

5 - Fair trial guarantees for children

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The right to a fair trial, also known as due process, is laid out in most international human rights treaties (for example: Article 6 ECHR, Article 47 [EU Charter](#), Article 14 [ICCPR](#)) and has been extensively analysed by international courts, legislation, and in academia.

Article 40 of the CRC lists child-specific fair trial guarantees which are applicable to children accused of or recognized as having infringed criminal law. The first paragraph of Article 40 lays down the general principles: children should be treated in a manner consistent with their sense of dignity; in accordance with their age and in light of the ultimate goal of reintegrating the child into society.

In Europe, the most extensive case law of the ECtHR covers the right to a fair trial. In some cases, the ECtHR has dealt with specific fair trial guarantees for children in conflict with the law. In its reasoning, the Court has drawn inspiration from Article 40 CRC and the CRC Committee's General Comments. The Court has routinely held that:

“criminal proceedings must be so organised as to respect the principle of the best interests of the child. It is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings (see *Adamkiewicz v. Poland*, no. 54729/00, § 70; *Panovits v. Cyprus*, no. 4268/04, § 67)

Under **EU law**, Recital 8 of the [Procedural Safeguards Directive](#) affirms that the child's best interests should be a primary consideration in accordance with Article 24 (2) of the EU Charter. Recital 8 draws attention to the goal of reintegration and potential for development of children. Consequently, national authorities should interpret EU law and domestic law which has been passed in the implementation of EU law in the spirit of the EU Charter (best interests principle) and the specificities of child development. Under EU law, four other directives have been adopted covering criminal law aspects (Directive (EU) 2016/343 concerning the presumption of innocence; Directive 2013/48/EU on the right to access to a lawyer; Directive 2012/13/EU regarding guarantees on the right to information in criminal proceeding and Directive 2010/64/EU laying down specific guarantees on the right to interpretation and translation). These directives are complementary to the child-specific [Procedural Safeguards Directive](#).

This factsheet covers the core guarantees laid down in international law for children suspected or accused of having infringed criminal law. The first section will highlight the scope of criminal justice proceedings from the perspective of international law. Sections 2.1. to 2.11 will subsequently address the substance of the due process rights for children which have been dealt with in international instruments and case law.

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1. The applicability of international law

Article 40 of the **CRC** refers to children “alleged as, accused of or recognized as having infringed the penal law”. Article 6 of the **ECHR** covers the right to a fair trial in the “the determination of a criminal charge.” From the perspective of the ECtHR the concept of ‘criminal charge’ is autonomous in that the qualification in national law is only the starting point and not the sole determinative criterion in assessing whether a person has been criminally charged. The reason for an autonomous interpretation of a criminal charge is to avoid that Member States simply exclude the application of Article 6 of the Convention through definitions adopted in national law. This could yield results incompatible with the object and purpose of this Article (see among many others *Öztürk v. Germany*, 21 February 1984, § 49, Series A no. 73; or *Matyjek v. Poland* (dec.), no. 38184/03, § 45, 30 May 2006).

The **ECtHR** will apply the *Engel criteria* to determine whether Article 6 ECHR -criminal limb- is applicable to a particular situation (*Engel and Others v. the Netherlands*, 8 June 1976, § 82, Series A no. 22).

Meaning of criminal charge under Article 6 ECHR (**the Engel criteria**):

- The first criterion is the legal classification of the offence under national law.
- The second is the very nature of the offence
- The third is the nature and degree of severity of the penalty that the person concerned risks incurring.

The second and third criteria are alternative, and not necessarily cumulative. This, however, does not exclude a cumulative approach where separate analysis of each criterion does not make it possible to reach a clear conclusion as to the existence of a criminal charge (see for eg: *Jussila v. Finland* [GC], no. 73053/01, §§ 30-31, ECHR 2006XIV, and *Ezeh and Connors v. the United Kingdom* [GC], nos. 39665/98 and 40086/98, § 82, ECHR 2003X).

The Engel criteria have been applied in the landmark case of *Blokhin v Russia* which concerned proceedings against a 12-year-old child arrested and subsequently placed in a temporary detention centre on suspicion of extortion.

Blokhin v Russia

(determination of a criminal charge against a 12-year old child)

The applicant was 12 years old when he was apprehended and detained by the police on suspicion of extortion. At the moment of the facts he was below the age of criminal responsibility under Russian national law.

The Government contended that he had not been criminally charged within the meaning of Article 6 (1) ECHR. According to the Government, his confinement in a temporary detention centre was to prevent him from committing further offences and correct his behaviour. The purpose was thus - according to the Government- preventive and not punitive.

The Court observed that the applicant had been placed in a temporary detention centre for juveniles on the ground of having committed a delinquent act and that the reason for not instituting proceedings was that he was under the minimum age of criminal responsibility in Russia. Also, the Court found that there had been a close link between the pre-investigation inquiry and the placement of the applicant in a temporary detention centre. Such placement was a direct consequence of the finding that his actions contained the elements of the criminal offence of extortion. It further found that the purpose of the detention had been punitive, rather than preventive or educational as submitted by the Government.

Consequently, in view of the nature of the offence together with the nature and severity of the penalty, the Court found that the applicant had been subjected to criminal proceedings in the sense of Article 6 (1) ECHR.

Such a finding entailed that all the guarantees of Article 6 ECHR were applicable to the applicant.

Conversely, the Court has held that Article 6 (1) ECHR does not apply to proceeding which ended with a warning to a 14-year-old boy who had been accused of indecent assault against several girls at school. In so finding, the Court ruled that the purpose of the warning was largely preventive and not punitive, that there had been no deprivation of liberty imposed or other restriction and that a warning was not the equivalent of a conviction (*R. v The United Kingdom*, (dec) no33506/05).

The provisions of Article 6 (1) ECHR apply from the moment a child becomes a suspect until the completion of the last (ordinary) stages of the criminal trial. The European Court will assess the fairness of the proceedings looking at them as a whole (eg. *Dvoski v Croatia*, no. 25703/11, §76).

Similarly, in the collective complaint [ICJ v Czech Republic](#) (ECSR, 148/2017 § 85) the **European Committee on Social Rights** has ruled on 17 March 2021 that:

“under Article 17 of the 1961 Charter children must benefit from an adequate level of protection, irrespective of the formal designation and nature of proceedings (criminal or civil) in national law. The Committee emphasises that the adoption of measures in light of the intention of the State to create a more protective system for children below the age of criminal responsibility should not result in children being provided with less and/or weaker legal procedural protection than adults”

The **EU Procedural Safeguards Directive** is not applicable to minor offences where deprivation of liberty cannot be imposed as a sanction and when a sanction is not imposed by a court. Similarly to Article 6 (1) ECHR, the provisions of the Procedural Safeguards Directive shall be applied from the moment children are made aware that they are suspects or accused persons (Recital 27).

2. Fair trial guarantees

Sections 2.1 to 2.11 below outline the fair trial guarantees for children developed in international instruments (with a particular focus on binding norms and case-law).

2.1. Right to information

Under EU law, children have the right to receive information about the general aspects of the conduct of the proceedings (Recital 19 and Article 4 of the [Procedural Safeguards Directive](#)). The rights set out in the [Procedural Safeguards Directive](#) are to be complemented by the provisions of [Directive 2012/13](#) of the European Parliament and of the Council of 22 May 2012 on the right to information in criminal proceedings (the “Right to Information Directive”).

The right to information applies from the moment children are made aware they are suspects or accused persons in criminal proceedings (Article 4(1) of the [Procedural Safeguards Directive](#)). Certain information is to be provided immediately (Article 4(1)(a) of the [Procedural Safeguards Directive](#)) whereas other information is to be given at the earliest appropriate stage of the proceedings (4(1)(b) Procedural Safeguards Directive).

Under Article 4(1)(a) of the [Procedural Safeguards Directive](#), and regardless of whether a child is detained or not, he or she should be informed of the following rights:

- i. The right to have the holder of parental responsibility informed,
- ii. the right to be assisted by a lawyer
- iii. the right to protection of privacy
- iv. the right to be accompanied by the holder of parental responsibility
- v. the right to legal aid

In addition, under The Right to Information Directive (Article 3 (c), (d) and (e)), children shall have the following rights whenever they are suspects or accused in criminal proceedings:

- i. the right to be informed of the charges
- ii. the right to interpretation and translation
- iii. the right to remain silent.

Further, Article 4(1)(b) of the Procedural Safeguards Directive lays down the obligation of the authorities to inform children of the following rights at the earliest appropriate stage in the proceedings:

- i. the right to an individual assessment;
- ii. the right to a medical examination and the right to medical assistance;
- iii. the right to limitation of deprivation of liberty; alternative measures and periodic review of detention (See also Factsheet no. 3);
- iv. the right to be accompanied by a holder of parental responsibilities during court hearings;
- v. the right to appear in person at trial;
- vi. the right to effective remedies.

Finally, specifically for suspects or accused who are detained, Article 4 of the Right to Information Directive lays down the right to receive a written Letter of Rights which they may keep in their possession. The Letter of Rights should include information concerning all the rights mentioned above as well as specific additional rights laid down under Article 4 of the Right to Information Directive. Under Article 7 of the Right to Information Directive, suspects or accused who are detained are entitled to access all materials in the possession of the authorities which can enable them to effectively challenge the lawfulness of their detention.

It is further important to note that the information provided to children should be adapted to their age and maturity. Article 4 (2) of the Procedural Safeguards Directive provides that the information should be in a simple and accessible language.

Article 6 (3) (a) of the **ECHR** equally enshrines the right to information. The ECtHR has relied on this right for children, stating that information should be adapted to them (*Panovits v Cyprus; Blokhin v Russia*). Failure to provide information could lead to a violation of Article 6 (1) -fairness of the proceedings seen in their entirety. The ECtHR has never found a violation of Article 6 (3) (a) solely on account of failure to provide adequate information to children suspected or accused of a criminal offense.

Under the CRC, Article 40 (b) (ii) ensures children's right to be informed promptly of the charges. In [General Comment no. 24](#), the CRC Committee has clearly stated that providing children with an official document is not enough and that they should be given an oral explanation.

Similarly, the Explanatory Protocol to the Council of Europe [Child Friendly Justice Guidelines](#) provides that children should be informed in a manner adapted to their age and maturity.

Last but not least, it is important to note that children's right to be informed in a manner suitable for their age and maturity is a core element of the concept of effective participation of children in criminal proceedings. The right to information is the first step in ensuring effective participation in the proceedings, and failure to implement it properly may result in a child's inability to express his views adequately and participate effectively in the proceedings (in this sense see also Factsheet no 7. – Children's right to effective participation as well as CRC Committee's [General Comment no. 12](#) (2009) – The right of the child to be heard, in particular § 41).

2.2. The right to an interpreter

The right to an interpreter is connected to the right to effective participation, and should be assured so that all persons accused or suspected of criminal offences understand the proceedings against them (Article 40 (2) (vi) CRC; Article 6 (3) (a) ECHR; [Directive 2010/64/EU](#) of the European Parliament and of the Council of 20 October 2010).

To date there have not been cases of international courts on the right to an interpreter specifically for children.

The [General Comment no. 24](#) provides that an interpreter should be trained to work with children. Paragraph 65 elaborates on the needs for adequate and effective assistance by well-trained professionals for children who experience communication barriers (in this sense see also **Factsheet no 10**).

2.3. The right to be accompanied by the holders of parental responsibility

This is a child specific guarantee and it is of utmost importance for their right to a fair trial in criminal proceedings. All the international instruments dedicated to children involved in criminal proceedings stress the importance of this right for children. The **CRC** provides it expressly under Article 40 (2) (b) (iii).

Under the **Procedural Safeguards Directive**, children should be accompanied by the holders of parental responsibility both during court proceedings and throughout other procedural steps. Also, where a holder of parental responsibilities cannot accompany the child, the child is entitled to nominate another responsible adult or in exceptional circumstances they can be accompanied by a representative of an institution responsible for the protection or welfare of children (Article 15). The possibility to nominate a responsible adult to accompany the child is exceptional and applies only where the presence of the holder of parental responsibility would be (i) contrary to the child's best interests or (ii) they are unknown or cannot be reached or (iii) on the basis of concrete factual circumstances their presence would substantially jeopardize the criminal proceedings. Circumstances which could substantially jeopardize the criminal proceedings relate for example to destruction of evidence, interference with witnesses or where the adult might have been involved in the criminal activity together with the child.

Moreover, the right to information (discussed under section 2.1. above) also applies to the holders of parental responsibilities who should be informed of all the aspects mentioned under Section 2.1. above (Article 5 Procedural Safeguards Directive).

The holders of parental responsibilities/ responsible adults should be entitled to question witnesses (see for eg. *Blokhin v Russia*, §211). The **ECtHR** found it problematic for an applicant to be questioned in absence of his guardian (*Panovits v Cyprus*, §§ 75-76). It should also be noted that the presence of a guardian does not imply that other important procedural guarantees, such as the right to access a lawyer could be waived by the latter on behalf of the child (*Panovits v Cyprus*, § 74, see also Factsheet no 7 on the right to legal assistance)

2.4. Right not to incriminate oneself (right to remain silent)

The right not to incriminate oneself, or the right to remain silent is guaranteed, among other international instruments, under Article 40 (2) (b) (iv) of the CRC, Recital 29 of the Procedural Safeguards Directive and Article 6 ECHR. This right is closely connected to the right to legal assistance from the first interrogation and for this reason is further elaborated upon in Factsheet no. 7.

2.5. Right to legal assistance

The manner of ensuring children's right to legal assistance has a direct impact on the fairness of the entire criminal proceedings. Lack of access to a lawyer from the first interrogation may result in the nullity of the entire process (see for example *Salduz v Turkey*). Many international instruments refer to the right to legal assistance. Among them are: Article 40 (2) (b) (iv) of the CRC, Article 6 of the Procedural Safeguards Directive, Directive 2013/48/EU, Article 6 ECHR as well as in many other non-binding instruments such as the General Comment no 24 or the Child Friendly Justice Guidelines.

Given its importance and specificity, the details of this right are further outlined in *Factsheet no. 7* on the right to legal assistance.

2.6. The right to an individual assessment

Article 7 of the **Procedural Safeguards Directive** lays down children's right to an individual assessment. The right to an individual assessment is arguably linked to the right to effective participation of children in proceedings as it ensures that the authorities are capable of taking into account the specific needs of children during the criminal proceedings. Thus, the individual assessment is arguably conducted in fulfillment of the child's best interests. The Procedural Safeguards Directive specifies that the individual assessment should be carried out at the earliest appropriate stage of the proceedings and no later than at the beginning of the trial hearings (Article 7 (5) and (6)).

In line with the child's right to participation, such assessment should be carried out with the close involvement of the child, by specialized personnel and it should be updated if circumstances change.

2.7. Right to audio-visual recording of questioning

This right is equally specific to children and addresses the need to offset the power imbalance between children and the authorities. Article 9 of the Procedural Safeguards Directive provides that the questioning by police should be recorded where this is proportionate and if it is in the best interests of the child. In absence of an audio-visual recording minutes are to be kept which have been duly verified. Paragraph 60 of the [General Comment no. 24](#) also mentions that audio-visual recordings are meant to safeguard children against coerced, unreliable or multiple testimonies (for further details regarding children's rights at the police station, see Factsheet no. 2).

2.8. Right to appear in person at the trial

Article 16 of the **Procedural Safeguards Directive** lays down the right of children to appear in person and participate in their trial. The right to appear in person is closely linked to the right to be presumed innocent. Absence during trial results in the right to a retrial under the conditions of Directive 2016/343. The Court of Justice of the European Union has interpreted the right to presence in a case concerning an adult; it has found that this right is not violated provided that the accused has been properly informed, he has been assisted by a lawyer and he has decided unequivocally to not participate in one hearing (CJEU, Case C688/18). It may be that more guarantees will be needed to secure this right for children, however there is no case law to date of the CJEU on this topic.

In the case of *Güveç v Turkey* (no 70337/01, §§127, 128), the **ECtHR** has found that the right to a fair trial had been breached as the applicant had not attended many hearings on the ground of medical reasons for which he had provided medical certificated. The Court also found that his inability to be present was not compensated by the presence of a lawyer.

2.9. Right to an independent and impartial tribunal

The ECtHR has on several occasions considered situations where the same judges had decided on pre-trial detention or directed the investigations were members of the panel convicting the applicants (*Nortier v The Netherlands*, no 13924/88; *Adamkiewicz v Poland* 54729/00 or *Romenskiy v Russia*, no 22875/02). The Court has considered that the mere fact that a trial judge has already taken pre-trial decisions in a case, including decisions relating to detention, cannot in itself justify fears as to the judge's impartiality. Special circumstances however may warrant a different conclusion. Such special circumstances relate to situations where the judge went beyond the finding of a suspicion and had assessed the guilt of the applicant. For example, in the case of *Romenskiy v Russia*, the Court found a violation of Article 6 (1) of the Convention on the ground that the judge extending the pretrial detention had also been on the panel convicting the applicant. When ruling on the pre-trial detention the judge refused the applicant's release on the ground that 'he had committed a serious crime'. This statement showed that the judge went beyond expressing a mere suspicion to a finding of guilt. The ECtHR will thus assess if the questions on which the judges rule prior to the trial phase overlap with the matter on which they decide as members of the panel in the criminal trial. If this is so, there is a risk that the judges preconceived ideas will impact on the fairness of the proceedings due to a lack of impartiality.

The CRC Committee has drawn attention to the fact that military tribunals and state security courts are not independent and impartial courts ([General Comment no. 24](#), § 96).

2.10. Equality of arms / The right to question witnesses

Under Article 6 (1) and 3 (d) of the ECHR, children suspected or accused of having infringed criminal law have the right to challenge and question witnesses. Failure to ensure this right is even more important for children and for adults and should in any event be secured if the testimonies of the witnesses had a decisive role in the investigation (*Blokhin v Russia*, §§ 212-216)

This right is also embedded in the notion of effective participation (Article 40 (2) (b) (iv) of the CRC and [General Comment no. 24](#), §§ 46, 61)

2.11. The right to review or appeal

Under Article 40 (2) (b) (v) of the CRC children have the right to review or appeal any finding of guilt. The CRC Committee has recommended that this should not apply only to the most serious offences and that states introduce automatic measures of review. The automatic measures of review should in any event exist for situations of deprivation of liberty or cases resulting in criminal records which have a substantial impact on the child's opportunities in the future ([General Comment no. 24](#), § 62).

Further reading

- [ECtHR Guide Article 6](#) – Right to a fair trial (criminal limb)
- [Fundamental Rights Agency - Handbook on European law relating to the rights of the child](#)