

UNIT. 10 Selected issues on deprivation of liberty

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COURSE

European Standards and Institutional
Practices of Family and Child's Rights
Protection

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**CHILD VICTIMS' AND WITNESSES'
RIGHT TO BE PROTECTED AGAINST
FURTHER VICTIMISATION, TO
RECOVERY AND REINTEGRATION,
AND TO EFFECTIVE PARTICIPATION
IN CRIMINAL AND ALTERNATIVE
PROCEEDINGS**

Child victims' and witnesses' right to be protected against further victimisation, to recovery and reintegration, and to effective participation in criminal and alternative proceedings

According to the Victim's Rights Directive 2012/29/EU under EU law, special attention is given to child victims. It states that the best interests of the child are paramount and must be evaluated on a case-by-case basis. Furthermore, the directive emphasizes a child-sensitive approach, requiring consideration of the child's age, maturity, perspectives, needs, and worries. Additionally, it aims to guarantee that both the child and the individual holding parental responsibility (or another legal representative) are informed about any measures or rights tailored specifically to the child (Article 1(2)).

Child victims also have the right to be heard during criminal proceedings, and Member States must ensure that they can also provide evidence. Due account must be taken of the child's age and maturity (Article 10 (1)). Furthermore, the directive aims to protect the privacy and identity of child victims during criminal proceedings, to prevent secondary victimisation, among other reasons (Article 21 (1), see also Article 26)

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Additionally, the directive includes a specific provision regarding the protection of child victims throughout criminal proceedings (Article 24). This provision addresses the audiovisual recording of interviews with child victims for use as evidence, the appointment of special representatives, and the right to legal representation in the child's own name in case of conflicts of interest between the child victim and those holding parental responsibility. Moreover, the directive contains various measures for the protection of all victims, such as access to victim support services. Specifically, for children and other vulnerable groups, specialized support services should be accessible (refer to Section 38 of the resolution accompanying the directive).

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The Child Sexual Abuse Directive requires a comprehensive approach for serious criminal offences such as the sexual exploitation of children and child pornography.

Member States must take the necessary measures to ensure that in criminal investigations of any of the offences connected to sexual abuse all interviews with the child victim or, where appropriate, with a child witness may be audiovisually recorded and that these audiovisually recorded interviews may be used as evidence in criminal court proceedings (Article 20 (4)).

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As per the Human Trafficking Directive, it's mandated that legal counseling and representation must be provided to child victims at no cost. Alongside measures accessible to all victims of human trafficking, Member States are obligated to ensure specific assistance, support, and protective measures for child victims. Due to their heightened vulnerability, child victims of trafficking require additional safeguards, especially during interviews within criminal investigations and proceedings. For instance, in cases involving unaccompanied children, appointing a guardian and/or representative is essential to uphold the child's best interests. Prompt decisions regarding the future of each unaccompanied child victim must be made, prioritizing a durable solution based on an individual assessment of the child's best interests, which should be paramount.

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Before being replaced by the Victims' Rights Directive, Framework Decision 2001/220/JHA addressed various aspects of victims' participation, rights, and fair treatment in criminal proceedings. While it acknowledged the unique position of vulnerable victims, it didn't explicitly mention children. However, according to this Framework Decision, the Court of Justice of the European Union (CJEU) ruled that children could be considered vulnerable, based on their age and the offenses they believed they were victims of. Consequently, they are entitled to special protective measures, such as being heard outside the courtroom and before the trial commences. The CJEU further ruled that all victim protection measures must be implemented in a manner that doesn't compromise the accused person's right to a fair trial. In essence, the protection of victims and witnesses should not undermine the accused's right to fair trial.

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Example: In the *Pupino* case, an Italian school teacher was prosecuted for maltreating a pupil. Under the Italian Code of Criminal Procedure, witnesses must, as a rule, testify in court during the trial. In certain circumstances, however, their evidence may be taken before a judge ahead of trial through a special procedure (*incidente probatorio*). In this case, the public prosecutor asked the national court to allow the testimonies of the young children given in advance as evidence, but the national court refused. For the first time, the CJEU gave its interpretation of some of the provisions relevant to the standing of children as victims and witnesses in criminal proceedings. It underscored that the Framework Decision 2001/220/JHA requires Member States to ensure the specific protection of vulnerable victims, which means that the national court must be able to authorise vulnerable victims to testify in a way that guarantees their protection, for example outside the trial and before it takes place.

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The CJEU stated: “However, independently of whether a victim’s minority is as a general rule sufficient to classify such a victim as particularly vulnerable within the meaning of the Framework Decision, it cannot be denied that where, as in this case, young children claim to have been maltreated – and maltreated, moreover, by a teacher – those children are suitable for such classification, having regard in particular to their age and to the nature and consequences of the offences of which they consider themselves to be a victim”. Furthermore, the CJEU ruled that all measures concerning the protection and prevention of secondary victimisation must be designed in such a way that the defendant is still granted a fair trial.

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Under CoE law, the ECtHR ruled that there is a duty of the state to protect victims' interests, including victims who participate as witnesses in criminal proceedings. Their interests under ECHR provisions, such as Article 2 and Article 8, must be balanced against the interests of the defence. The ECtHR has a number of rulings concerning sexual offences in which children testified against the alleged perpetrators. The Court recognised that criminal proceedings concerning sexual offences “are often conceived of as an ordeal by the victim, in particular when the latter was unwillingly confronted with the defendant” and that this was even more prominent when children were concerned. Consequently, the Court accepted that in such cases certain measures may be taken for the purpose of protecting the child victims.

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However, it also noted that such measures may not jeopardise the adequate and effective exercise of the rights of the defence, and the judicial authorities may therefore be required to take measures which counterbalance the handicaps under which the defence operates.

Example: In *Kovač v. Croatia*, a 12-year-old girl testified before an investigating judge that the applicant had committed indecent acts on her. The applicant had not been present or represented during the said testimony, nor was he given the opportunity to contest the victim's statement. The ECtHR reiterated that, as a rule, all evidence must be provided in the presence of the accused at a public hearing with a view to adversarial arguments.

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If statements at the stage of the police inquiry or the judicial investigation are used as evidence, this is not in itself inconsistent with Article 6 of the ECHR, provided that the defendant is given an adequate and proper opportunity to challenge and question the witness concerned, either at the time of making the statements or at a later stage of the proceedings. In the applicant's case, the victim's statements were the only direct evidence of the facts held against the applicant, and this evidence was decisive in the court's decision to issue a guilty verdict. However, the applicant had been unable to contest or obtain a reply from the domestic courts concerning his complaint in that respect. What is more, the victim's actual statement had never been read out before the trial court. Instead, the judge merely noted that the victim upheld her statement made before the investigating judge. Therefore, the ECtHR concluded that the applicant had not been afforded a fair trial, a breach of Article 6 (1) in conjunction with Article 6 (3) (d) of the ECHR.

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Example: In *S.N. v. Sweden*, 739 a 10-year-old boy testified to the police that he was sexually abused by the applicant. The boy was interviewed twice by a police inspector with significant experience in child abuse cases. The first interview was videotaped, the second audiotaped. The lawyer of the applicant did not attend the second interview but agreed with the police-inspector on the issues that needed to be discussed. During the trial, the District Court played the recordings of the child's interviews but did not examine him in person. The court ultimately convicted the applicant, relying almost entirely on the child's testimonies. The Court of Appeal upheld the conviction. It found that the police interviews provided sufficient evidence for the applicant's guilt to be established, even though it acknowledged that there was no technical evidence supporting the child's allegations, which were sometimes imprecise.

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The ECtHR accepted that, in sexual offence cases, cross-examination of a witness is not always possible and that, in such cases, witness testimonies should be treated with extreme care. Although the statements made by the child were virtually the sole evidence against the accused, the proceedings as a whole were fair. The videotape was shown during the trial and appeal hearings and the transcript of the second interview was read out before the District Court; the audiotape was also played before the Court of Appeal. This gave the applicant sufficient opportunity to challenge the child's testimony and his credibility in the course of the criminal proceedings. Consequently, there had been no violation of Article 6 (3) (d) of the ECHR.

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Case law from the European Court of Human Rights (ECtHR) doesn't solely revolve around striking a balance between safeguarding child victims and ensuring the defendant's right to a fair trial. It also encompasses protecting the right to life of witnesses and their families, including children, under Article 2 of the European Convention on Human Rights (ECHR). This is exemplified by the following instance.

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Example: The case of *X and Others v. Bulgaria* concerned allegations of child sexual abuse in an orphanage. In regard to the procedural part, the Court ruled that the Bulgarian authorities had breached their procedural obligation under Article 3 of the ECHR, which requires authorities to conduct an effective investigation into arguable claims of torture or inhuman or degrading treatment. Although the Bulgarian authorities had taken a series of investigative steps, the Court found that these had not met the required level of 'effectiveness'. One of the reasons for this was a failure to take any steps to involve the victims in the investigation. In its interpretation of Article 3, the Court took into account other applicable international instruments and in particular the Lanzarote Convention.

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Article 31 of the Lanzarote Convention outlines the general protective measures that Member States should implement to safeguard the rights and interests of victims, including addressing their specific needs as witnesses, throughout investigations and criminal proceedings (Article 31(1)). These measures entail informing victims about their rights, the availability of support services, and the overall progress of investigations or proceedings. They also encompass ensuring the privacy and safety of victims, which includes informing them about the release of the accused individual, and preventing contact between victims and perpetrators in court and law enforcement agency premises. Furthermore, Article 31 mandates that victims have access to legal assistance (Article 31(3)). The information provided must be tailored to the age and maturity of children and communicated in a language they comprehend (Article 31(6)).

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The Council of Europe's Guidelines on child-friendly justice emphasize the protection of child victims and witnesses, particularly when they testify in judicial proceedings. These guidelines urge member States to ensure that children give evidence in the most favorable settings and under suitable conditions, considering their age, maturity, understanding, and any communication challenges they may face. Trained professionals should be involved, and audiovisual statements should be encouraged. Children should also have the opportunity to provide evidence in criminal cases without the alleged perpetrator present. Moreover, the guidelines acknowledge that this child-friendly approach should uphold the right of other parties to challenge the content of the child's statements. Additionally, they emphasize protecting the privacy and family life of child witnesses (Section IV(a)(9)), suggesting that proceedings should preferably be held in camera.

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Under international law, the need to protect child victims has been explicitly recognised in Article 39 of the CRC. This provision stipulates that States Parties must take all appropriate measures to promote physical and psychological recovery and social reintegration of child victims. This recovery and reintegration must take place in an environment which fosters the health, self-respect and dignity of the child.

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It's noteworthy that the UN has adopted Guidelines on justice in matters involving child victims and witnesses of crime. These guidelines advocate for child victims and witnesses to be treated in a "child-sensitive manner," which entails an approach that balances the child's right to protection while considering their individual needs and perspectives. They offer detailed guidance on implementing these principles.

Additionally, the UN Committee on the Rights of the Child has emphasized the importance of these guidelines under Article 12 of the CRC (right to be heard) in its General Comment.

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According to the committee, child victims and witnesses of a crime should have the opportunity to fully exercise their rights to express their views freely. This includes being consulted on relevant matters concerning their involvement in the case and being enabled to express their views and concerns in their own manner. The Committee also asserts that the right of the child victim and witness is connected to being informed about various issues, such as the availability of support services, the role of a child victim and/or witness, the process of questioning, support mechanisms during investigations and court proceedings, hearing schedules, protective measures, possibilities of receiving reparation, and avenues for appeal.