning too) that may cause or trigger offending behaviour? Are there any gang activities or organised crime syndicates operating in the community? What are the levels of poverty, illiteracy and unemployment in the community of origin? Use can be made here of a wide variety of offender assessment tools like clinical interview schedules, offending behaviour questionnaires, clinical observations and rating schemes in order to gather relevant information related to the offender-in-situation.

## Assessment Report

After completion of the assessment, the probation officer must compile the assessment report with recommendations on various issues stipulated in the Act, including, where applicable: the 'possible criminal capacity' of the child, if the child is 10 years or older but under the age of 14 years, as well as measures to be taken in order to prove criminal capacity. The assessment report must be submitted to the prosecutor before commencement of the preliminary inquiry, and in the case where the child offender has been arrested, the preliminary inquiry must be conducted within 48 hours after the arrest. The prosecutor, who is required to decide whether or not to prosecute a child, must, in the case where the child is 10 years or older but under the age of 14 years, take the following factors into account:<sup>7</sup>

- The educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;
- The nature and seriousness of the alleged offence;
- The impact of the alleged offence on any victim;
- The interests of the community;
- A probation officer's assessment report;
- The prospects of establishing criminal capacity if the matter were to be referred to a preliminary inquiry;
- The appropriateness of diversion; and
- Any other relevant factor.

In compiling the assessment report, it is necessary to cite information about the child's problems, needs and risks. This involves an examination of the present status of the issue of concern – its intensity, frequency and duration. As a criminal justice practitioner you are interested in what happens before, during and following the occurrence of the criminal act/s. Additionally you also explore the problem in the past, in other words, what may have caused or triggered the offending behaviour. During the assessment you would typically trace or track the information of the offending behaviour from the time of its initial occurrence to the present time.

This could entail analysing the criminal act/s of the offender and the risk of reoffending, in relation to:

- Severity (S). 'How severe, harsh or brutal was the criminal act?' For example, did the offender use a weapon in the commission of the crime? Did the offender abuse, intimidate, torture or mutilate the victim of the crime? The higher the intensity of the criminal act in relation to severity, harshness and brutality, the more dangerous the offender and the more likely the person will re-offend in future.
- Frequency (F). 'What was the rate of occurrence of the criminal act/s?' For example, was this a once-off criminal act, or high incidence, repeated acts of criminality? The higher the frequency of occurrence of the criminal act/s the more likely the offender will be a repeat offender or recidivist.

- Duration (D). 'What was the length of time or over what period did the criminal act/s take place?' The longer the duration, period or length of time over which the criminal act/s took place, the more dangerous the offender and the more likely the person will re-offend in future.

## Conclusion

The nature of the child was historically seen as evil or innocent. The way we define children incorporates assumptions about how we ought to treat them (the child is a criminal and the criminal is a child). Historically, children were believed to be naturally evil, born in original sin and susceptible to influence and vulnerable to corruption therefore one had to beat the devil out of them. The child justice system was developed because of recognition of the need for protection of children. Later, the belief was that children are moral. A child was believed to be sacred, morally pure, to be nurtured and protected. The child justice system was therefore for control, discipline and restraint or public accountability.

Is the child a victim or a threat? Children are perceived as both. In criminal law, "whether a child is a child or not a child depends on what he or she has done." In probation work, a child and what he or she is, goes beyond what they are doing, allowing youth second chances while also punishing offenders for crimes. At the heart of the debate over the age of criminal capacity is its relationship to moral judgment, competence and accountability. The criminal capacity debate is an attempt to establish something very important based on a biological indicator, namely, age. Thus, proportionality in sentencing regards the child as having reduced culpability. The dilemmas of this include; the judging level of culpability of adolescents for criminal offences, and allowing youth second chances while punishing offenders for crimes.

Therefore, the theory basis, as mentioned in this article, will have to be applied when the criminal capacity of the 13 year old boy will be under investigation. ●

7 Ibid.



# The Guidelines on Action for Children in the Justice System in Africa

## An Explanatory Note

By Tegan Clark

*This article serves as an explanatory note on the substantive provisions of the Guidelines on Action for Children in the Justice System in Africa (The Guidelines). The key principles, general elements of child-friendly justice, as well as the fair trial rights afforded to children in conflict with the law contained in the Guidelines will be identified and assessed.*

### **Aims, Objectives, Scope of Application, and Definitions**

The drafters of the Guidelines acknowledge that, although the progress made by African countries in promoting child survival, protection, development and participation, has been slow, there have also been significant developments. Progress will be achieved if accountability mechanisms are strengthened. The Guidelines would therefore serve as a guide for State Parties in law reform and harmonisation aimed at implementing a child justice system that complies with international human rights treaties. The effectiveness of the Guidelines would depend on effective and improved cooperation between State Parties, non-governmental organisations, and civil society. However, the State still retains the greatest responsibility to implement the Guidelines. The Guidelines apply to formal and informal, administrative, civil or criminal proceedings which bring children in contact with the law.

All decisions and actions taken pertaining to children should be in a 'child-friendly' manner, noting that the justice system must be cognisant of the increasing capacity and developing maturity of the specific child and family life.

The Guidelines recognises the variety of kinship and family ties in Africa by extending the definition of 'parent' beyond biological parents to an individual care-giver, extended family member or any person performing a parental role.

The notion of 'restorative justice' is also defined in the Guidelines and its objective is to ensure a reconciliatory solution that promotes accountability and fosters reintegration.

### **Principles**

Regarding child participation, national legislation could either provide for participation of the child at all ages, levels of maturity and understanding or participation subject to the child's age, level of maturity and understanding. The right to participation as defined in the Guidelines entails the child accessing information in a manner that facilitates his or her participation, the information being provided by a competent authority, such as a prosecutor or legal representative. Participation also includes proper consideration of the child's views and opinions. Findings that are contrary to these views and opinions should be explained to the child in a

manner he or she understands. The right of the child in conflict with the law to participate in the proceedings will therefore be meaningful if he or she is given sufficient information to form an informed opinion and express such opinion. It would be in the child's best interest if States legislate that the right to participate should be subject to the child's age, level of maturity and his/her level of understanding.

Acting in the **best interest of the child** should be the highest priority in all matters concerning children in the justice system. However, there may be instances where public policy considerations dictate otherwise. The best interest of the child principle ties in with the child's right to protection, dignity, participation, and non-discrimination. The Guidelines' provisions on best interest expand the CRC's provision. Whereas the Guidelines approach the principle in a multidisciplinary manner, the CRC's approach involves factors external to the child. Consequently, the Guidelines and the CRC should be read together, given that the focus should be on the child as well as external factors affecting him or her to give full effect to the principle.

With regard to **non-discrimination**, the Guidelines do not list any grounds of discrimination, therefore offering no guidance to States on protecting children in conflict with the law from discrimination, considering their vulnerability. The question then arises whether States should refer to grounds of discrimination in other international instruments to which they are party. The CRC and Guidelines adopt different approaches to non-discrimination. Whilst the CRC stipulates grounds on which children in conflict with the law may not be discriminated against, the Guidelines are silent on the matter, rather providing for special protection of the most vulnerable children in conflict with the law. The CRC is also silent on special protection of children in conflict with the law. Therefore the provisions in the Guidelines and CRC relating to non-discrimination are to be read together to encapsulate the entire meaning of the principle and thus provide greater protection to children.

With regard to **dignity**, generally, the State is to legislate that the child's right to dignity is to be respected in all instances where the child is in conflict with the law. Thus, even if a State does not have constitutional provisions protecting the dignity of children, implementing the Guidelines would ensure that there is adequate protection of children's dignity, particularly if they are in conflict with the law. The child in conflict with the law is to be treated with care, sensitivity, and respect at all stages of proceedings in the child justice system, "regardless of his/her legal status or of the manner in which they have come into contact with the justice system". Therefore, the right to dignity ties in with the right to non-discrimination. To get a holistic understanding of the right to dignity, therefore, the Guidelines and article 40 of the CRC should be read together to capture the entire meaning of the right to dignity.

### **Fair Trial Rights of Children in Conflict with the Law**

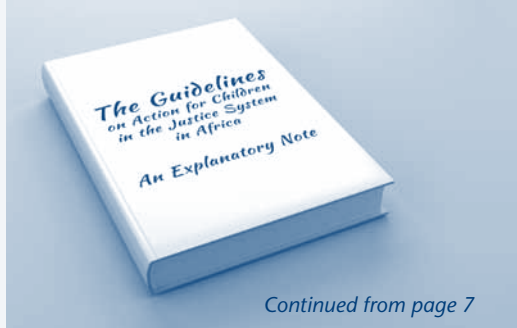
The Guidelines provide for a variety of **alternatives to formal, criminal judicial proceedings** that cater to the needs of African countries, such as the use of traditional mediation, restorative justice, community programmes such as temporary supervision and guidance, restitution and compensation to victims. Utilising these alternatives is advantageous as it alleviates the pressures on formal juvenile, criminal judicial institutions.

The different forms of restorative justice processes must be aimed at reformation, social rehabilitation and reintegration of the child into the family. These processes are to be used whether in a formal or informal institution or proceeding. The CRC, like the Guidelines, encourages the use of alternatives to formal, criminal judicial proceedings when a child is in conflict with the law – the only requirement being that human rights and legal safeguards are to be adhered to. The Guidelines require that the best interest principle be adhered to in all proceedings, formal and informal.

With regard to the **right to legal counsel and representation**, the Guidelines make provision for every 'accused' child to have legal assistance, and, if appropriate and in the best interests of the child, his or her parents, a family relative or legal guardians, during the proceedings. State Parties are to ensure, that the legal representation provided to the child is in a language he or she understands and enabled him or her to make informed decisions. Legal representation may be free. Agencies and programmes are to be established to ensure the availability of other professionals such as psychologists specialising in children in conflict with the law. State Parties are to ensure, in particular, that the right of every child in conflict with the law who is deprived of liberty to access legal assistance while in detention is respected. However, the information given to the child by the legal representative is subject to the age, level of maturity, development, and any disabilities he/she may have. Under the CRC, a child in conflict with the law has a right to "legal or other appropriate assistance in the preparation and presentation of his/her defence". This is the same as that provided in the Guidelines, except that the Guidelines provides specific directives on how the information is to be conveyed to the child.

The Guidelines provide for **pre-trial detention and custodial sentencing** in some cases. Before trial, a child may only be detained as a measure of last resort and for the shortest possible period of time, separate from adults. To this extent, the Guidelines coincide with the Havana Rules. Detention should also not be used as a sanction, infringing the child's right to presumption of

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innocence until proven guilty, thus bringing the Guidelines in conformity with the CRC. As a sentence, detention should only be imposed by a court, upon a finding of guilt for a serious offence involving the use of violence, on a persistent child offender or where there is no other sentencing option for the child. Capital and corporal punishment are strictly prohibited as punishment.

The Guidelines further contain the following fair trial principles: law enforcement (police), as well as judicial officers, is to be competently trained to deal with children who are in the criminal justice system; no arbitrary arrests or detention of children may take place; and a child who has been accused of having committed a criminal offence shall have the right to not be compelled to provide any testimony or confess his/her alleged guilt, and to be provided with an interpreter, at no cost, if he/she cannot comprehend nor communicate in the language used (also provided for in the CRC). These rights are all essential to fulfill the principles of the best interests of the child and his/her right to dignity.

### **General Measures of Implementation**

The Guidelines places an obligation on African countries to: conduct a legislative review to guarantee congruency between the States' domestic laws with the Guidelines, other agreements of an international or regional nature, and any declarations and guidance from the United Nations (UN) and African Union (AU); establish a "national policy for children in the justice system", and this policy is to contemplate the interrelatedness of the challenges facing children; execute a framework of information and management systems which are concerned with children in the justice system to monitor, develop and measure progress; designate money and resources in national budget to implement an adequate justice system in the country; and

alternatives to (formal) judicial proceedings (which include "mediation, conciliation, restorative justice practices, and traditional dispute resolution systems") must be promoted.

In developing systems to advance justice for children, special attention must be paid to protecting particular groups of children – children with disabilities, deprived of liberty, living and/or working on the streets, deprived of a family environment and in vulnerable groups. Given the peculiar circumstances of such children, their best interest should be highly prioritised. In my opinion, in this sense, the Guidelines call for an individualised approach when confronted with cases in which the abovementioned children are involved.

### **Traditional Justice**

The Guidelines contain an entire section dedicated to traditional justice relating to child justice proceedings: it provides a list of minimum factors to be implemented in traditional justice systems in Africa. Such a provision is unique, in that the CRC and the African Charter on the Rights and Welfare of the Child do not specify provisions on how children in conflict with the law are dealt with in non-formal justice systems.

The principle of **non-discrimination** should be applicable in traditional justice systems and so are the child's rights to dignity, liberty and security, and gender equality. Awareness of the vulnerability of female children is essential as well as giving due consideration to the rights of parents, legal guardians and care-givers of children in conflict with the law before traditional courts. States are to guarantee the impartiality of traditional courts, guarding against improper influence, inducements, pressure, threats or interferences, direct or indirect, from any external party in the courts' decision. Any stigma attached to children as witches or wizards are to be prohibited. Grounds of discrimination are also listed. Questions arise as to whether they apply to only children facing traditional justice systems or are applicable in all circumstances. As noted above, there are no listed grounds on which a child in conflict with the law cannot be discriminated against. In my opinion, children in conflict with the law facing traditional justice systems are entitled to all the other rights contained in the Guidelines.

### **Conclusion**

The Guidelines recommend that to develop a strong national child-friendly justice system, States should seek technical and other assistance of inter-governmental, non-governmental and academic institutions, regional expertise and international and regional financial institutions. To fully implement the Guidelines, it is important that States develop specialised courts in support of child -friendly justice, and a well-trained social workforce. Inter-governmental assistance will help strengthen weak national justice institutions and build good relations especially between neighbouring countries which assist each other.

Although the Guidelines have complied and, in some cases, expanded, on key provisions contained in the relevant international law instruments, it is highly progressive to the extent that it recognises that traditional and restorative forms of justice has a crucial role, especially in African countries. The Guidelines, as a whole, conform to international law instruments, the CRC in particular, as well as the rules and guidelines applicable to the Convention. ●





# **Children and the Administration of Justice**

## **A Day of General Discussion at the United Nations Human Rights Council**

*The United Nations Human Rights Council (hereinafter HRC) held its 19th ordinary session from 27 February until 23 March 2012. The HRC decided to dedicate 8 March 2012 as the annual day of general discussion on children's rights. For this day they chose the theme: "Children and the administration of justice". This article will provide a brief update of the activities that took place on 8 March 2012 and it will also provide a brief overview of the draft resolution proposed after this day of general discussion.*

### **The Day of General Discussion**

The Day of General Discussion on children and the administration of justice was officially opened by the UN High Commissioner for Human Rights, Dr Navanethem Pillay. In her opening speech she highlighted that, based on media reports and political consequences, there seemed to be a public discourse that children commit many offences. She argued that these media reports do not necessarily reflect an objective assessment of how many children actually commit offences. She encouraged States not to lower the minimum age of criminal responsibility. In her words, she said "it must be set high and not lowered". She also spoke of the importance of upholding the international principle of deprivation of liberty of children as a measure of last resort.

After the opening by the UN High Commissioner for Human Rights, a personal testimony of an adult from Spain was given. Now an adult, Antonio Caparros Linares, gave a personal testimony of when he committed an offence as a child and how the Spanish child justice system helped him with rehabilitation and how this affected his life as an adult. From a personal point of view, he advised the States Parties present at the HRC session to seriously consider the rehabilitation and reintegration of children deprived of their liberty.

During the morning session, substantive presentations in relation to children and the administration of justice were made by: Susan Bissel from

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UNICEF; Prof. Jorge Cardona, a member of the United Nations Committee on the Rights of the Child; Prof. Julia Sloth-Nielsen from the University of the Western Cape; Prof. Connie de la Vega from the University of San Francisco; and Ms Renata Winter, a judge at the Special Court for Sierra Leone.

The morning session was dedicated to the child/ juvenile justice procedure and substantive topics in relation to criminalising children's behaviour. These presentations focused on what is meant by "justice for children". In this regard Susan Bissel argued that the scope of justice for children goes beyond juvenile justice and includes any justice system for children. These could be formal or informal in nature. Jorge Cardona spoke about his fear of children's behaviour being criminalised and exposed by the media to the public in very bad light. He argued that this reinforces the fear of criminality in the public by using children's behaviour. In relation to the administration of justice, Julia Sloth-Nielsen presented on both the positive developments and the challenges in the justice system facing both child offenders and victims. On the positive developments she commended the fact that there seems to be a practice of including diversion within legislation. In relation to challenges, she argued that there seemed to be a lack of appreciation for the special needs of children, amongst others. Renata Winter spoke about the use of diversion and alternatives to detention. She argued that research has shown a marked decrease of recidivism by children who have been diverted away from the criminal justice system, as opposed to those who were imprisoned.

In response to these presentations, countries like Mauritania (on behalf of the Organisation of Islamic States) stipulated that this body has a human rights charter, which the UN has failed to promote. Sudan said that the minimum age of criminal responsibility within Sudan is 12 years and that they have created children's courts. Namibia highlighted that they will soon table their Child Justice Bill in Parliament.

The afternoon session started with an introduction by the Deputy Executive Director of the United Nations Office on Drugs and Crime (UNODC),

Mr Sandeep Chawla. He started his speech by saying that children should be better served in the justice system. He argued that States can no longer neglect their priorities in relation to the justice system for children.

The presenters for the afternoon sessions were: Ms Marta Santos-Pais, UN Special Representative of the Secretary-General on Violence against Children; Ms Rani Shankardass of Penal Reform International and the Justice Association of India; Mr Luis Pedernera of the Latin American and Caribbean Network for the Defense of the Rights of the Boys, Girls and Adolescents; Prof. Dainius Puras, Head and Professor of the Centre of Child Psychiatry and Social Pediatrics at Vilnius University, Lithuania; and Mr Abdul Manaff Kemokai, Executive Director of Defence for Children International (DCI) Sierra Leone.

Marta Santos-Pais said that violence against children in the juvenile justice system is a priority for the Special Representative of the Secretary General's mandate. She said that children are especially targeted in institutions where they are detained. The violence that they suffer in the juvenile justice procedure is enforced by staff of institutions and torture is also experienced. Rami Shankardass presented on children of incarcerated parents in developing countries. She argued that the criminal justice systems of these countries are entrenched in colonial contexts and that this was a stumbling block in dealing with children incarcerated with parents. Luis Pedernera spoke of the three worrying trends in relation to the detention of children in Latin America. These being: (i) children are still sentenced to life imprisonment; (ii) torture is still taking place; and (iii) no juvenile justice systems in certain jurisdictions. He also raised a concern in relation to the reduction in standards of detention. Dainius Puras spoke to the health needs of children in detention, which includes mental health needs. He argued that mental health services can only be effective if international human rights law principles are respected. Finally Abdul Manaff Kemokai spoke to effective methods of rehabilitation of children who were convicted of committing offences. He argued that traditional concepts and institutional rehabilitation can be used as methods in this regard. He also argued that an important aspect of methods in place should be to ensure no re-offending takes place.

To conclude the day of general discussion, the chairperson of the HRC, Her Excellency Ambassador Laura Dupuy Lasserre, from Uruguay stipulated that a resolution on the rights of the child will be drafted and adopted by the General Assembly. The next point of discussion in this article would be this resolution.

### ***Draft Resolution on the Rights of the Child***

The draft resolution on the rights of the child prepared by the HRC speaks to multiple issues in relation to the rights of children and not just the administration of justice. The topics covered are the following:

- Implementation of the CRC and other instruments;
- Mainstreaming the rights of the child;
- Protecting and promoting the rights of the child;
- Prevention and eradication of the sale of children, child prostitution and child pornography;
- Protection of children affected by armed conflict; and
- Children and the administration of justice

For the purposes of this article, I will only deal with the provisions in relation to children and the administration of justice.

In relation to children and the administration of justice, the draft resolution covers substantive provisions on the following, amongst others:

It calls for “States to develop and implement a comprehensive juvenile justice policy to prevent and address juvenile delinquency with a view to promoting... the use of alternative measures, such as diversion and restorative justice...” In other words, the resolution places a focus on measures to prevent future criminal conduct by children, who are currently in the child justice system. Therefore it emphasises that a child justice system should be geared towards addressing the prevention of future criminal activities.

The draft resolution also calls on States Parties to abolish the death penalty and life imprisonment of children without the option of parole who were under 18 years old at the time of committing the offence. Therefore sentencing provisions should not be formulated to take a child’s age into account at the time of sentencing, but rather when he or she committed an offence.

Article 51 of the draft resolution encapsulates article 37(a) of the CRC by requiring that States Parties protect children against torture and other cruel, inhuman or degrading treatment. It also requires States to prohibit sentences such as forced labour and corporal punishment. Thus apart from the prevention of torture of children currently in the system, it also seeks to prohibit cruel and inhuman sentences.

The draft resolution formulates the provisions surrounding legal assistance as a mechanism of protecting children in the justice system. It frames it as follows: “States [are] to take special measures to protect juvenile offenders, including by means of provision of adequate legal assistance...” The meaning of adequate in this sentence should be interpreted in a positive sense and should not be seen as limiting children to the type of legal assistance that might come from paralegals, for example.

Article 57 of the draft resolution calls on States to refrain from enacting or reviewing legislation that criminalises children’s behaviour, which, if they were adults would not have been criminalised. In relation to South Africa this is important, as consensual sexual relations between children in a certain age category is currently criminalised, but if they had consensual sexual intercourse as adults, such behaviour would not be criminalised. Therefore this article in the draft resolution is certainly welcome in order to ensure that children’s behaviour in relation to their human development is not criminalised.

One can certainly argue that as a result of the UN Secretary-General’s Special Representative on Violence Against Children’s intervention on violence against children in the juvenile justice system, article 58 of the draft resolution was inserted. This article “urges States to take all necessary and effective measures, including legal reform where appropriate, to prevent and respond to all forms of violence against children within the justice system.”

Another important article in the draft resolution relates to the minimum age of criminal capacity. The draft resolution, in the spirit of the United Nations Committee on the Rights of the Child General Comment No. 10,



encourages States not to lower the minimum age of criminal capacity, but rather ensure that it is above 12 years of age or higher. It does this quite strongly by stipulating: “... refers to the recommendation of the Committee of the Rights of the Child to increase their lower minimum age of criminal responsibility without exception to the age of 12 years as the absolute minimum age...” Currently South Africa’s minimum age of criminal responsibility is still at 10 years. This is not only in contravention of the draft resolution, but more importantly also in contravention of the interpretation of the CRC.

The last section of the draft resolution does not, *per se*, cover children who have committed offences, but due to the fact that their parents have, they find themselves incarcerated with their parents. This section urges States to consider the best interest of children once sentencing their primary caregivers (who were convicted of committing offences) and reminds States that the best interest of the child should be taken into consideration when debating how long children should stay with their mother in prison.

## **Conclusion**

The initiative by the HRC to have its day of general discussion on children’s rights should be commended. From an international perspective it certainly re-emphasised that children, just like adults, also have rights and that States are to respect, protect, promote and fulfil the rights of children, especially those who find themselves in the justice system.

It is recommended that the draft resolution be finalised as soon as possible and the monitoring and follow-up of the provisions, as contained within this draft resolution and other international instruments, are fulfilled. ●



# notice BOARD



The Child Justice Alliance recently published its version of the 2nd year annual report on the implementation of the Child Justice Act. Feel free to download this publication at [www.childjustice.org.za](http://www.childjustice.org.za).

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