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RIGHT TO LEGAL REPRESENTATION OF CHILDREN IN CONFLICT WITH THE LAW International and regional standards

Legal aid/legal representation is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. The right to legal representation is a precondition of children's access to justice. Children left alone without any independent legal counsel are not only deprived of their voice, but are also subject to numerous abuses as they are often intimidated and not aware of their rights, although these are guaranteed by almost all of the countries in the world.

The right to legal representation of children in conflict with the law is proscribed by the ICCPR, the ECHR, and specifically regarding children only the UN Convention on the Rights of the Child (CRC). However, even though these international instruments provide a consistent of standards on child-friendly measures for the provision of legal assistance to children, they do so in a very general manner. Only the Council of Europe Guidelines on Child-Friendly Justice, gives specific guidance on how lawyers, paralegals, should interact with child clients and their families, with child and other victims, with the police and prosecuting agencies, or with courts or tribunals designated to adjudicate cases. Therefore, there is much space for future development of possible international legal document that will address this issue in more specific manner.

Key words: Legal representation; Children; Criminal justice system.

"There can be no keener revelation of a society's soul than the way in which it treats its children."

NELSON MANDELA

1. INTRODUCTION

Legal aid/legal representation is an essential element of a fair, humane and efficient criminal justice system that is based on the rule of law. It is a base for the

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further enjoyment of other human rights, including the right to a fair trial, the right to liberty and security of person, the right to be free from torture and inhuman and degrading treatment. The Universal Declaration of Human Rights¹ reaffirms that the respect of legal representation is an important safeguard that ensures fundamental fairness and public trust in the criminal justice process. The right to legal representation is a precondition of children’s access to justice.

Often children are given long pre-trial detention in unequipped facilities to harbor juveniles, are given prison sentences and are locked up in prison conditions, which often do not meet the international criteria; sometimes with adults, sometimes for very minor offences or no offences at all, and most often children are not provided with free legal representation that could improve the treatment of children in the criminal proceedings.

Nevertheless the right to defense and legal representation is a fundamental one. Children left alone without any independent legal counsel are not only deprived of their voice, but are also subject to numerous abuses as they are often intimidated and not aware of their rights, although these are guaranteed by almost all of the countries in the world.

There are numerous international and regional human rights instruments that proscribe for the right of legal representation. However, some are more specific than others when in case of children in all judicial proceedings. Nevertheless, they set certain international standards that should be the baseline in the creation of national legislation with respect to legal representation, especially regarding juvenile justice.

2. INTERNATIONAL AND REGIONAL STANDARDS

“Legal aid is an essential element of fair, humane and efficient criminal justice system that is based on the Rule of Law and that it is a foundation for the enjoyment of other rights including the right to a fair trial.”²

Numerous research into human rights of children reveal an array of legal and practical barriers that impede children’s access to justice and which disproportionately affect children in vulnerable situations.³ Court fees, the costs of legal representation, distance to justice institutions, lack of information generally and lack of child-sensitive procedures discourage children from accessing remedies. Legal advice and legal aid services have not suf-

¹ See: The Universal Declaration of Human Rights, www.un.org/en/documents/udhr.

² The Johannesburg Declaration on the Implementation of the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, Johannesburg, South Africa, June 24-26, 2014.

³ UNICEF Children’s Equitable Access to Justice: Central and Eastern Europe and Central Asia, 2015.

ficiently taken children into account, and the existing resources allocated to these are insufficient lacking effectiveness and consistency.⁴

The right to legal and other appropriate assistance of children, especially in the context of criminal proceedings, is established under international human rights law. The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems specify that: "*Legal aid provided to children should be prioritized, in the best interests of the child, and be accessible, age-appropriate, multidisciplinary, effective and responsive to the specific legal and social needs of children.*"⁵

However, the issue of legal representation to children and in children in conflict with the law has relatively recently found it self on the international, regional and, as well as, on national agendas.⁶ The right to legal representation of children and of children in conflict with the law is proscribed by the ICCPR, the ECHR,⁷ and specifically regarding children only the UN Convention on the Rights of the Child (CRC).⁸

These international and regional legal frameworks are clear regarding states' duties with respect to legal representation of children and children in conflict with the law.⁹ They also provide for new strategies for delivering legal aid through the use of alternative mechanisms especially the ICRC.

The ICCPR as a general human rights instrument deals with legal representation in general in its articles 14.3(b), and 14.4.¹⁰ However, it tackles the issue in a general way and does not speak of children in a separate manner. The ICCPR states that everyone including juvenile person will have adequate time and facilities for the preparation of his defense and to communicate with counsel of his own choosing, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.¹¹

⁴ *Ibid.*

⁵ The United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems.

⁶ Commission on Crime Prevention and Criminal Justice Twenty-second session Vienna, 22-26 April 2013 Follow-up to the Twelfth United Nations Congress on Crime Prevention and Criminal Justice and preparations for the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice E/CN.15/2013/CRP.1

⁷ European Convention on Human Rights, http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁸ Convention on the Rights of the Child Adopted and opened for signature, ratification and accession by General Assembly resolution 44/25 of 20 November 1989 entry into force 2 September 1990, in accordance with article 49.

⁹ International Legal protection, HR/PUB/11/01 UNITED NATIONS ISBN-13: 978-92-1-154191-5 eISBN-13: 978-92-1-055097-0, 2011 UN.

¹⁰ ICCPR Article 14.

¹¹ ICCPR Article 14.

Similar, the ECHR approach in its article 6, is even more unspecific and refers to a child’s “representative,” but does not define the concept beyond implying that a representative need not be formally trained in the law and that any system of assistance should take a child’s evolving capacity into account.¹² However, it is common understanding that the ECHR’s article 6 imposes a positive obligation to establish a court system, which upholds this right – for example, by providing interpreters or legal aid in criminal proceedings.¹³ Article 6 of the European Convention on Human Rights (ECHR) guarantees the right to a fair trial in both civil and criminal proceedings thus the right to legal representation applies in both procedures. Furthermore, the case law of the European Court of Human Rights, stresses the vital connection between the right to legal assistance and the general interest in guaranteeing the right to a fair trial. The ECHR also points out that the legal representation should be effective in addition to just being there.¹⁴ This can be seen from *Artico v. Italy*,¹⁵ where the Court stressed that “(...) *The Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective. (...) [M]ere nomination does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfill his obligations.*”¹⁶

When faced with a criminal charge, the right to legal assistance is explicitly set out in article 6 (3) (c), providing that legal representation is mandatory in criminal cases.¹⁷ This was reaffirmed in *Jordan v. United Kingdom*,¹⁸ when the Court found a violation of the state’s procedural obligations under article 2, because the family members of a man unlawfully killed by the police were not given legal aid during the investigation.

Article 6 (3) (c) consists of three separate parts: (1) the right of an accused to defend himself or herself in person; (2) the right of an accused to defend himself or herself through legal assistance of his or her own choosing; and (3)

¹² Article 6 ECHR.

¹³ *Ibid.*

¹⁴ Article 6 (3) (c) requires that the assistance of the lawyer be effective; formal appointment alone is not sufficient, since the ECHR is intended to guarantee rights that are not theoretical or illusory but are practical and effective.

¹⁵ *Artico v. Italy*, Judgment of May 13, 1980.

¹⁶ *Ibid.*

¹⁷ Article 6 (3) (c) requires that “a person charged with a criminal offense” has the right to defend himself or herself in person or through legal assistance of his or her own choosing or, if he or she does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

¹⁸ *Jordan v. United Kingdom*, Judgment of May 4, 2001.

the right of an accused to be given legal assistance free of charge when he or she has no means to pay for it and the interests of justice so require.¹⁹

The first two parts of the article do not provide for absolute protection. The Court has decided that an individual cannot insist upon representing himself or herself without the assistance of a lawyer in all circumstances, and that compulsory legal representation before a court does not violate the Convention, meaning that in cases of juveniles mandatory representation is a must. Especially in cases where deprivation of liberty is at stake, the interests of justice in principle calls for legal representation. The interests of justice usually indicates that free legal assistance for vulnerable groups such as minors is always required.

The ICRC has been more specific with respect to the right to legal representation of children. Namely, article 12 gives the child a right to be heard in any judicial or administrative proceeding “either directly, or through a representative or an appropriate body” consistent with national law, which is still considered as a broad approach.²⁰

However, article 40 is most specific on the issue of legal representation of juveniles.²¹ It requires that a child in conflict with the law should be “informed promptly and directly of the charges against him or her, and, if appropriate, through his parents or legal guardian, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense”. Article 40 further provides that a child in conflict with the law be given “a fair hearing, according to law, in the presence of legal or other appropriate assistance (...)”²²

Pursuant to this the Committee on the Rights of the Child further addressed children’s rights in juvenile justice proceedings in its General Comment No. 10, where affirmatively declares that a child in conflict with the law “must be guaranteed legal or other appropriate assistance in the preparation and presentation of his/her defense”, and that such assistance must be free. However, the Comment provides that legal aid can also be provided by social workers, paralegals or others, but cautions that anyone who provides legal aid to a child “must have sufficient knowledge and understanding of the various, legal issues (...)”²³ which is contrary to the law of many coun-

¹⁹ Article 6 ECHR.

²⁰ CRC, www.ohchr.org/en/professionalinterest/pages/crc.aspx.

²¹ CRC Article 40 (2) (b) (ii).

²² CRC Article 40 (2) (b) (ii), (iii).

²³ See also the U.N. Rules for the Protection of Juveniles Deprived of their Liberty (“Havana Rules,” 1990), U.N. legal aspects of the process of juvenile justice and must be trained to work with children in conflict with the law. General Comment No. 10, para 49.

tries that have regulated the legal profession through law. Therefore it could create confusion and the dangerous situation of non-professionals offering unsuitable legal aid to children, which could be damaging to the overall outcome of the proceedings.

In order to regulate this matter in more specific way the UN has prepared the Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”) that further elaborates on the right to legal representation.²⁴ The Rules require states to ensure that “throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country”.²⁵

This approach encompasses the situations including when a child has no financial means to engage a lawyer, thus pointing out that the state has the obligation to ensure that the legal aid in such cases is free and accessible. The Rules also provide that “in-service training, refresher courses and other appropriate modes of instruction shall be utilized to establish and maintain the necessary professional competence of all personnel dealing with juvenile cases”.²⁶ However, the Rule does not expressly include training of lawyers and their specializations in Juvenile Justice, but it implies this possibility. To that end, even though the Beijing Rules are principally directed at juvenile justice proceedings, their principles can be extended to all matters in which a child’s legal interests are at issue including legal representation.²⁷ The proper training of professionals offering aid to children in criminal proceedings was specifically mentioned in the United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, approach to Justice for Children (2008).²⁸

Having in mind the previously said, the Council of Europe recently released the most specific regional document by now, articulating the meaning of child-friendly justice, including access to legal assistance.²⁹ The Council

²⁴ Standard Minimum Rules for the Administration of Juvenile Justice.

²⁵ (Rule 15.1).

²⁶ (Rule 22.1).

²⁷ *Ibid.*

²⁸ United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, approach to Justice for Children Adopted by the Economic and Social Council in its resolution 2005/20 of 22 July 2005, in para. 22 establish that “[c]hild victims and witnesses and, where appropriate, family members should have access to assistance provided by professionals who have received relevant training (...) This may include assistance and support services such as financial, legal, counseling, health, social and educational services, physical and psychological recovery services and other services necessary for the child’s reintegration.”

²⁹ The Council of Europe Guidelines on Child- Friendly Justice (Nov. 2010).

of Europe Guidelines on Child-Friendly Justice provides the most comprehensive definition of child-friendly justice.³⁰ Namely, the Guidelines define it as the “justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the fundamental principle”.³¹ Furthermore, the Guidelines explicitly state that children should have the right to their “own legal counsel and representation” during judicial proceedings.³² The Guidelines state that all proceedings have to be taken with the best interests of children and also specify that “children should be considered as fully-fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child”.³³

The Guidelines also provide that children involved in judicial proceedings should have access to free legal aid, under the same or more lenient conditions as adults, and that “lawyers representing children should be trained in and knowledgeable on children’s rights and related issues, receive ongoing and in-depth training and be capable of communicating with children and young people at their level of understanding”.³⁴

It could be observed that the Guidelines are most specific document in elaborating international standards and in legal representation of children in criminal proceedings, concentrating on all important aspects of the legal aid given to children/juveniles offering concrete measures to be implemented into national legislations.

3. CONCLUSION

Collectively, the analyzed international instruments provide a consistent but still very general set of standards on child-friendly measures for the provision of legal assistance to children. With the exception of the Council of Europe Guidelines on Child-Friendly Justice, none gives specific guidance on how lawyers, paralegals, and others who provide legal assistance to children should interact with child clients and their families, with child and other victims, with the police and prosecuting agencies, or with courts or tribunals designated to adjudicate cases. However, those international legal instruments even general in nature regarding legal representation of children set strong base for further development in this field.

³⁰ *Ibid.*

³¹ Par. III (A) ((1) & (2).

³² Paragraph IV (D) (2) (par. 37).

³³ Par. IV (D) (2) par. 40).

³⁴ Par. IV (D) (2), par. 38), Par. IV (D) (2) par. 39).

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