

# Protecting Children against Torture in Detention:

*Global Solutions for a Global Problem*



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## Disclaimer

The ideas, opinions and conclusions expressed in this volume are those of the authors only, and do not necessarily represent the views of the American University Washington College of Law Center for Human Rights & Humanitarian Law, the United Nations, the UN Special Rapporteurship on Torture, the Swiss Federal Department of Foreign Affairs, the Open Society Foundations, or the International Institute of Education and Ford Foundation.



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# Preface

It is my pleasure to introduce the publication *“Protecting Children Deprived of Liberty From Torture: Reflections on the Special Rapporteur on Torture’s 2015 Thematic Report,”* which expands upon a key thematic priority explored by the Special Rapporteurship on Torture in 2015. This volume asks a wide variety of stakeholders and thought-leaders to reflect on the report on children deprived of liberty (A/HRC/28/68, available in Annex I) issued by Professor Juan Méndez during his Rapporteurship on Torture at the United Nations (UN). This publication provides additional data and analyses on the myriad of critical issues raised in the report.

The publication is an effort of the *Anti-Torture Initiative* (ATI), a project of the Center for Human Rights & Humanitarian Law (the Center) at American University Washington College of Law to support the mandate of the United Nations Special Rapporteur on torture and other cruel, inhuman and degrading treatment or punishment (SRT), a position that Professor Juan Méndez held from November 2010 to October 2016. The Center created the ATI in 2012 as part of its mission to develop new tools and strategies for the creative advancement of international human rights norms. During the time of Professor Méndez’s mandate, the ATI expanded the strategies used by the SRT in furtherance of its mandate by supporting, monitoring, and assessing implementation of his recommendations, and providing a multi-dynamic model for effective and comprehensive country-specific and thematic follow-up, in areas such as the torture and ill-treatment of children deprived of liberty. In the aftermath of Professor Méndez’s mandate, the ATI has continued its role as a foremost player in the global movement against torture, by continuing to work closely with partners from international agencies, regional organizations, governments and policy-makers, and actors from civil society and academia, in an effort to have a positive impact on the landscape of efforts to fight and prevent torture worldwide, in particular when it affects the most vulnerable and marginalized persons worldwide, such as children deprived of liberty.

The 2015 report that serves as the basis for this publication came at a timely moment of growing attention to the plight of the more than one million children who are estimated to be deprived of liberty around the world. The report makes a critical contribution by framing abuses and violence commonly perpetrated against children in various guises of deprivation of liberty as torture and other ill-treatment under international law, and by analyzing the unique vulnerability of children to, and concomitant heightened obligation of States to protect children from, such acts. The report analyzes practices within juvenile, criminal justice systems, and administrative, notably immigration, detention, as well as practices in health- and social-care institutions, and the situation of children in armed conflict. It addresses existing gaps in law and policy that facilitate torture and ill-treatment against children deprived of their liberty worldwide. Constrained as it is by an UN-imposed word limit, the report is meant to be a starting-point for discussion, which the articles in this volume pick up.

Following its presentation to the UN Human Rights Council in March 2015, the report generated a considerable amount of interest and discussion on a range of issues explored therein. This volume seeks to contribute to and continue this discussion by creating space to elaborate

on the report and the essential legal, policy, and advocacy issues raised in a variety of contexts of deprivation of liberty of children around the world. The publication chronicles part of the robust response by practitioners, advocates, and policy-makers to the cross-cutting issues explored by the report. **Section I** of this volume provides a broad overview of the problem of children deprived of liberty worldwide, and delves into several key questions of law and policy at the intersection of the torture and other ill-treatment and children's rights frameworks, including the potential of the report as a tool for advocacy to promote the recognition and protection of the rights of children in the context of deprivation of liberty; the unique vulnerability of children to torture and other ill-treatment; the challenge of translating standards into practice; the question of access to justice for children deprived of liberty; the role of the Council of Europe in addressing the deprivation of liberty of children; and avenues for meaningful participation of children and adolescents in the recommendations of United Nations human rights bodies in the context of deprivation of liberty.

**Section II** addresses the unique challenges posed by the deprivation of liberty of children in conflict with the law in juvenile and criminal justice systems, featuring a call for the end of child detention as a form of punishment. It also includes a commentary on the UN Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice systems. It also analyzes the placement of children in solitary confinement, early diversion, monitoring mechanisms, and models of psychosocial intervention for children deprived of liberty. **Section III** delves into the situation of migrant, asylum-seeking, and refugee children, and their deprivation of liberty in these contexts. It further refers to the situation of children, including children with disabilities, in institutions and orphanages, as well as the situation of children in armed conflict, child soldiers, and the detention of children on grounds of "national security."

The Center for Human Rights & Humanitarian Law is grateful for the contributions made by the authors featured in this compilation, who are working jointly and independent across sectors, institutions, and regions, to ensure greater respect for the human rights of children deprived of their liberty worldwide. We hope that this volume will help continue and enrich essential conversations around the important topic of children deprived of their liberty in different contexts around the world today, and contribute to steps being taken to guarantee that no child, under any circumstance, will be subjected to torture or any other forms of ill-treatment.

**Macarena Sáez**

Director

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# Introduction

Violence against children has been and remains prevalent in many forms around the world today, and particularly so when children are deprived of their liberty. Despite the fact that acts of violence and forms of abuses against children often amount to torture and other cruel, inhuman, or degrading treatment or punishment (other ill-treatment) under international law, the torture and other ill-treatment framework has, until recently, rarely been applied to such acts and to the situation of children deprived of liberty. My 2015 report on torture and other ill-treatment of children deprived of liberty (A/HRC/28/68, available in Annex I) sought to examine the situation of children deprived of liberty—in a variety of contexts around the world—from the perspective of torture and other ill-treatment in international law, and to draw connections between children’s rights and torture and other ill-treatment frameworks in international human rights law.

## **Unique Vulnerability of Children Deprived of Liberty to Torture and Other Ill-Treatment and Heightened State Obligations**

Children in detention are at a heightened risk of experiencing violence and abuse, and significantly more vulnerable than adults to being subjected to torture and other ill-treatment, due to their unique physiological and psychological needs. In view of their unique vulnerabilities, the detention of children, whether within criminal or juvenile justice systems, administrative immigration detention, or in institutions, is inextricably linked—in fact if not in law—with the ill-treatment of children. States therefore have a heightened due diligence obligation to take additional measures to ensure their children’s human rights of life, health, dignity, and physical and mental integrity. In determining the seriousness of acts that may constitute ill-treatment or torture, due consideration must be given to the age of the victim, and to the acts’ physical and mental effects upon the victims. In the case of children, higher standards must be applied to classify treatment and punishment as cruel, inhuman or degrading, and protections must go beyond what international human rights law affords adults.

Detention of children often occurs in squalid conditions, without adequate oversight or proper regulation, and has devastating effects on children’s psychological and physical development. As such, even very short periods of deprivation of liberty can undermine a child’s psychological and physical well-being and compromise his or her cognitive development. Medical literature establishes that children experience pain and suffering differently than adults, and that the long-term damaging effects of mistreatment tend to cause even greater or irreversible damage in children than in adults. Children’s unique vulnerability, therefore, requires higher standards and broader safeguards to protect them from being subjected to torture or other ill-treatment in detention, or from experiencing developmentally harmful and torturous conditions of confinement. Evidence shows that depriving children of their liberty is costly, ineffective, and, more often than not, results in serious violations of their human rights, often amounting to torture and other ill-treatment.

### *Children in Conflict With the Law*

Many practices imposed on children in conflict with the law around the world today run afoul of the prohibition of torture and other ill-treatment, despite the solid international legal framework in place. Life sentences without parole, life imprisonment, and lengthy sentences—such as consecutive sentencing—are grossly disproportionate and therefore cruel, inhuman or degrading. Children in conflict with the law must be tried, charged, and sentenced only within juvenile justice systems and afforded adequate forms of protection. Children must never be treated as adults or subjected to adult sentences that are inherently cruel, inhuman or degrading because they fail to consider any of the special measures of protection or safeguards that international law requires for children. Their sentencing must unfailingly reflect the principles of rehabilitation and reintegration—a measure that will ultimately benefit communities and society at large. The imposition of solitary confinement, the death penalty, or any sort of corporal punishment on children, while strictly prohibited, are woefully common occurrences. In many jurisdictions the majority of children deprived of their liberty are held in pre-trial detention, often for minor offenses, for prolonged periods, and in unsuitable premises. States must, as a matter of urgency, cease such practices and adopt child-friendly administrative and criminal court procedures and train law enforcement and other officials who encounter children deprived of their liberty in child protection principles, and provide them with a better understanding of children’s specific vulnerabilities to human rights violations and particularly to torture and other forms of ill-treatment.

### *Children in Immigration Detention*

States also frequently, and increasingly, detain children who are refugees, asylum-seekers, or irregular migrants. The context of the current migration crisis has made clear that immigration detention practices by States around the world, whether *de jure* or *de facto*, subject and put children at risk of cruel, inhuman or degrading treatment or punishment, and even torture. As I concluded in my report, the deprivation of liberty of children based on their or their parents’ migration status is never in the best interest of the child, exceeds the requirement of necessity, becomes grossly disproportionate, and constitutes cruel, inhuman or degrading treatment of migrant children. This is because such a measure is not absolutely essential to ensure the appearance of children at immigration proceedings or to implement an eventual deportation order, and accordingly, can never be understood as one that complies with the child’s best interests. States must expeditiously and completely cease the detention of children, with or without their parents, on the basis of their immigration status, and immediately put in place alternative measures to detention that promote the care and well-being of the child.

### *Children in Institutions*

Torture and ill-treatment occur in a diverse range of settings, even where the purpose or intention of a State’s action or inaction may not be to degrade, humiliate or punish a child—but where this nevertheless is the result. Accordingly, States’ obligation to prevent torture applies not only to public officials, such as law enforcement agents, but also to private actors, such as healthcare and social workers operating in private settings. Abuses suffered by children in health or social care institutions are often the result of acts of omission rather than commission, such as emotional disengagement or unsafe and unsanitary living conditions, and the result of deficient policies, rather than from an intention to inflict pain and suffering. In this context, it is essential to note that purely

negligent conduct constitutes ill-treatment when it leads to pain and suffering of some severity, and when the State is, or should be, aware of the pain and suffering being inflicted. This includes cases where children are not provided appropriate treatment, and where the State failed to take all reasonable steps to protect children's physical and mental integrity. Unless States take positive measures to address human rights abuses suffered by many children under the guise of care or treatment and by private actors, they will continue to fail to comply with their fundamental human rights obligations under international law.

### *Aims of the Present Volume*

The present publication consists of a compilation of articles submitted by global experts and practitioners who have been invited to reflect and expand upon key aspects of my report, its recommendations, and on the diverse practices that afflict violence, often in the form of torture and other ill-treatment, on children in different settings worldwide. Given each author's valuable and specific expertise, we deferred to them to identify the topic of their article. This compilation comprises both academic and advocacy pieces, covering, *inter alia*, the situation of children in conflict with the law and abusive practices visited upon children in penal settings and juvenile justice systems; the plight of migrant and refugee children in administrative immigration detention; the treatment of children with disabilities in institutions; and additional scenarios, such as the situation of children in armed conflict.

This publication seeks to further clarify the main areas of concerns raised in the report and most importantly, to generate and contribute to the ongoing discussion about the application and implementation of human rights standards in the cases of millions of children facing violence and abuses in different contexts worldwide. Being aware that the aims and objectives of this publication are ambitious, we have tried to be as comprehensive as possible and to shed light on different facets of the issue of torture and mistreatment of children deprived of their liberty in diverse situations around the globe. The detailed evidence and analyses presented by our authors represent valuable contributions to our understanding of the normative frameworks at play and of specific policies and concrete practices that facilitate the abuse of children deprived of their liberty in different settings around the world today; it further offers recommendations for much-needed reforms.

In conjunction with my report, this publication is aimed at States and policy-makers, practitioners and advocates, and concerned stakeholders around the globe who are tasked with fostering legislative frameworks, policies, and practices that comply with fundamental international human rights norms, and with protecting children from violence and abuse in a plethora of contexts. It is my hope that through continued collaboration with key stakeholders, including the valued authors and organizations that have made this publication possible, we will continue to make progress towards the elimination of torture and other ill-treatment of children deprived of their liberty around the world.

### **Juan E. Méndez**

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Former United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2010—2016)*



# Foreword

SUSAN L. BISSELL\*

Over one billion children<sup>†</sup> are exposed to violence every year, some of which unquestionably amount to torture or other cruel, inhuman or degrading treatment or punishment under international law. Girls and boys of every age, in every community, and in every country—from the richest to the poorest—are affected by sexual, physical, and emotional violence, as well as by neglect or negligent treatment. Children can experience violence in any sphere, from State and private institutions and schools to their own homes. Far too often, violence against children is accepted as commonplace, permissible, or as a private matter.

As the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment emphasized in his 2015 thematic report (A/HRC/28/68), because of their unique needs and vulnerabilities, children deprived of their liberty are at an even greater risk of violence, abuse, and torture and other ill-treatment. The effects of violence on children, including children deprived of their liberty, are severe and long-lasting. Children exposed to violence are more likely to experience poor health throughout their lives, physical and mental underdevelopment, compromised immune systems, and tend to live shorter lifespans. As the Special Rapporteur's report articulated, detention is inextricably linked to ill-treatment in the case of children, and even short amounts of time spent in detention can undermine a child's physical and psychological well-being and affect cognitive development. Violence against children not only impacts their lives, but also weakens social cohesion and undermines the trust placed in institutions, hurting communities at large.

Although well-intentioned promises have been made over the years to end violence against children, national strategies to combat violence against children have, until now, been fragmented, weak, or non-existent. While the violence faced by children is disturbing and deplorable, it is not inevitable, and the current drive for ending the violence that so acutely affects children's lives has never been stronger. As part of the new Sustainable Development Goals (SDGs), leaders from around the world recently came together in a collaborative partnership to commit to ending all forms of violence against children by 2030. The Global Partnership to End Violence Against Children (the Partnership), which was launched in July 2016, is central to achieving target 16.2 of the SDGs, which strives to "[e]nd abuse, exploitation, trafficking, and all forms of violence against and torture of children."

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\* Susan L. Bissell is the Director of the Global Partnership to End Violence against Children, and the former Chief of UNICEF's Child Protection Section.

† Any person below the age of 18 years.



The Partnership brings together a broad coalition of stakeholders—including governments, United Nations agencies, international organisations, civil society, faith groups, the private sector, philanthropic foundations, researchers and academics, and children themselves—seeking to end violence against children everywhere and make societies safer for children. The Partnership serves as an essential platform for organisations and institutions dedicated to uniting efforts and amplifying impact in the quest to end violence against children, and functions as both a convener and a catalyst to build on successes attained to date. As we know, establishing targets to end violence against children will accomplish little unless the goals are reinforced by robust commitments to action. Significantly, the Partnership will work with States to help translate their commitments into action.

The Partnership's first goal is to build and sustain political will to achieve the SDGs and end violence against children. By promoting evidence-based strategies, significant, sustained, and measurable reductions in violence can be achieved. Additionally, violence against children, and the actions needed to prevent it, must become part of the national, regional, and global discourse. The second goal is for Partners to work together to accelerate action to tackle the violence faced by children, with an initial focus on Pathfinder countries that have chosen to lead the movement to end violence. Pathfinder countries formally pledge to support actions to end all forms of violence against children and implement a technical package at scale, while monitoring its effects. The Partnership's third goal is to strengthen collaboration among and between States, and with civil society and other stakeholders. Serving as the global forum to facilitate and accelerate learning and mutual accountability, the Partnership will support platforms for sustained transnational action and learning.

Every child has the right to grow up in a world free from violence, and we all must work together to realise that vision. The Special Rapporteur's thematic report on Children Deprived of Liberty and this follow-up publication take a substantial step toward achieving that objective by shedding light on the violence children face on a daily basis in different contexts around the world, and on possible remedies for ensuring that children are no longer abused, exploited, or subjected to torture or other ill-treatment. The broad array of articles presented in this volume by practitioners, academics, and experts working to end the scourge of violence against children promote much-needed, robust discussion of the topics and themes raised in the report, and help advance the Partnership's mission. Violence against children is preventable. Let us seize this opportunity to unite the world to protect our most precious asset—our children.

# I.

## Children Deprived of Liberty and Applicable Legal Frameworks

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# The Global Overuse of Detention of Children

MICHAEL GARCIA BOCHENEK\*

## Abstract

*Around the world, children languish behind bars, sometimes for protracted periods, under conditions that are often violent and inhumane. Some are serving sentences that are categorically forbidden under international law, such as life without the possibility of release, or have received other lengthy sentences that are disproportionate to the crime they have committed and inappropriate for their age and level of maturity. Others are held for acts that should not be crimes at all. Some have never been tried for their alleged crimes; others are tried as if they were adults and if convicted, sent to serve their time in adult prisons. Migrant children who travel alone or with their families are routinely held in immigration detention even though international standards oppose the detention of children solely on the basis of their immigration status. Children, particularly those with disabilities, may also be institutionalized in the name of protection, again in violation of international standards. States can and should act now to address these abusive practices. They should ensure that children who are found to have committed offenses are sentenced to detention only when strictly necessary. States should also develop and employ alternatives to detention in every area—in responding to juvenile crime, where detention should be a truly exceptional measure, as well as in response to migration and disability, contexts that never in themselves justify detention or confinement.*

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\* Michael Garcia Bochenek is senior counsel on children's rights at Human Rights Watch.

## Introduction

The camera shows a slightly built 13-year-old boy pacing in a tiny cell, pausing every so often to lean against the wall, his head buried in his arms, his body trembling. Three guards then rush in and quickly overpower the boy, stripping him naked. It wasn't the only time detention centre guards in Australia's Northern Territory used excessive force against this boy—at least five such instances were recorded on camera between October 2010 and August 2014, the Australian Broadcasting Corporation's *Four Corners* reported in July 2016.<sup>1</sup>

These and other images appalled Australians when the programme aired. Perhaps most disturbing of all was the image of the same boy, at age 17, strapped tightly to a restraint chair, a hood over his head; viewers learn he was left in that position alone in a cell for two hours.<sup>2</sup> Within 12 hours of airing, Prime Minister Malcolm Turnbull announced the establishment of a Royal Commission, an investigatory body with the power to compel testimony and the production of other evidence, to examine the abuses.<sup>3</sup> The prime minister stated in a media release announcing the Royal Commission, "This needs to be a thorough inquiry which exposes what occurred and why it remained concealed for so long."<sup>4</sup>

It's true that these images had not been publicly available before the *Four Corners* programme aired. But it's not the case that these abuses had been entirely hidden from authorities. The Northern Territory Children's Commissioner issued a detailed report on a series of abuses by guards in the same juvenile detention facility, the Don Dale Youth Detention Centre, in August 2014, after a different boy, age 14, opened his unlocked cell, threatened staff with a weapon made from a plastic plate, and damaged other parts of the isolation unit where he was held.

"Let the fucker come through," a camera recorded one staff member saying to another when the 14-year-old tried to climb through a broken window, "I'll pulverise the little fucker."<sup>5</sup>

Later, the 14-year-old asked to speak to a staff member. "Nah, you've had your chance," another staffer replied.<sup>6</sup> Instead of talking the youth down, staff fired tear gas into the unit. They then hooded and handcuffed six boys, including two who had taken no part in the disturbance, and moved them all to an adult prison.<sup>7</sup>

Prior to the August 2014 incident, five of the six boys had been held in cramped, dark, and hot isolation cells for between six and 17 days and confined to their cells 22 hours or more per day.<sup>8</sup> "[The disturbance] wouldn't have happened if they didn't keep them in there so long," one of the staff members later told the Northern Territory's children's commissioner.<sup>9</sup>

<sup>1</sup> Caro Meldrum-Hanna, Mary Fallon, and Elise Worthington, "Australia's Shame," transcript, *Four Corners*, July 26, 2016, <http://www.abc.net.au/4corners/stories/2016/07/25/4504895.htm> (accessed August 5, 2016).

<sup>2</sup> *Ibid.*

<sup>3</sup> Malcolm Turnbull MP, Federal Member for Wentworth, Prime Minister of Australia, "Royal Commission into Don Dale Youth Centre," Media Release, July 26, 2016, <http://www.malcolmtturnbull.com.au/media/prime-minister-attorney-general-royal-commission-into-don-dale-youth-detent> (accessed August 5, 2016).

<sup>4</sup> *Ibid.*

<sup>5</sup> Office of the Children's Commissioner, Northern Territory, *Own Initiative Investigation Report: Services Provided by the Department of Correctional Services at the Don Dale Youth Detention Centre* (Casuarina, Northern Territory: Office of the Children's Commissioner, August 2015), p. 17, <http://www.childrenscommissioner.nt.gov.au/publications/Childrens%20Commissioner%20DDYDC%20-%20Report%20to%20Minister%20170915.pdf> (accessed June 8, 2016).

<sup>6</sup> *Ibid.*, p. 18.

<sup>7</sup> *Ibid.*, pp. 18-26.

<sup>8</sup> *Ibid.*, pp. 9, 31-34, 36, 39.

<sup>9</sup> *Ibid.*, p. 14.

This account could serve as a checklist for how not to handle troubled youth: the use of extended isolation, rapid resort to excessive force, and ultimate reliance on an alternative place of detention designed for adults rather than for children.

I haven't mentioned the facility's failure to tell these children when they would be returned to the general population, the fact that their isolation had been repeatedly extended, with no legal basis, or the lack of any serious effort to evaluate whether isolation in these abusive conditions would serve its purported aim of managing the youths' behaviour.

But such abusive practices, or worse, are far from unusual. Around the world, children languish behind bars, sometimes for protracted periods, under conditions that are often violent and inhumane.

Some of these children have been found guilty of offenses that have resulted in them being sentenced to life without parole, even though such sentences are categorically forbidden under international law, or receiving other lengthy sentences that are disproportionate to the crime they have committed and inappropriate for their age and level of maturity. Others are held for acts that should not be crimes at all—such as skipping school, acting out at home or running away from home, having consensual sex (with a partner of the same or opposite sex), or seeking or having an abortion. Some have never been tried for their alleged crimes; others are tried as if they were adults and if convicted, sent to serve their time in adult prisons.

Migrant children who travel alone or with their families are routinely held in immigration detention even though international standards oppose the detention of children solely on the basis of their immigration status.

Children, particularly those with disabilities, may also be institutionalized in the name of protection, again in violation of international standards.

Whatever the purported justification for their confinement, hundreds of thousands of children—the exact number is unknown—are held in decrepit, abusive, and demeaning conditions, deprived of education, access to any meaningful activities, and regular contact with the outside world.

States can and should act now to address these abusive practices. They should ensure that children who are found to have committed offenses are sentenced to detention only when strictly necessary. They should also develop and employ alternatives to detention in every area—in responding to juvenile crime, where detention should be a truly exceptional measure, as well as in response to migration and disability, contexts that never in themselves justify detention or confinement.

## The Number of Children Behind Bars

When the United Nations Children's Fund (UNICEF) conducted research on children in detention in 2007 and 2008, it estimated that there were more than 1.1 million children behind bars around the world, although it cautioned that that number was likely a significant underestimate.<sup>10</sup>

Getting an accurate sense of the numbers of children behind bars is complicated by the fact that some governments hold children in several kinds of facilities, including jails (which generally hold adults who have been charged with but not yet convicted of a crime) and prisons (facilities for convicted adults) as well as juvenile detention centres. Figures may be reported in different ways—

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<sup>10</sup> United Nations, Twelfth U.N. Congress on Crime Prevention and Criminal Justice, *Children, Youth, and Crime: Working Paper Prepared by the Secretariat*, ¶ 23, U.N. Doc. A/CONF.213/4 (Feb. 15, 2010).

for example, by annual totals or monthly averages—and for different age ranges. Moreover, most countries keep no accurate records of the numbers of children they hold in detention.

The United States likely leads the industrialized world in the number and percentage of children it locks up in juvenile detention facilities, with some 54,000 children in such facilities in 2013, a rate of 173 juvenile detainees per 100,000 population.<sup>11</sup> That number includes only children in “juvenile residential custody facilities.”<sup>12</sup> In addition, the United States also sends children to adult jails and prisons in large numbers—nearly 140,000 in 2010, Human Rights Watch and the American Civil Liberties Union (ACLU) estimated—with few opportunities for meaningful education or rehabilitation.<sup>13</sup>

The UN Office on Drugs and Crime (UNODC) collects data on the number of juvenile detainees held on a particular day in the year. These data are far from complete—for instance, Australia has not reported data since 2010, many other countries have reported only sporadically or not at all, and the figures for the United States (5,800 for 2013) wildly understate the true number of detained children. Using these figures as the basis for a rough comparison, Scotland had a rate of 54.6 children in detention per 100,000 children, the highest in Northern Europe, followed by Lithuania (15.8 per 100,000), Estonia (13.7 per 100,000), Latvia (12.8 per 100,000), Finland (7.6 per 100,000), and England and Wales (7.1 per 100,000).<sup>14</sup>

Elsewhere in the world, Brazil—thought to have one of the largest absolute number of juvenile detainees in the world, but which has not reported data to UNODC—has more than 20,000 children in its juvenile detention system,<sup>15</sup> a figure that would represent a rate of 31.8 per 100,000 persons age 19 and younger.<sup>16</sup>

## Detention and Incarceration in Response to Crime

Many of these children should not be locked up, for several reasons. First, international law requires that holding children in either detention or criminal jails or prisons be a matter of last resort. Too often, it’s the first, or even only, resort; there simply may be no alternatives in law or practice.

Second, children are too often charged and held for acts that shouldn’t be criminal. For instance, children living on the streets are frequently presumed to be guilty of wrongdoing and arrested on

<sup>11</sup> Child Trends, “Juvenile Detention: Indicators on Children and Youth,” December 2015, p. 3, [http://www.childtrends.org/wp-content/uploads/2012/05/88\\_Juvenile\\_Detention.pdf](http://www.childtrends.org/wp-content/uploads/2012/05/88_Juvenile_Detention.pdf) (accessed May 5, 2016). The rate is calculated per 100,000 children from age 10 to the “upper age of each state’s juvenile court jurisdiction.” *Ibid.*, Fig. 1.

<sup>12</sup> *Ibid.*

<sup>13</sup> Human Rights Watch and American Civil Liberties Union (ACLU), *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States* (New York: Human Rights Watch, 2012), p. 106 (Table 4).

<sup>14</sup> UNODC, *Juveniles Held in Prisons, Penal Institutions, or Correctional Institutions*, <https://data.unodc.org/> (follow “Crimes and Criminal Justice” tab, then “Criminal Justice,” then “Juveniles Held” to view data for regions or particular countries) (accessed May 5, 2016).

<sup>15</sup> Conselho Nacional do Ministério Público, *Um olhar mais atento nas unidades de internação e semiliberdade para adolescentes: Relatório da Resolução 67/2011 (dados 2014, ano 2015)* (Brasília: Conselho Nacional do Ministério Público, 2015).

<sup>16</sup> Brazil’s 2010 Census reports population figures by age groups that include 18- and 19-year-olds along with children. Brazil had a population of approximately 63 million persons age 19 and under in 2010. Instituto Brasileiro de Geografia e Estatística, *Censo 2010, Tabla 1.12 (população residente, por sexo e grupos de idade, segundo as grandes regiões e as unidades da Federação—2010)*, [http://www.ibge.gov.br/home/estatistica/populacao/censo2010/tabelas\\_pdf/Brasil\\_tab\\_1\\_12.pdf](http://www.ibge.gov.br/home/estatistica/populacao/censo2010/tabelas_pdf/Brasil_tab_1_12.pdf) (accessed May 9, 2016).

vague charges—if they are charged at all. In Uganda, Human Rights Watch has found that police often treat street children as a part of the larger crime problem, arbitrarily arresting, beating, and forcing them to clean the detention facilities where they are held.<sup>17</sup> Similarly, Cambodia has locked up street children along with other people deemed to be “undesirable” in roundups, holding them in so-called vocational training and drug treatment centres that in fact offer no meaningful training or treatment.<sup>18</sup> The Committee on the Rights of the Child has recently criticized the arbitrary detention of children living on the streets in Brazil, Colombia, India, Indonesia, and Jordan, among other countries.<sup>19</sup>

Many countries place children in detention for disobeying their parents, curfew violations, or for other “status offences,” acts that would not be crimes if committed by an adult.<sup>20</sup> A study by the Texas Public Policy Foundation found that in the United States in 2010, over 8,400 children were held in confinement for acts such as truancy, running away from home, “incorrigibility,” underage drinking, and curfew violations. Many more children were placed on probation for or ordered to perform community service or other restitution for status offenses, meaning that they were at risk of detention if they did not comply with the terms of their court orders.<sup>21</sup>

Girls may face specific restrictions on their freedom of movement, enforced by criminal law. In Saudi Arabia, for example, girls as well as adult women may be jailed, imprisoned, and flogged for the ill-defined offences of “seclusion” and “mingling,”<sup>22</sup> which one official described to Human Rights Watch as a girl or woman “being in an apartment by herself, or with a group of others, or sitting in a place where it is not natural for her to be.”<sup>23</sup> Saudi Arabia’s Ministry of Social Affairs has broad latitude to continue to confine children and young women after they have served their sentence, and may also order a girl or young woman detained or imprisoned indefinitely based solely on the assessment of her guardian and institution staff that she “remains in need of additional guidance and care.” Human Rights Watch has documented similar abusive practices in the Indonesian state of Aceh.<sup>24</sup>

<sup>17</sup> Human Rights Watch, “Where Do You Want Us to Go?” *Abuses Against Street Children in Uganda* (New York: Human Rights Watch, 2014), <https://www.hrw.org/report/2014/07/17/where-do-you-want-us-go/abuses-against-street-children-uganda> (accessed May 6, 2016).

<sup>18</sup> Human Rights Watch, “They Treat Us Like Animals”: *Mistreatment of Drug Users and “Undesirables” in Cambodia’s Drug Detention Centers* (New York: Human Rights Watch, 2013), <https://www.hrw.org/report/2013/12/08/they-treat-us-animals/mistreatment-drug-users-and-undesirables-cambodias-drug> (accessed May 5, 2016).

<sup>19</sup> Comm. on the Rights of the Child, Concluding Observations: Brazil, ¶ 83(a), U.N. Doc. CRC/C/BRA/CO/2-4 (Oct. 30, 2015); Comm. on the Rights of the Child, Concluding Observations: Colombia, ¶ 61, U.N. Doc. CRC/C/COL/CO/4-5 (Mar. 6, 2015); Comm. on the Rights of the Child, Concluding Observations: India, ¶ 83, U.N. Doc. CRC/C/IND/CO/3-4 (Jul. 7, 2014); Comm. on the Rights of the Child, Concluding Observations: Indonesia, ¶ 73, U.N. Doc. CRC/C/IDN/CO/3-4 (Jul. 10, 2014); Comm. on the Rights of the Child, Concluding Observations: Jordan, ¶ 59, U.N. Doc. CRC/C/JOR/CO/4-5 (Jul. 8, 2014).

<sup>20</sup> See CRIN, *Global Report on Status Offences* (London: CRIN, 2009), [https://www.crin.org/en/docs/Status\\_Offences\\_doc\\_2\\_final.pdf](https://www.crin.org/en/docs/Status_Offences_doc_2_final.pdf) (accessed May 9, 2016).

<sup>21</sup> Mark Levin and Derek Cohen, “Kids Doing Time for What’s Not a Crime: The Over-Incarceration of Status Offenders,” *Policy Perspective* (Texas Public Policy Foundation, March 2014), p. 6, <http://mstservices.com/images/2014-03-PP12-JuvenileJusticeStatusOffenders-CEJ-DerekCohenMarcLevin.pdf> (accessed May 9, 2016).

<sup>22</sup> Human Rights Watch, *Adults Before Their Time: Children in Saudi Arabia’s Criminal Justice System* (New York: Human Rights Watch, 2008), p. 35, <https://www.hrw.org/report/2008/03/24/adults-their-time/children-saudi-arabias-criminal-justice-system> (accessed May 5, 2016).

<sup>23</sup> *Ibid.*, p.35.

<sup>24</sup> Human Rights Watch, *Policing Morality: Abuses in the Application of Sharia in Aceh, Indonesia* (New York: Human Rights Watch, 2010), <https://www.hrw.org/report/2010/11/30/policing-morality/abuses-application-sharia-aceh-indonesia> (accessed May 5, 2016).



Children in some countries may face criminal charges for consensual sexual conduct with a partner close to their own age, particularly if the partner is of the same sex or, in heterosexual relationships, a younger girl.<sup>25</sup> In some cases, “sexting,” the use of smartphones or other means to share sexually suggestive content, can be the basis for prosecution.<sup>26</sup> Children may also face arrest and imprisonment or detention when they engage in survival sex<sup>27</sup> (the exchange of sex for food or shelter), and in some cases even when they are sexually assaulted by adults.<sup>28</sup> And girls who seek or procure an abortion may face criminal charges in Bolivia, El Salvador, Ecuador, Mexico, and the Philippines, among other countries.<sup>29</sup>

Third, children may be imprisoned under sentences that are impermissible under international law. International law flatly prohibits sentences of death (as well as life sentences that do not allow for the possibility of release) for crimes committed under the age of 18.<sup>30</sup> Nevertheless, as of December 2014, at least 160 individuals were on death row in Iran for crimes they were found to have committed when they were under 18 years of age, the UN Secretary-General reported;<sup>31</sup>

<sup>25</sup> See, for example, *Teddy Bear Clinic for Abused Children & RAPCAN v. Minister of Justice and Constitutional Development et al.*, [2013] ZACC 35 (S. Afr. Const. Ct. October 3, 2013) (finding unconstitutional the imposition of criminal liability for consensual sexual conduct between children under age 16), <http://www.saflii.org/za/cases/ZACC/2013/35.pdf> (accessed May 6, 2016); *C.K.W. v. Attorney General & Director of Public Prosecution*, Petition No. 6 of 2013, [2014] eKLR (Kenya High Ct.) (upholding provisions of Kenya’s Sexual Offences Act that criminalize sexual conduct between consenting children), <http://kenyalaw.org/caselaw/cases/view/100510/> (accessed May 6, 2016); Abiud Ochieng, “Kenya: Can Teenage Sex Be Consensual? The Teens Think So, the Law Says No,” *Daily Nation*, October 7, 2015, <http://allafrica.com/stories/201510070855.html> (accessed May 6, 2016); Human Rights Watch, *No Easy Answers: Sex Offender Laws in the United States* (New York: Human Rights Watch, 2007), pp. 72-75, <https://www.hrw.org/reports/2007/us0907/> (accessed May 6, 2016); Michael H. Meidinger, “Peeking Under the Covers: Taking a Closer Look at Prosecutorial Decision-Making Involving Queer Youth and Statutory Rape,” *Boston College Journal of Law & Social Justice*, vol. 32 (2012), pp. 421-451; “Sweden Wrestles with Legality of Underage Sex,” *The Local*, August 29, 2011 (discussing conviction of 15-year-old boy for having consensual sex with his 13-year-old girlfriend), <http://www.thelocal.se/20110829/35836> (accessed May 6, 2016).

<sup>26</sup> Joanna R. Lampe, “A Victimless Sex Crime: The Case for Decriminalizing Consensual Teen Sexting,” *University of Michigan Journal of Law Reform*, vol. 46 (2013), p. 709; Jaclyn A. Machometa, “Round Up the Usual Suspects: Advocating for Leniency on Consensual, Teenage Sext Offenders,” *University of Maryland Law Journal of Race, Religion, Gender and Class*, vol. 14 (2015), pp. 311-15.

<sup>27</sup> See, for example, Meredith Dank et al., *Surviving the Streets of New York: Experiences of LGBTQ Youth, YMSM, and YWSW Engaged in Survival Sex* (Washington, D.C.: The Urban Institute, 2015), pp. 32-33, <http://www.urban.org/research/publication/surviving-streets-new-york-experiences-lgbtq-youth-ymsm-and-ywsw-engaged-survival-sex> (accessed May 6, 2016).

<sup>28</sup> See, for example, Thanassis Cambanis, “In Rape Case, a French Youth Takes on Dubai,” *New York Times*, November 1, 2007, <http://www.nytimes.com/2007/11/01/world/middleeast/01dubai.html> (accessed May 6, 2016).

<sup>29</sup> See, for example, Amnesty International, “Bolivia: Briefing to the UN Committee on the Elimination of Discrimination Against Women,” July 2015, pp. 10-13; Human Rights Watch, “Ecuador: Adopt UN Recommendations on Abortion Law,” April 22, 2015, <https://www.hrw.org/news/2015/04/22/ecuador-adopt-un-recommendations-abortion-law> (accessed May 5, 2016); Amnesty International, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador* (London: Amnesty International, 2014), [https://www.amnestyusa.org/sites/default/files/el\\_salvador\\_report\\_-\\_on\\_the\\_brink\\_of\\_death.pdf](https://www.amnestyusa.org/sites/default/files/el_salvador_report_-_on_the_brink_of_death.pdf) (accessed May 5, 2016); Human Rights Watch, *The Second Assault: Obstructing Access to Legal Abortion After Rape in Mexico* (New York: Human Rights Watch, 2006), <https://www.hrw.org/report/2006/03/06/mexico-second-assault/obstructing-access-legal-abortion-after-rape-mexico> (accessed May 5, 2016); Center for Reproductive Rights, “Facts on Abortion in the Philippines: Criminalization and a General Ban on Abortion,” January 28, 2010, <http://www.reproductiverights.org/document/facts-on-abortion-in-the-philippines-criminalization-and-a-general-ban-on-abortion> (accessed May 5, 2016); Tara Culp-Ressler, “Abortion Bans Are Putting Women Behind Bars,” *ThinkProgress*, March 9, 2015, <http://thinkprogress.org/health/2015/03/09/3629297/countries-jailing-women-abortion/> (accessed May 5, 2016).

<sup>30</sup> Convention on the Rights of the Child, art. 37(a), Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>31</sup> U.N. General Assembly, Human Rights Council, Situation of Human Rights in the Islamic Republic of Iran: Report of the Secretary-General, ¶ 14, U.N. Doc. A/HRC/28/26 (Feb. 20, 2015). See also Amnesty International, *Growing Up on Death Row: The Death Penalty and Juvenile Offenders in Iran* (London: Amnesty

in January 2016, Amnesty International estimated that the actual number of juvenile offenders under sentence of death in Iran was much higher.<sup>32</sup> Since 2010, juvenile offenders have been sentenced to death in Bangladesh, Egypt, Iran, Maldives, Pakistan, Saudi Arabia, Sri Lanka, Sudan, and Yemen, and juvenile offenders sentenced before 2010 continue to be held under sentence of death in Indonesia, Nigeria, and Papua New Guinea.<sup>33</sup>

International law also requires detention or incarceration of children to be for the shortest appropriate period of time.<sup>34</sup> Life sentences and other very long sentences do not meet that standard. Children must receive sentences that are proportionate both to the circumstances and gravity of their offences as well as their own individual circumstances and needs. Their sentences must be subject to early, regular, and meaningful review for the purpose of conditional release or parole. Nevertheless, children may receive life sentences in 73 countries around the world, including the United States and 49 of the 53 states in the Commonwealth of Nations, a 2015 study by the Child Rights International Network (CRIN) found.<sup>35</sup>

Fourth, children from minority groups may be disproportionately subject to arrest and detention, as research in Australia, Canada, and the United States, among other countries, has found.<sup>36</sup> In fact, the disparities between their treatment and that of children from groups that represent the majority may increase at every stage of the process, from arrest to bail determinations to sentencing to parole decisions.<sup>37</sup>

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International, 2016), <https://www.amnesty.org/en/documents/mde13/3112/2016/en/> (accessed May 6, 2016).

<sup>32</sup> See Amnesty International, "Iran's Hypocrisy Exposed as Scores of Juvenile Offenders Condemned to Gallows," January 26, 2016, <https://www.amnesty.org/en/latest/news/2016/01/irans-hypocrisy-exposed-as-scores-of-juvenile-offenders-condemned-to-gallows/> (accessed June 3, 2016).

<sup>33</sup> Amnesty International, *Death Sentences and Executions 2015* (London: Amnesty International, 2016), p. 8, <https://www.amnesty.org/en/documents/act50/3487/2016/en/> (accessed May 6, 2016).

<sup>34</sup> CRC, *supra* note 26, at art. 37(b).

<sup>35</sup> CRIN, *Inhuman Sentencing: Life Imprisonment of Children Around the World* (London: CRIN, 2015), [https://www.crin.org/sites/default/files/life\\_imprisonment\\_children\\_global\\_0.pdf](https://www.crin.org/sites/default/files/life_imprisonment_children_global_0.pdf) (accessed May 6, 2016).

<sup>36</sup> See, for example, South Australian Council of Social Service (SACOSS), *Justice or an Unjust System? Aboriginal Over-Representation in South Australia's Juvenile Justice System* (Unley, South Australia: SACOSS, 2015), [https://www.sacoss.org.au/sites/default/files/public/documents/Reports%20copy%201/Youth\\_Justice\\_Report\\_FINAL.pdf](https://www.sacoss.org.au/sites/default/files/public/documents/Reports%20copy%201/Youth_Justice_Report_FINAL.pdf) (accessed May 6, 2016); Jioji Ravulo, "Pacific Youth Offending Within an Australian Context," *Youth Justice*, vol. 16 (2016), pp. 34-48; Robin T. Fitzgerald and Peter J. Carrington, "Disproportionate Minority Contact in Canada: Police and Visible Minority Youth," *Canadian Journal of Criminology and Criminal Justice*, vol. 53 (2011), pp. 449-86; Joshua Rovner, "Disproportionate Minority Contact in the Juvenile Justice System," Policy Brief, The Sentencing Project, May 2014, <http://sentencingproject.org/wp-content/uploads/2015/11/Disproportionate-Minority-Contact-in-the-Juvenile-Justice-System.pdf> (accessed May 6, 2016); Joshua Rovner, "Racial Disparities in Youth Commitments and Arrests," Policy Brief, The Sentencing Project, April 2016, <http://www.sentencingproject.org/wp-content/uploads/2016/04/Racial-Disparities-in-Youth-Commitments-and-Arrests.pdf> (accessed May 6, 2016).

<sup>37</sup> See Barry C. Feld, *Kids, Cops, and Confessions: Inside the Interrogation Room* (New York: New York University Press, 2012), p. 210.

Prosecuting children as adults poses additional problems. Not every country has established a juvenile justice system,<sup>38</sup> despite the requirement in international law to do so.<sup>39</sup> Of those that do have a juvenile justice system, some states nevertheless treat older children as if they were adults. This may be done systematically, by setting an age lower than 18 for the jurisdiction of the ordinary criminal courts, as is the case in Cuba, Ethiopia, Jamaica, Hong Kong, the Philippines, Ukraine, Yemen, the Australian state of Queensland, and the US state of New York, among other jurisdictions.<sup>40</sup> It may also be done arbitrarily, for example when judges decide to treat children as adults if they show signs of puberty, as is done in Saudi Arabia and other countries in the Middle East,<sup>41</sup> or in states that prosecute children in adult courts when they have committed offenses together with adults.<sup>42</sup>

In the United States, every state and the federal criminal justice system allow some children to be prosecuted in the ordinary criminal courts, depending on their age and the seriousness of the offense with which they are charged.<sup>43</sup> Many US states made it easier to prosecute children as adults in the early 1990s, in response to since-discredited claims of a looming crime wave perpetrated by “juvenile superpredators.”<sup>44</sup> But more recently some US states have changed course, repealing automatic transfer laws and taking other measures to ensure that children are kept in the juvenile system.<sup>45</sup>

<sup>38</sup> For example, the Committee on the Rights of the Child has noted deficiencies in Chile, Jordan, Mauritius, Turkmenistan, and Uruguay, among other countries. Comm. on the Rights of the Child, Concluding Observations: Chile, ¶ 85(a), U.N. Doc. CRC/C/CHL/CO/4-5 (Oct. 30, 2015) (lack of a “duly dedicated judicial system, with specialized judges, prosecutors and defence attorneys”); Comm. on the Rights of the Child, Concluding Observations: Jordan, ¶ 63(a), U.N. Doc. CRC/C/JOR/CO/4-5 (Jul. 8, 2014) (“[t]he Juveniles Bill does not provide for the establishment of specialized juvenile courts”); Comm. on the Rights of the Child, Concluding Observations: Mauritius, ¶ 69, U.N. Doc. CRC/C/MUS/CO/3-5 (Feb. 27, 2015) (“the absence of juvenile justice tribunals with specialized judges”); Comm. on the Rights of the Child, Concluding Observations: Turkmenistan, ¶ 57(a), U.N. Doc. CRC/C/TKM/CO/2-4 (Mar. 10, 2015) (calling on the state to “[e]xpediently establish specialized juvenile court facilities and procedures”); Comm. on the Rights of the Child, Concluding Observations: Uruguay, ¶ 71(a), U.N. Doc. CRC/C/URY/CO/3-5 (Mar. 5, 2015) (noting “[t]he absence of a specialized juvenile justice system throughout the country”).

<sup>39</sup> See Human Rights Comm., General Comment No. 32: Right to Equality Before the Courts and Tribunals and to a Fair Trial, ¶ 43, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007) (“States should take measures to establish an appropriate juvenile criminal justice system, in order to ensure that juveniles are treated in a manner commensurate with their age.”); Comm. on the Rights of the Child, General Comment No. 10: Children’s rights in juvenile justice, ¶ 4, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter Comm. on the Rights of the Child, General Comment No. 10] (noting that the convention “requires States parties to develop and implement a comprehensive juvenile justice policy”).

<sup>40</sup> See, for example, Neal Hazel, “Cross-National Comparison of Youth Justice” (Youth Justice Board, 2008), p. 35; Connie de la Vega, Amanda Solter, Soo-Ryun Kwon, and Dana Marie Isaac, *Cruel and Unusual: U.S. Sentencing Practices in a Global Context* (San Francisco: University of San Francisco School of Law, Center for Law and Global Justice, 2014), pp. 55-56.

<sup>41</sup> See, for example, Human Rights Watch, *World Report 2015* (New York: Human Rights Watch, 2015), p. 461 (in Saudi Arabia, “[c]hildren can be tried for capital crimes and sentenced as adults if physical signs of puberty exist”).

<sup>42</sup> See Comm. on the Rights of the Child, Concluding Observations: Jordan, ¶ 63(b), U.N. Doc. CRC/C/JOR/CO/4-5 (Jul. 8, 2014).

<sup>43</sup> Human Rights Watch and ACLU, *Growing Up Locked Down*, pp. 11-14, <https://www.hrw.org/report/2014/04/10/branded-life/floridas-prosecution-children-adults-under-its-direct-file-statute#193564> (accessed May 6, 2016); Human Rights Watch and American Civil Liberties Union, *Growing Up Locked Down*, pp. 11-14.

<sup>44</sup> See, for example, Franklin E. Zimring, “American Youth Violence: A Cautionary Tale,” *Crime and Justice*, vol. 42 (2013), pp. 2, 25; Human Rights Watch, *No Minor Matter: Children in Maryland’s Jails* (New York: Human Rights Watch, 1999), <https://www.hrw.org/reports/1999/maryland/> (accessed May 6, 2016).

<sup>45</sup> “America Corrects a Mistake: Trying Minors as Adults,” editorial, *The Christian Science Monitor*, March 7, 2011, <http://www.csmonitor.com/Commentary/the-monitors-view/2011/0307/America-corrects-a-mistake-trying-minors-as-adults> (accessed May 7, 2015); Sarah Childress, “More States Consider Raising the

Few countries follow the particular models used in the United States, but a worrying number of countries have lowered their minimum age of criminal responsibility in recent years, including Georgia, Hungary, Panama, and Bolivia.<sup>46</sup>

In July 2015, Brazil's Chamber of Deputies approved a proposal to lower the age of criminal majority to 16.<sup>47</sup> The measure was still being considered in a Senate committee as of June 2016.<sup>48</sup> If it is enacted, children aged 16 and over who are accused of serious crimes will be prosecuted in adult courts.

India amended its Juvenile Justice Act in 2015 to provide that 16- and 17-year-olds may be prosecuted as adults for serious crimes if an independent board finds that they understand the consequences of their actions. These children will be tried in children's courts but may be sent to jails with adults when they reach age 21 if they are not found to have been "reformed."<sup>49</sup> The amendment is now facing a constitutional challenge in India's Supreme Court.<sup>50</sup>

Prosecuting children as adults deprives them of the special protections of the juvenile justice system and, if they are held in adult jails and prisons, also exposes them to greater risk of harm than if they were in juvenile detention facilities.<sup>51</sup> That risk of harm is exacerbated when the prosecution of children as adults is marked by arbitrariness and racial disparities, as Human Rights Watch documented in the state of Florida.<sup>52</sup> Children in adult facilities in the United States can be subjected to solitary confinement for weeks or months, meaning that children as young as 13 are isolated for 22 to 24 hours a day, denied books and education as well as exercise and family visits. "I felt like I was going mad. Nothing but a wall to stare at. . . . I started talking to myself and answering myself. Talking gibberish," a youth confined in Michigan told Human Rights Watch.<sup>53</sup>

Extensive, well-regarded research has shown that children prosecuted as adults and sentenced to serve time in adult prisons are more likely to commit new crimes compared with those kept in the juvenile system.<sup>54</sup>

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Age for Juvenile Crime," *Frontline*, June 2, 2016, <http://www.pbs.org/wgbh/frontline/article/more-states-consider-raising-the-age-for-juvenile-crime/> (accessed June 3, 2016).

<sup>46</sup> See CRIN, "States Lowering Age of Criminal Responsibility," <https://www.crin.org/en/home/what-we-do/policy/stop-making-children-criminals/states-lowering-age-criminal-responsibility> (accessed June 3, 2016).

<sup>47</sup> César Muñoz, "Dispatches: Brazil's Congress Runs over Children's Rights," July 2, 2015, <https://www.hrw.org/news/2015/07/02/dispatches-brazils-congress-runs-over-childrens-rights-0> (accessed May 7, 2016).

<sup>48</sup> See Simone Franco, "CCJ aprova novo debate sobre redução da maioridade penal," *Agência Senado*, June 1, 2016, <http://www12.senado.leg.br/noticias/materias/2016/06/01/ccj-aprova-novo-debate-sobre-reducao-da-maioridade-penal> (accessed July 12, 2016); Senado Federal, *Atividade Legislativa*, Proposta de emenda à Constituição no. 115, de 2015, <http://www25.senado.leg.br/web/atividade/materias/-/materia/122817> (accessed May 7, 2016).

<sup>49</sup> See Shalini Nair, "New Juvenile Justice Act to Come into Force from Today," *The Indian Express*, January 15, 2016, <http://indianexpress.com/article/india/india-news-india/new-juvenile-justice-act-to-come-into-force-from-today/> (accessed May 7, 2016).

<sup>50</sup> "Amendment to Juvenile Justice Law Challenged," *The Hindu*, January 31, 2016, <http://www.thehindu.com/news/national/amendment-to-juvenile-justice-law-challenged/article8175786.ece> (accessed May 7, 2016).

<sup>51</sup> See, for example, Human Rights Watch and ACLU, *Growing Up Locked Down*, pp. 16-19; Allen J. Beck, Marcus Berzofsky, and Rachel Caspar, "Sexual Victimization in Prisons and Jails Reported by Inmates, 2011-2012 Update," Bureau of Justice Statistics, US Department of Justice, December 9, 2014, <http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4654> (accessed May 5, 2016).

<sup>52</sup> Human Rights Watch, *Branded for Life*, pp. 29-32.

<sup>53</sup> Human Rights Watch and ACLU, *Growing Up Locked Down*, p. 25.

<sup>54</sup> See, for example, Robert Hahn et al., "Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A Report on Recommendations of the Task Force on Community Preventive Services," Centers for Disease Control and Prevention, November 30, 2007, <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5609a1.htm> (accessed May 5, 2016).

Moreover, the treatment of children as if they were adults is at odds with what is known about adolescence. Common experience and developmental science teach that teens tend to act in concert with and be influenced by others. Teenagers have limited comprehension of risks and consequences and are unable, generally speaking, to act with adult-like volition. They are also particularly amenable to change and rehabilitation. For most adolescents, risk-taking and criminal behaviour are fleeting; they cease with maturity.<sup>55</sup>

For these reasons, the United Nations Committee on the Rights of the Child, which monitors state compliance with the Convention on the Rights of the Child, calls for “every person under the age of 18 years at the time of the alleged commission of an offence [to] be treated in accordance with the rules of juvenile justice.”<sup>56</sup>

Children are sometimes held with adults even in states that nominally afford them juvenile justice protections. For example, the Committee on the Rights of the Child recently criticized Brazil, Croatia, the Dominican Republic, Gambia, Indonesia, Kyrgyzstan, Mauritius, Switzerland, Tanzania, Timor-Leste, and Venezuela, among other countries, for holding children together with adults in police stations, jails, or prisons.<sup>57</sup>

Moreover, detained or incarcerated children may be subjected to abuses when they are separated from adults. In Australia, a damning report from the Northern Territory’s Children’s Commissioner made public in September 2015 revealed serious shortcomings in juvenile detention practices in the territory. As the opening account in this essay illustrates, youths in detention were subjected to isolation in cramped quarters, sometimes for nearly three weeks at a time, as well as excessive use of force.<sup>58</sup> In Florida, two children died in February and September 2015 after beatings at the hands of other juvenile detainees that may have been prompted by “food bounties,” a practice in which guards offer children contraband food as a reward for “beat-downs.”<sup>59</sup>

Detention centres for girls frequently suffer from specific shortcomings. Girls are usually detained far less frequently than boys, so there are generally fewer detention facilities for girls, meaning that they may be held far from their families and communities, or shunted off to the adult

<sup>55</sup> See, for example, Laurence Steinberg et al., “Age Differences in Future Orientation and Delay Discounting,” *Child Development*, vol. 80 (2009), pp. 28-44; Margo Gardner and Laurence Steinberg, “Peer Influence on Risk Taking, Risk Preference, and Risky Decision Making in Adolescence and Adulthood: An Experimental Study,” *Developmental Psychology*, vol. 41 (2005), pp. 625-35; Laurence Steinberg et al., “The Study of Developmental Psychopathology in Adolescence: Integrating Affective Neuroscience with the Study of Context,” in Dante Cicchetti and Donald Cohen, eds., *Developmental Psychopathology* (Oxford: John Wiley & Sons, 2006), p. 710.

<sup>56</sup> Comm. on the Rights of the Child, General Comment No. 10, *supra* note 35, ¶ 37.

<sup>57</sup> Comm. on the Rights of the Child, Concluding Observations: Brazil, ¶ 87(c), U.N. Doc. CRC/C/BRA/CO/2-4 (Oct. 30, 2015); Comm. on the Rights of the Child, Concluding Observations: Croatia, ¶ 58(d), U.N. Doc. CRC/C/HRV/CO/3-4 (Oct. 13, 2014); Comm. on the Rights of the Child, Concluding Observations: Dominican Republic, ¶ 71(d), U.N. Doc. CRC/C/DOM/CO/3-5 (Mar. 6, 2015); Comm. on the Rights of the Child, Concluding Observations: Gambia, ¶ 82(c), U.N. Doc. CRC/C/GMB/CO/2-3 (Feb. 20, 2015); Comm. on the Rights of the Child, Concluding Observations: Indonesia, ¶ 77, U.N. Doc. CRC/C/IDN/CO/3-4 (Jul. 10, 2014); Comm. on the Rights of the Child, Concluding Observations: Kyrgyzstan, ¶ 66(d), U.N. Doc. CRC/C/KGZ/CO/3-4 (Jul. 7, 2014); Comm. on the Rights of the Child, Concluding Observations: Mauritius, ¶ 69(b), U.N. Doc. CRC/C/MUS/CO/3-5 (Feb. 27, 2015); Comm. on the Rights of the Child, Concluding Observations: Switzerland, ¶ 72(d), U.N. Doc. CRC/C/CHE/CO/2-4 (Feb. 24, 2015); Comm. on the Rights of the Child, Concluding Observations: Tanzania, ¶ 72(d), U.N. Doc. CRC/C/TZA/CO/3-5 (Mar. 2, 2015); Comm. on the Rights of the Child, Concluding Observations: Timor-Leste, ¶ 62(f), U.N. Doc. CRC/C/TLS/CO/2-3 (Oct. 30, 2015); Comm. on the Rights of the Child, Concluding Observations: Venezuela, ¶ 74(e), U.N. Doc. CRC/C/VENCO/3-5 (Oct. 13, 2014).

<sup>58</sup> Office of the Children’s Commissioner, Northern Territory, *Own Initiative Investigation Report*.

<sup>59</sup> Carol Marbin Miller, “5 Fired at Miami-Dade Lockup Where Teen Died in Beat-Down,” *Miami Herald*, September 30, 2015, <http://www.miamiherald.com/news/special-reports/florida-prisons/article37157142.html> (accessed May 6, 2016).

system. Girls are sometimes simply held in women's prisons with no effort to ensure their separation from detained adults. Girls in detention or prison may also receive fewer programmes and services than those offered to detained or imprisoned boys. In addition, some detention centres lack adequate sanitation, and girls may lack the materials and privacy needed to manage their menstruation. The lack of privacy in areas for bathing or going to the bathroom exacerbates the risk of sexual harassment or assault.

There have been some positive developments in juvenile justice. In California, legislation enacted in 2014 offered the possibility of earlier parole for several thousand young offenders who were under 18 at the time of a crime but who were tried as an adult and sentenced to an adult prison term, and a 2015 law extended eligibility for parole to those who were 22 or under at the time of the crime.

## Detention As a Means of Immigration Control

Under international standards, the detention of any asylum seeker, whether a child or an adult, should normally be avoided.<sup>60</sup> Mandatory or indefinite detention of children violates the principle that the detention of children should be used only as a matter of last resort and for the shortest appropriate period of time.<sup>61</sup> Moreover, the detention of children solely because of their own or their parents' immigration status violates the prohibition on arbitrary detention.<sup>62</sup>

Nevertheless, many countries continue to detain children as a means of enforcing their migration laws. Most notoriously, Australia has operated a mandatory detention framework for all asylum seekers, children as well as adults, since 1992, although it moved to eliminate immigration detention of children in early 2016. At the end of March 2016, Australia held 17 children in immigration detention in mainland detention centres, down from some 2,000 in July 2013 and approximately 100 at the end of 2015. At least 50 more children were held in Australia's regional processing centre in Nauru, a detention centre for asylum seekers.<sup>63</sup>

Children held on Nauru alone or with their families spent a year and a half or more crowded into vinyl tents that offered little shelter from the elements.<sup>64</sup> An August 2016 joint report by Human

<sup>60</sup> U.N. High Comm'r for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, ¶ 2.

<sup>61</sup> CRC, *supra* note 26, at art. 37(c).

<sup>62</sup> See Committee on the Rights of the Child, Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration (2012), ¶ 78; U.N. General Assembly, Human Rights Council, Report of the Working Group on Arbitrary Detention, ¶ 60, UN Doc. A/HRC/13/30 (Jan. 18, 2010); Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection, Advisory Opinion OC-21/14, Inter-Am. Ct. H.R. (ser. A) No. 21, ¶¶ 154-60 (Aug. 19, 2014).

<sup>63</sup> Australian Government, Department of Immigration and Border Protection/Australian Border Force, Immigration Detention and Community Statistics Summary, March 31, 2016, p. 4, <https://www.border.gov.au/ReportsandPublications/Documents/statistics/immigration-detention-statistics-31-mar-2016.pdf> (accessed May 6, 2016).

<sup>64</sup> See UNHCR Monitoring Visit to the Republic of Nauru, 7 to 9 October 2013, <http://unhcr.org.au/wp-content/uploads/2015/05/2013-12-06-Report-of-UNHCR-Visit-to-Nauru-of-7-9-October-2013.pdf> (accessed May 6, 2016); Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* (Sydney: Australian Human Rights Commission, 2014), <https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/forgotten-children-national-inquiry-children> (accessed May 6, 2016); Philip Moss, Review into Recent Allegations Relating to Conditions and Circumstances at the Regional Processing Center in Nauru, Final Report, February 6, 2015, <https://www.border.gov.au/ReportsandPublications/Documents/reviews-and-inquiries/review-conditions-circumstances-nauru.pdf> (accessed May 6, 2016); U.N. General Assembly, Human Rights Council, Report of the Special Rapporteur on Torture, Addendum, ¶¶ 16-31, U.N. Doc. A/HRC/28/68/Add.1 (Mar. 5, 2015).

Rights Watch and Amnesty International found that refugees and asylum seekers held on Nauru, children as well as adults, regularly endure violence, threats, and harassment from Nauruans. Prolonged detention in appalling conditions has exacerbated the trauma many suffered from persecution in their home countries and the abuses and other hazards they faced on their journeys to Australia. Children began to wet their beds, suffered from nightmares, and engaged in disruptive and other troubling behaviour; some engaged in acts of self-harm, and others spoke openly of wanting to end their lives.<sup>65</sup>

A cache of 2,000 incident reports published in August 2016 by *The Guardian* showed that child refugees and asylum seekers disproportionately experienced assaults, sexual abuse, and other forms of child abuse, as well as self-harm attempts.<sup>66</sup> Other accounts by whistleblowers have suggested that guards often discourage refugees and asylum seekers from filing reports of physical abuse, including sexual assault. When refugees and asylum seekers made such reports, senior managers downgraded their accounts and appear to have failed to undertake prompt and effective investigations.<sup>67</sup>

In the United States in mid-2014, the Obama administration dramatically expanded family immigration detention capacity, from less than 100 to more than 3,000 beds. It did so for the stated purpose of deterring Central American migrants from crossing into the United States from Mexico. In April 2015, a group of mothers held in Karnes City, Texas, went on hunger strike, writing, "The environment our children are in is not good. Our children are not eating well, every day they lose weight, and their health deteriorates."<sup>68</sup>

Thailand's immigration laws permit the indefinite detention of all refugees, and migrant children are held in squalid cells without adequate food or little or no opportunity to exercise or receive an education. Children have told Human Rights Watch that immigration detention centres are sometimes so crowded that they must sleep sitting up. One mother described conditions that she and her four daughters experienced in one Thai detention centre, where there were only three toilets for the 100 detained migrants. Her teenage daughter would avoid using the toilets, because they had no doors or privacy. Even an immigration officer raised concerns about the toilet facilities, highlighting specifically his concern for girls, "The toilet needs to be improved, the cleaning. I see that it's not really comfortable when they need to clean themselves . . . I'm concerned for the girls, no privacy to wash."<sup>69</sup>

<sup>65</sup> See Human Rights Watch and Amnesty International, "Australia: Appalling Abuse, Neglect of Refugees on Nauru," August 2, 2016, <https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru> (accessed August 25, 2016).

<sup>66</sup> Paul Farrell, Nick Evershed, and Helen Davidson, "The Nauru Files: Cache of 2,000 Leaked Reports Reveal Scale of Abuse of Children in Australian Offshore Detention," *The Guardian*, August 10, 2016, <https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention> (accessed August 25, 2016).

<sup>67</sup> See "Ex-Aid Worker: Abuse of Refugee Children on Nauru Was Mostly Ignored," NPR, August 24, 2016, <http://www.npr.org/sections/parallels/2016/08/24/491170178/ex-aid-worker-abuse-of-refugee-children-on-nauru-was-ignored> (accessed August 25, 2016); Helen Davidson, "Former Save the Children Workers Say Nauru Files 'Just the Tip of the Iceberg,'" *The Guardian*, August 10, 2016, <https://www.theguardian.com/news/2016/aug/10/former-save-the-children-workers-say-nauru-files-just-the-tip-of-the-iceberg> (accessed August 25, 2016).

<sup>68</sup> Clara Long (Human Rights Watch), "Detained Migrant Families Spend Mother's Day in Prison," AlJazeera America, May 10, 2015, <http://america.aljazeera.com/opinions/2015/5/detained-migrant-families-spend-mothers-day-in-prison.html> (accessed May 6, 2016).

<sup>69</sup> Human Rights Watch, *Two Years with No Moon: Immigration Detention of Children in Thailand* (New York: Human Rights Watch, 2014), p. 51, <https://www.hrw.org/report/2014/09/01/two-years-no-moon/immigration-detention-children-thailand> (accessed May 6, 2016).

Elsewhere in the world, Human Rights Watch and other groups have documented detention of migrant children in large numbers, alone or with their families, in Bangladesh, Indonesia, and Mexico.<sup>70</sup> In some countries, including Croatia, Malaysia, Saudi Arabia, and Yemen, children are held with unrelated adults in immigration detention facilities.<sup>71</sup>

Saladu, 35, a Somali woman, told Human Rights Watch in February 2014 that Saudi authorities had detained her for nine days with her two children, aged seven and nine, and her sister's three children before deporting them. "The room we stayed in with 150 other women and children was extremely hot and there was no air conditioning. The children were sick. My son was vomiting and his stomach was very bloated. There were no mattresses, people just slept on the floor," she said.<sup>72</sup>

## Detention in the Name of National Security

Children deemed to be a security threat may be held under administrative or military regimes that are subject to fewer checks than those available in the criminal and juvenile justice systems, as my colleague Jo Becker examines in more detail in her chapter.

Captured, surrendered, or demobilised child soldiers are one such group, even though international standards call for States to treat former child soldiers primarily as victims of offences under international law, not only as perpetrators, and to offer them rehabilitative programmes. As one example, in Somalia, children have been held in Mogadishu's Serendi rehabilitation camp, with strict limits on their freedom of movement, for their reported former association with Al-Shabab. Children have also been held in large numbers in Afghanistan, Democratic Republic of Congo, Iraq, and Syria for alleged association with armed or extremist groups. In fact, the Special Representative of the Secretary-General for Children and Armed Conflict, Leila Zerrougui, noted that children were detained for alleged involvement with armed groups in 17 of the 23 situations covered in the UN Secretary-General's 2014 report on children and armed conflict.<sup>73</sup> The Secretary-General's 2015 report observed, "An area of particular concern related to the response to extreme violence is the deprivation of liberty of children due to their alleged association with extremist groups. Children have been detained on the suspicion of being associated with an extremist group without review of the lawfulness of the deprivation of liberty."<sup>74</sup>

<sup>70</sup> Comm. on the Rights of the Child, Concluding Observations: Bangladesh, ¶ 70, U.N. Doc. CRC/C/BGD/CO/05 (Oct. 30, 2015) ("Rohingya asylum-seeking children from Myanmar and their families are routinely detained because of illegal entry"); Human Rights Watch, *Barely Surviving: Detention, Abuse, and Neglect of Migrant Children in Indonesia* (New York: Human Rights Watch, 2013), <https://www.hrw.org/report/2013/06/23/barely-surviving/detention-abuse-and-neglect-migrant-children-indonesia> (accessed May 6, 2016); Human Rights Watch, *Closed Doors: Mexico's Failure to Protect Central American Refugee and Migrant Children* (New York: Human Rights Watch, 2016), <https://www.hrw.org/node/287389/> (accessed May 6, 2016).

<sup>71</sup> Human Rights Watch, *World Report 2016* (New York: Human Rights Watch, 2016), p. 249 (in Croatia, unaccompanied children placed in reception centers for adults); Amnesty International, *Trapped: The Exploitation of Migrant Workers in Malaysia* (London: Amnesty International, 2010), p.82; Human Rights Watch, *Detained, Beaten, Deported: Saudi Abuses Against Migrants During Mass Expulsions* (New York: Human Rights Watch, 2015), (noting that dozens of children were held in a Riyadh jail together with adults awaiting deportation); Comm. on the Rights of the Child, Concluding Observations: Yemen, ¶ 75(b), U.N. Doc. CRC/C/YEM/CO/4 (Feb. 25, 2014).

<sup>72</sup> Human Rights Watch, *Detained, Beaten, Deported*.

<sup>73</sup> U.N. General Assembly, Security Council, Children and Armed Conflict: Report of the Secretary-General, ¶ 9, U.N. Doc. A/68/878-S/2014/339 (May 15, 2014).

<sup>74</sup> U.N. General Assembly, Security Council, Children and Armed Conflict: Report of the Secretary-General, ¶ 14, U.N. Doc. A/69/926-S/2015/409 (June 5, 2015).



Israeli security forces in the occupied West Bank arrest Palestinian children suspected of criminal offences, usually stone-throwing, in their homes at night, at gunpoint. Some 500 to 700 Palestinian children are arrested, detained, and prosecuted in the Israeli military court system each year, Defence for Children International Palestine reports. Israel applies military law to all Palestinians in the West Bank and is the only country that automatically prosecutes children in military courts.<sup>75</sup> In 2015, Human Rights Watch found that Israeli security forces also used unnecessary force to arrest or detain Palestinian children as young as 11 in East Jerusalem and elsewhere in the West Bank. Security forces have choked children, thrown stun grenades at them, beaten them in custody, threatened and interrogated them without the presence of parents or lawyers, and failed to let their parents know their whereabouts.<sup>76</sup>

### Detention in the Name of Treatment or Care

Eight drug detention centres in Cambodia hold about 1,000 people at any one time. At least one in 10 is a child under the age of 18. Children face the same abuses as adults while confined: they are held in the same rooms as adults; forced to perform exhausting physical exercises and military-like drills; and are also subject to abuse, including cruel, inhuman and degrading treatment and even torture.<sup>77</sup> For example, Romchoang was under age 18 when he was held in the military-run drug detention centre in Cambodia's Koh Kong province for 18 months. He was locked in a room, chained to a bed for the first week of his detention, and later made to perform physical exercises each morning. Soldiers told him that sweating would help him recover from drugs. Soldiers beat him for falling asleep when he was meant to be sweeping the barracks.<sup>78</sup>

Cambodia's drug detention centres are also used to hold street children who do not use drugs but who are confined in the centres following operations to "clean the streets."<sup>79</sup> Similarly, street children are frequently rounded up and detained arbitrarily elsewhere in the world. Sometimes States purport to justify their detention under vaguely worded criminal laws, as noted in the "Detention and Incarceration in Response to Crime" section, above. In other cases, as in Cambodia, they are held for the ostensible purpose of treatment.

In another example, in Rwanda, until August 2014 street children were among other marginalised people rounded up and detained arbitrarily by police in Kigali's Gikondo Transit Centre, described by one government official as "a transit centre for the rehabilitation of homeless children and idlers." In a typical account of ill-treatment at the centre, a 17-year-old told Human Rights Watch that when he arrived, an adult detainee who was the unofficial leader of the dormitory demanded payment from the boy. "But I had no money," the boy said. The man made the boy hold a bucket filled with excrement and urine in front of him. "So I had to wrap my arms around the bucket . . . . Then he hit me on my back."<sup>80</sup>

<sup>75</sup> Defence for Children International Palestine, "Military Detention," [http://www.dci-palestine.org/issues\\_military\\_detention](http://www.dci-palestine.org/issues_military_detention) (accessed May 7, 2016).

<sup>76</sup> Human Rights Watch, "Israel: Security Forces Abuse Palestinian Children," July 19, 2015, <https://www.hrw.org/news/2015/07/19/israel-security-forces-abuse-palestinian-children> (accessed May 7, 2016).

<sup>77</sup> Human Rights Watch, "They Treat Us Like Animals": *Mistreatment of Drug Users and "Undesirables" in Cambodia's Drug Detention Centers* (New York: Human Rights Watch, 2013), p. 2.

<sup>78</sup> *Ibid.*, pp. 27.

<sup>79</sup> *Ibid.*, pp. 30-32.

<sup>80</sup> Human Rights Watch, "Why Not Call This Place a Prison?" *Unlawful Detention and Ill-Treatment in Rwanda's Gikondo Transit Center* (New York: Human Rights Watch, 2015), p. 19, <https://www.hrw.org/report/2015/09/24/why-not-call-place-prison/unlawful-detention-and-ill-treatment-rwandas-gikondo> (accessed May 7, 2016).

Children with disabilities may also be locked up in many countries around the world. The institutionalisation of children with disabilities is often said to be for their care, but in far too many cases, in fact, they are hidden away in an institution in part because of a lack of community services and support for families, with no mechanism to challenge their deprivation of liberty. In Russia, for example, children deemed “too disabled to learn” are often whisked away to institutions shortly after birth, where they may be tied to beds, receive little or no attention or education and may also be denied health care and adequate nutrition.<sup>81</sup> Human Rights Watch has found similar abusive practices in Croatia, Greece, and India, to name just a few recent examples.<sup>82</sup>

Some children may be locked up for perceived or actual psychosocial disabilities. Human Rights Watch documented the practice of shackling children as young as five years old—together with adults—in so-called prayer camps (or spiritual healing centres) in Ghana. Not only were they tied to a tree or wooden post with a heavy metal chain, they were also denied food, water, and shelter and were separated from their families.<sup>83</sup> In June 2015, the UN Committee on the Rights of the Child called on the government of Ghana to prohibit admission and treatment of children with disabilities in prayers, and to investigate and prosecute any such acts.<sup>84</sup>

## Abusive Conditions of Confinement

As many of the examples noted above starkly illustrate, children are frequently held in conditions that are inhumane, unhealthy, and unsafe.

Sexual assault is a specific risk, particularly for girls and whenever children are held with adults. Bathrooms in immigration detention facilities are often the site of sexual violence and harassment.<sup>85</sup> In Ukraine, for example, a 17-year-old Somali girl detained while seeking asylum reported harassment by other detainees: “the boys and girls are in one place... [The boys] tried to spy on me in the shower. There were up to six girls and 30 to 40 boys. We didn’t go to the toilet freely. They stood and smoked and we were scared... I was afraid repeatedly.”<sup>86</sup>

Torture and other ill-treatment at the hands of guards is a risk for every form of detention, especially for children held on national security grounds. For example, 44 out of 105 child detainees

<sup>81</sup> Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages* (New York: Human Rights Watch, 2014), <https://www.hrw.org/report/2013/12/08/they-treat-us-animals/mistreatment-drug-users-and-undesirables-cambodias-drug> (accessed May 7, 2016).

<sup>82</sup> Human Rights Watch, “Once You Enter, You Never Leave”: *Deinstitutionalization of Persons with Intellectual or Mental Disabilities in Croatia* (New York: Human Rights Watch, 2010), <https://www.hrw.org/report/2010/09/23/once-you-enter-you-never-leave/deinstitutionalization-persons-intellectual-or> (accessed May 7, 2016); Lydia Gall, “Dispatches: Greece—No Excuse for Caging Children,” November 18, 2014, <https://www.hrw.org/news/2014/11/18/dispatches-greece-no-excuse-caging-children> (accessed May 7, 2016); Human Rights Watch, “Treated Worse Than Animals”: *Abuses Against Women and Girls with Psychosocial or Intellectual Disabilities in Institutions in India* (New York: Human Rights Watch, 2014).

<sup>83</sup> Human Rights Watch, “Like a Death Sentence”: *Abuses Against Persons with Mental Disabilities in Ghana* (New York: Human Rights Watch, 2012), <https://www.hrw.org/report/2012/10/02/death-sentence/abuses-against-persons-mental-disabilities-ghana> (accessed May 7, 2016).

<sup>84</sup> Comm. on the Rights of the Child, Concluding Observations: Ghana, ¶ 26(a), U.N. Doc. CRC/C/GHA/CO/3-5 (June 9, 2015).

<sup>85</sup> See generally Human Rights Watch, Submission on Gender Equality to the Special Rapporteur on the Human Right to Safe Drinking Water and Sanitation, February 14, 2016, <https://www.hrw.org/news/2016/02/14/human-rights-watch-submission-gender-equality-special-rapporteur-human-right-safe> (accessed May 5, 2016).

<sup>86</sup> Human Rights Watch, *Buffeted in the Borderland: The Treatment of Migrants and Asylum Seekers in Ukraine* (New York: Human Rights Watch, December 2010), p. 77, <https://www.hrw.org/report/2010/12/16/buffed-in-borderland/treatment-asylum-seekers-and-migrants-ukraine> (accessed May 5, 2016).

in Afghanistan interviewed by the United Nations between February 2013 and December 2014 reported torture or other ill-treatment, including rape or threats of sexual violence upon arrest or in detention.<sup>87</sup> In the Democratic Republic of Congo, when the UN surveyed children who had been released after being held for alleged association with armed groups, 40 per cent reported ill-treatment during their detention.<sup>88</sup>

Educational services are often not available to children who are held for acts of delinquency or on national security grounds. Children who are deprived of their liberty in the name of protection or care, including children with disabilities, frequently do not receive the education and other services they need.<sup>89</sup>

Similarly, children in immigration detention may be held for months without access to education, as Human Rights Watch has documented in Egypt, Indonesia, Mexico, Thailand, and elsewhere.<sup>90</sup> Australia's Christmas Island detention centre, which held child asylum seekers and their families until the end of 2014, offered no schooling between mid-2013 and mid-2014.<sup>91</sup> Unaccompanied migrant children in Belarus, Kazakhstan, Kyrgyzstan, Russia, Tajikistan, and Ukraine are often held for protracted periods in prison-like "transit centres" with little or no access to education, CRIN has found.<sup>92</sup>

## The Impact of Detention or Imprisonment

Detention takes an enormous toll on children, particularly on their physical and mental health. As discussed in the previous section, it frequently exposes children to violence and subjects them to other abuses. It often interrupts their education and separates them from family.

The detention of children for acts of delinquency or on national security grounds frequently serves no rehabilitative purpose, because the facilities where they are held are often little more than warehouses, lacking the staff and the infrastructure necessary to provide anger management classes, life skills training, counselling, and other support. In fact, detention for delinquency or criminal offenses leads to higher rates of recidivism than alternatives to detention.

Detained child asylum seekers, in particular, experience extremely high rates of anxiety, depression, and symptoms of post-traumatic stress disorder, research in Australia, Britain, and the United

<sup>87</sup> U.N. Security Council, Report of the Secretary-General on Children and Armed Conflict in Afghanistan, ¶ 27, U.N. Doc. S/2015/336 (May 15, 2015), [https://unama.unmissions.org/sites/default/files/may\\_2015\\_-\\_report\\_of\\_the\\_secretary-general\\_on\\_children\\_and\\_armed\\_conflict\\_in\\_afghanistan.pdf](https://unama.unmissions.org/sites/default/files/may_2015_-_report_of_the_secretary-general_on_children_and_armed_conflict_in_afghanistan.pdf) (accessed May 5, 2016).

<sup>88</sup> U.N. General Assembly, Security Council, Children and Armed Conflict: Report of the Secretary-General, ¶ 60, U.N. Doc. A/69/926-S/2015/409 (June 5, 2015).

<sup>89</sup> See, for example, Michael Garcia Bochenek, "All Children Have a Right to Education—Even from Behind Bars" (blog), Righting Development, September 18, 2015 (summarizing Human Rights Watch research findings), <https://www.hrw.org/blog-feed/righting-development#blog-281343> (accessed May 5, 2016).

<sup>90</sup> Human Rights Watch, "Egypt: Syria Refugees Detained, Coerced to Return," November 10, 2013, <https://www.hrw.org/news/2013/11/10/egypt-syria-refugees-detained-coerced-return> (accessed May 7, 2016); Human Rights Watch, *Barely Surviving*, p. 44; Human Rights Watch, *Closed Doors*, pp. 93-94; Human Rights Watch, *Two Years with No Moon*, pp. 39-40.

<sup>91</sup> Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention 2014* (Sydney: Australian Human Rights Commission, November 2014), p. 31, [https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten\\_children\\_2014.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/forgotten_children_2014.pdf) (accessed May 5, 2016).

<sup>92</sup> Child Rights International Network (CRIN), *In Whose Interests? How the Law Treats Unaccompanied Children in the Countries of the Commonwealth of Independent States* (London: CRIN, 2014), pp. 33-34, [https://www.crin.org/sites/default/files/crin\\_unaccompanied\\_children\\_final.pdf](https://www.crin.org/sites/default/files/crin_unaccompanied_children_final.pdf) (accessed May 5, 2016).

States has found.<sup>93</sup> Detained children have demonstrated developmental and behavioural problems as well as mental health difficulties that included major depression, suicide ideation, and incidents of self-harm as well as sleep difficulties, anxiety regarding delays in educational progress, and a sense of shame.<sup>94</sup>

Immigration detention may also lead children to abandon asylum claims even though they are in need of international protection. UNHCR's office in Mexico has found that frequently, "children and adolescents do not access the asylum system in order to avoid being detained during proceedings for recognition as a refugee, instead preferring to be returned to their countries of origin even when their lives or physical integrity is at risk."<sup>95</sup>

Deprivation of liberty of children with disabilities may lead to involuntary treatment and is frequently accompanied by verbal and physical abuse and unhygienic conditions of confinement. In many countries, children and adults with disabilities who are institutionalised have no meaningful way to challenge their deprivation of liberty, meaning that they can be kept locked up for life.

## Alternatives to Detention

It's easy for States to rely on euphemisms such as "treatment centre," "rehabilitation centre," "shelter," and the like to characterise their facilities for children as alternatives to detention. Too often, in fact, these centres are merely alternative places of detention.

To ensure that deprivation of liberty is really used as a last resort, States should establish and employ true alternatives to detention. In the justice system, alternatives include diversion, probation, mediation, counselling, community service, and the use, in appropriate cases, of "semi-open" facilities that provide children with supervision and structure but allow them to attend schools in the community and return home for overnight visits periodically.

For migrant children and families, the experience of many countries is that community-based alternatives—housing in settings that allow asylum seekers, refugees, and other migrants to attend regular schools, work in the community, and otherwise interact regularly with others—are prefer-

<sup>93</sup> See, for example, G.J. Coffey et al., "The Meaning and Mental Health Consequences of Long-Term Immigration Detention for People Seeking Asylum," *Social Science and Medicine*, vol. 70 (2010), pp. 2070-79; Kat Robjant, Rita Hassan, and Cornelius Katona, "Mental Health Implications of Detaining Asylum Seekers: Systematic Review," *British Journal of Psychiatry*, vol. 194 (2009), pp. 306-12 <http://bjp.rcpsych.org/content/194/4/306> (accessed May 5, 2016); M. Ichikawa et al., "Effect of Post-Migration Detention on Mental Health among Afghan Asylum Seekers in Japan," *Australian and New Zealand Journal of Psychiatry*, vol. 40 (2006), pp. 341-46; Zachary Steel et al., "Impact of Immigration Detention and Temporary Protection on the Mental Health of Refugees," *British Journal of Psychiatry*, vol. 188 (2005), pp. 58-64, <http://bjp.rcpsych.org/content/bjprpsych/188/1/58.full.pdf> (accessed May 5, 2016). See also Zachary Steel and Derrick M. Silove, "The Mental Health Implications of Detaining Asylum Seekers," *Medical Journal of Australia*, vol. 175 (2001), pp. 596-99; A.S. Keller et al., "Mental Health of Detained Asylum Seekers," *The Lancet*, vol. 362 (2003), pp. 1721-23.

<sup>94</sup> See Ann Lorek et al., "The Mental and Physical Health Difficulties of Children Held within a British Immigration Detention Center: A Pilot Study," *Child Abuse and Neglect*, vol. 33 (2009), pp. 573-85, [https://www.childrenssociety.org.uk/sites/default/files/tcs/research\\_docs/Yarl'sWoodDoctor'sReport.pdf](https://www.childrenssociety.org.uk/sites/default/files/tcs/research_docs/Yarl'sWoodDoctor'sReport.pdf) (accessed May 5, 2016); L.K. Newman and Z. Steel, "The Child Asylum Seeker: Psychological and Developmental Impact of Immigration Detention," *Child and Adolescent Psychiatric Clinics of North America*, vol. 17 (2008), pp. 665-83; S. Mares and J. Jureidini, "Psychiatric Assessment of Children and Families in Immigration Detention—Clinical, Administrative and Ethical Issues," *Australia and New Zealand Journal of Public Health*, vol. 28 (2004), pp. 520-26; Aamer Sultan and Kevin O'Sullivan, "Psychological Disturbances in Asylum Seekers Held in Long Term Detention: A Participant-Observer Account," *Medical Journal of Australia*, vol. 175 (2001), pp. 593-96.

<sup>95</sup> Oficina del Alto Comisionado de las Naciones Unidas para los Refugiados (ACNUR), *Arrancados de raíz* (México, D.F.: Oficina del ACNUR en México, 2014), p. 14.

able in virtually every respect to immigration detention.<sup>96</sup> Community-based alternatives do not have the adverse health consequences of detention. They may be more cost-effective. And even in transit countries, individuals who are housed in community-based settings have a high rate of appearance at asylum or immigration hearings, research has found.<sup>97</sup>

For migrant children who are separated from caregivers, community-based alternatives must offer adequate supervision and other appropriate care and protection. Such requirements may lead States to rely on detention instead of developing acceptable alternatives. But many States have well-developed systems for providing protection and support to children who cannot live with their families, offering, for example, foster care or placement in small group homes for children who have been abused or neglected. Such programmes could potentially also accommodate unaccompanied and separated children who are seeking asylum. States should also do more to facilitate the placement of children with relatives in the destination country or in third countries.

Detention can never be justified on the basis of the existence of a disability.<sup>98</sup> Children with disabilities should enjoy their right to live in the community, with appropriate support to themselves and their families to enable them to do so. When institutional treatment is necessary, it should follow strict therapeutic protocols, including strict safeguards on involuntary treatment. Children with disabilities should receive appropriate legal and other support to enable them to make important life decisions, including decisions with respect to their medical treatment and admission to health facilities, and should have meaningful opportunities to challenge institutionalisation.

## Positive Developments

Recent years have seen some positive developments in the treatment of children who otherwise would have been detained. The number of children in juvenile detention centres in the United States has fallen consistently and dramatically since 1996,<sup>99</sup> the result of new policies that increased the availability of alternatives to detention and reduced the use of detention for minor offenses, among other measures.<sup>100</sup> In the last seven years, five US states—Connecticut, Illinois,

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<sup>96</sup> See, for example, Australian Human Rights Commission, *Community Arrangements for Asylum Seekers, Refugees and Stateless Persons* (Sydney: Australian Human Rights Commission, 2012), pp. 14-16; Committee on Migration, Refugees and Displaced Persons, Parliamentary Assembly, Council of Europe, *The Alternatives to Immigration Detention of Children*, Doc. 13597 (September 15, 2014), pp. 9-12; Jesuit Refugee Service Europe, *From Deprivation to Liberty: Alternatives to Detention in Belgium, Germany and the United States* (Brussels: Jesuit Refugee Service Europe, 2011).

<sup>97</sup> See Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and "Alternatives to Detention" of Refugees, Asylum-Seekers, Stateless Persons, and Other Migrants*, Legal and Protection Policy Research Series, PPLA/2011/01.Rev.1 (Geneva: UNHCR Division of International Protection, 2011); Ophelia Field with Alice Edwards, *Alternatives to Detention of Asylum Seekers and Refugees*, Legal and Protection Policy Research Series, POLAS/2006/03 (Geneva: UNHCR Division of International Protection, 2006).

<sup>98</sup> See G.A. Res. 61/106, *Convention on the Rights of Persons with Disabilities*, arts. 14, 19, (Jan. 24, 2007); Committee on the Rights of Persons with Disabilities, "Statement on Article 14 of the Convention on the Rights of Persons with Disabilities," September 2014, <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=15183&LangID=E> (accessed June 3, 2016).

<sup>99</sup> See Annie E. Casey Foundation, "Reducing Youth Incarceration in the United States," February 2013, <http://www.aecf.org/m/resourcedoc/AECF-DataSnapshotYouthIncarceration-2013.pdf> (accessed June 3, 2016); Child Trends Data Bank, "Juvenile Detention," December 2015, <http://www.childtrends.org/?indicators=juvenile-detention> (accessed June 3, 2016).

<sup>100</sup> National Juvenile Justice Network and Texas Public Policy Foundation, *The Comeback States: Reducing Youth Incarceration in the United States* <http://www.texaspolicy.com/library/docLib/comeback%20states%20report-updated.pdf> (accessed May 9, 2016).

Massachusetts, Mississippi, and New Hampshire—have raised the age of criminal majority to 18,<sup>101</sup> and South Carolina was poised to do the same in June 2016.<sup>102</sup>

In California, legislation enacted in 2014 offered the possibility of earlier parole for several thousand offenders who were under 18 at the time of the crime for which they were convicted and who were tried as adults and sentenced to adult prison terms.<sup>103</sup> A 2015 California law extended eligibility for parole to those who were 22 or under at the time of their crimes.<sup>104</sup>

South Africa's 2008 Child Justice Act, emphasizing restorative justice and alternatives to detention, reduced the number of children in South Africa's prisons by nearly 80 per cent.<sup>105</sup> Canada, under its 2003 Youth Criminal Justice Act, reduced its overall youth incarceration rate by over 50 per cent, from 13 youths per 10,000 in 2002-03 to 6 youths per 10,000 in 2013-2014.<sup>106</sup>

Several countries have agreed in recent years to end or sharply reduce detention of migrant children. Finland, Malta, and the United Kingdom have publicly committed to ending detention of child migrants, while policies in France and Israel limit the detention of migrant children to "exceptional circumstances."<sup>107</sup> Panama, Japan, Turkey, and Taiwan have enacted legislation or taken other steps to restrict the detention of migrant children,<sup>108</sup> and a South African court has ruled that migrant children may only be detained as a last resort.<sup>109</sup>

In July 2015, a federal court required US immigration officials to begin individually evaluating asylum-seeking families for release and setting bond where appropriate. It specifically criticized the Department of Homeland Security's no-release policy, which directed officials to deny bond or other forms of release to Central American families based on a blanket claim that this would pose a threat to US national security. In August 2015, the court found that the United States' family

<sup>101</sup> Sarah Childress, "More States Consider Raising the Age for Juvenile Crime," *Frontline*, June 2, 2016, <http://www.pbs.org/wgbh/frontline/article/more-states-consider-raising-the-age-for-juvenile-crime/> (accessed June 3, 2016).

<sup>102</sup> Cory Herro, "South Carolina Close to Raising Cutoff Age for Juvenile Offenders to 18," May 26, 2016, <http://thinkprogress.org/justice/2016/05/26/3782192/south-carolina-close-to-raising-cutoff-age-for-juvenile-offenders-to-18/> (accessed June 3, 2016).

<sup>103</sup> Fair Sentencing for Youth, "Senate Bill 260—Justice for Juveniles with Adult Prison Sentences," <http://fairsentencingforyouth.org/legislation/senate-bill-260-justice-for-juveniles-sentenced-to-adult-prison-terms/> (accessed June 3, 2016).

<sup>104</sup> Human Rights Watch, "California: New Hope for Young Offenders," October 5, 2015, <https://www.hrw.org/news/2015/10/05/california-new-hope-young-offenders> (accessed June 3, 2016).

<sup>105</sup> Ann Skelton, *Freedom in the Making: Juvenile Justice in South Africa*, forthcoming.

<sup>106</sup> Statistics Canada, "Youth Correctional Statistics in Canada, 2013-2014," <http://www.statcan.gc.ca/pub/85-002-x/2015001/article/14164-eng.htm>.

<sup>107</sup> See Australian Coalition to End Immigration Detention of Children, *Alternatives to Detention Fact Sheet*, June 2015, pp. 2-3, [http://endchilddetention.org/wp-content/uploads/2015/05/Fact-Sheet\\_ATD\\_OZ.pdf](http://endchilddetention.org/wp-content/uploads/2015/05/Fact-Sheet_ATD_OZ.pdf) (accessed June 3, 2016).

<sup>108</sup> See Decreto Ley No. 3 (February 22, 2008), art. 93 (Panama), <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2008/6077.pdf?view=1> (accessed June 3, 2006); Global Detention Project, "Japan Immigration Detention," n.d., <http://www.globaldetentionproject.org/countries/asia-pacific/japan#facts-figures> (accessed June 3, 2016) (noting that immigration authorities have in recent years granted provisional release to anyone under age 18); Law on Foreigners and International Protection, art. 66(b), (c) (Turkey) (providing that "[t]he Ministry for Family and Social Policies shall place unaccompanied children in suitable facilities, in the care of their adult relatives, or a foster family" but that "[c]hildren over 16 years of age may be placed in reception and accommodation centres"), <http://www.refworld.org/docid/5167fbb20.html> (accessed June 3, 2016); Immigration Act, January 23, 2015, art. 38-1(3) (Taiwan) (noting that the National Immigration Agency "would desist [from] or cease" detention of children under age 12), [http://www.moi.gov.tw/english/english\\_law/law\\_detail.aspx?sn=332](http://www.moi.gov.tw/english/english_law/law_detail.aspx?sn=332) (accessed June 3, 2016).

<sup>109</sup> See *Centre for Child Law and Another v. Minister of Home Affairs and Others*, 2005 (6) SA 50 (T); Refugees Act, section 29(2) (South Africa).

detention system violated an 18-year-old settlement agreement obligating the government to treat migrant children humanely and to house them in non-jail facilities licensed to care for children.<sup>110</sup>

Such steps show that States can do more to reduce their reliance on juvenile detention and incarceration. Locking up children is frequently unnecessary, abusive, and counterproductive. It's time for States to recognise these facts and end these unlawful practices.

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<sup>110</sup> *Flores v. Johnson, In Chambers—Order re Plaintiffs' Motion to Enforce Settlement of Class Action and Defendants' Motion to Amend Settlement Agreement*, Case No. CV 85-4544 (C.D. Cal. July 24, 2015), <https://graphics8.nytimes.com/packages/pdf/us/FloresRuling.pdf> (accessed June 3, 2016); *Flores v. Lynch, Order re Response to Order to Show Cause*, Case No. CV 85-04544 (C.D. Cal. Aug. 21, 2015), <http://www.aila.org/File/Related/14111359p.pdf> (accessed June 3, 2016).

# Reflections on a New Tool for Protecting the Rights of the Child

IAN M. KYSEL\*

## Abstract

*The March 2015 thematic report by the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, regarding the torture and ill-treatment of children deprived of their liberty, presented to the Human Rights Council in its twenty-eighth session, is a significant contribution to the children's rights movement. It provides a new tool for advocacy to promote the recognition and protection of the rights of children in the context of deprivation of liberty: showing how the right to be free from torture and ill-treatment can be used to protect children from mistreatment in custody and otherwise limit the deprivation of liberty of children. This chapter will first highlight a few of the report's general contributions to the corpus of human rights law protecting the rights of the child. Then, this chapter will discuss some of the ways in which the report promotes the progressive development of this law in specific areas. In particular, it will discuss the deprivation of liberty in the contexts of the migration of children and of children in conflict with the law. Finally, this chapter will discuss the detention landscape in the United States and ways in which States and civil society can make use of the report to promote changes in law and practice and reduce the deprivation of liberty of children and promote improvements in conditions of confinement for those in detention.*

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*I am frustrated from being locked up for almost a year. I really can't stand being locked up anymore. I don't need therapy. I need to go home.*<sup>1</sup>

– Morris

*The loneliness made me depressed and the depression caused me to be angry [sic], leading to a desire to displace the agony by hurting others. I felt an inner pain not of this world . . . And at the first opportunity of release (whether I was being released from isolation or receiving a cell-mate) I erupted like a volcano, directing violent forces at anyone in my path.*<sup>2</sup>

– Kyle B.

*It's aggression that the staff puts on you. The staff are so quick to put their hands on you.*<sup>3</sup>

– Anne C.

Well over a million children are deprived of their liberty, at any given time, worldwide.<sup>4</sup> Yet human rights law requires that the deprivation of liberty of children be used only as a measure of last resort and for the shortest appropriate period of time.<sup>5</sup> Further, despite broad agreement among States that a range of fundamental rights protect children, the reality is that those children in detention are at great risk of abuse, violence, and a range of other rights violations.<sup>6</sup> The recent Report of United Nations Special Rapporteur Juan E. Méndez (the “Report”) makes clear that the general prohibition against torture and cruel, inhuman, or degrading treatment or punishment must necessarily apply differently to children, given their special status under international law and the developmental differences between children and adults. Further, the Report shows that the right to be free from torture and ill-treatment applies with particular force in the context of the deprivation of liberty of children. In doing so, the Report can serve as a useful tool to promote the rights of children not to be subject to mistreatment in custody, and further to promote the reduction of the deprivation of liberty of children more generally.

**Part I** of this chapter will highlight a few key contributions that the Report makes to the corpus of human rights law protecting the rights of the child. **Part II** of this chapter will discuss some of the ways in which the Report promotes the progressive development of this field of the law. In particular, it will discuss the deprivation of liberty in the contexts of children in conflict with the law and migration. **Part III** of this chapter will discuss aspects of the detention landscape in the United

<sup>1</sup> Women’s Refugee Commission and Orrick, Herrington & Sutcliffe LLP, *Halfway Home: Unaccompanied Children in Immigration Custody* (February 2009), at 1 (citing February 5, 2006 interview with Morris), <http://www.refworld.org/pdfid/498c41bf2.pdf>.

<sup>2</sup> Human Rights Watch and the American Civil Liberties Union, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States* (October 2012), at 27 (citing May 3, 2012 letter from Kyle B. to Human Rights Watch), <https://www.aclu.org/files/assets/us1012webwcover.pdf>.

<sup>3</sup> Human Rights Watch and the American Civil Liberties Union, *Custody and Control: Conditions of Confinement in New York’s Juvenile Prisons for Girls* (September 2006), at 49 (citing March 17, 2006 interview with Anne C.), <https://www.aclu.org/other/custody-and-control-conditions-confinement-new-yorks-juvenile-prisons-girls?redirect=custody-and-control-conditions-confinement-new-yorks-juvenile-prisons-girls>.

<sup>4</sup> There is, however, a paucity of robust data. See, e.g., *Call for a Global Study on Children Deprived of Liberty Expert Consultation Report*, (2014), at 3, [http://www.unodc.org/documents/congress//background-information/NGO/Defence\\_for\\_children\\_international/GScdl\\_AdvocacyBrochure\\_2014.pdf](http://www.unodc.org/documents/congress//background-information/NGO/Defence_for_children_international/GScdl_AdvocacyBrochure_2014.pdf) (citing UNICEF data). This estimate excludes immigration detention as well as administrative detention. *Id.* The United States may account for a striking percentage of those children, as U.S. Government data suggest that, on any given day, tens of thousands of children are deprived of their liberty in the juvenile justice system and thousands more are deprived of their liberty in jails and prisons in the adult criminal justice system (Sickmund, M. and Puzanchara, C. eds., *Juvenile Offenders and Victims: 2014 National Report* (National Center for Juvenile Justice, December 2014), 188, 220-221, <http://www.ojjdp.gov/ojstatbb/nr2014/downloads/NR2014.pdf>).

<sup>5</sup> Convention on the Rights of the Child (the “CRC”), Art. 37(b).

<sup>6</sup> The CRC is the most broadly-ratified human rights treaty, with 196 States parties.

States, noting some of the contexts in which using the Report could make an impact in strengthening rights protections for children there. **Part IV** of this chapter will discuss ways in which States, international organizations, and civil society can make use of the Report to promote changes in law and practice, in the U.S. and worldwide.

### **Part I: Children are Different and the Law Must Protect Them in Different Ways**

International law has historically recognized the differences between children and adults; in recent decades a distinct body of law protecting the rights of the child has developed through treaty law and State practice.<sup>7</sup> Human rights law has long required that States recognize and protect children, and provide them with special measures of protection.<sup>8</sup> Importantly, this means that all human rights protections apply differently to children, based on their developmental and legal status.<sup>9</sup>

The work of the United Nations Special Rapporteur on Torture, however, has not always clearly and explicitly recognized the special application to children of the prohibition against torture and against cruel, inhuman, or degrading treatment or punishment. Indeed, the mandate of this U.N. rapporteurship was created prior to the ratification of the CRC and thus did not include a specific reference to children (or to the explicit prohibition of torture and ill-treatment in relation to children which now appears in the CRC) within its mandate.<sup>10</sup> Over the decades, and following

<sup>7</sup> This recognition is not a new trend. *See, by way of example*, Declaration of the Rights of the Child, G.A. Res. 1386 (XIV), U.N. GAOR, 14th Sess., Supp. No. 16, A/4354, at 19 (Nov. 20, 1959); Geneva Declaration of the Rights of the Child of 1924, adopted Sept. 26, 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

<sup>8</sup> International Covenant on Civil and Political Rights art. 24, opened for signature Dec. 16, 1966, 999 U.N.T.S. 171 (hereinafter “ICCPR”) (Mar. 23, 1976) (The provision is non-derogable: “Every child shall have, without any discrimination . . . the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.”). *See also*, U.N. Committee on the Rights of the Child, *General Comment No. 12 (2009): The right of the child to be heard*, 20 July, 2009, CRC/C/GC/12, <http://www.refworld.org/docid/4ae562c52.html>, at ¶ 18 (“The Convention recognizes the child as a subject of rights, and nearly universal ratification of this international instrument by States parties emphasizes this status of the child.”); Joseph, S., & Castan, M., (2013). *The International Covenant On Civil and Political Rights: Cases, Materials, And Commentary*. Oxford: Oxford University Press at 701 (“Whilst historically international law may have reflected limited recognition of the civil and political rights of children, this is no longer the case. Children traditionally were defined by their incompetence, rather than as rights holders in international law. However, the ICCPR and the CRC demonstrate that civil and political rights are applicable to children, both as ‘people’ in the general sense and, where appropriate, specifically by virtue of their status as minors”)

<sup>9</sup> *See, e.g.*, U.N. Human Rights Committee, *General Comment No. 17: (Article 24) (Rights of the Child)*, 7 April 1989, at ¶ 2 (“General Comment No. 17”), in Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, U.N. Doc. A/44/40, at 173 (Sept. 29, 1989), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6623&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=INT%2fCCPR%2fGEC%2f6623&Lang=en) (“The Committee points out that the rights provided for in article 24 are not the only ones that the Covenant recognizes for children and that, as individuals, children benefit from all of the civil rights enunciated in the Covenant. In enunciating a right, some provisions of the Covenant expressly indicate to States measures to be adopted with a view to affording minors greater protections than adults . . . In other instances, children are protected by the possibility of the restriction—provided that such restriction is warranted—of a right recognized by the Covenant.”)

<sup>10</sup> United Nations Commission on Human Rights, *Resolution on Torture and other cruel, inhuman or degrading treatment or punishment*, resolution no 1985/33, E/CN4/Res/1985/33 (13 March 1985), <http://antitorture.org/wp-content/uploads/2012/07/J4-Original-Resolution-for-SRT.pdf>. The resolution explicitly references the prohibitions found in Article 5 of the Universal Declaration of Human Rights and Article 7 of the ICCPR, as well as the then newly-adopted Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, but granted an expansive mandate that included all “questions relevant to torture”. *Id.* at ¶ 1. Importantly, the current mandate remains general and is not limited to any particular treaty or treaties. Human Rights Council, *Torture and other cruel, inhuman or degrading treatment or punishment: mandate of the Special Rapporteur*, A/HRC/25/L.25 (24 March 2014), <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G14/122/90/PDF/G1412290.pdf?OpenElement>.

successive renewals of this mandate, the Rapporteurship has come to affirm a set of general guidelines and recommendations for States, which subsequent mandate-holders have updated and reaffirmed; but these have likewise not always explicitly referenced State obligations in respect of the rights of children to be free from torture or ill-treatment.<sup>11</sup> The Rapporteurship has, it should be noted, engaged in important work addressing the rights of children to be free from torture and ill-treatment, including in thematic reports.<sup>12</sup> However, the rights of children have not always been the subject of explicit focus in these reports, nor have they necessarily been treated differently or separately from the application of the general prohibitions, taking into account child status or the developmental differences between children and adults as a matter of law.

The recent Report, focusing on the deprivation of liberty of children, thus makes an important contribution within the context of the mandate, in asserting that, “[t]he Convention on the Rights of the Child is *lex specialis* on the human rights protections afforded to children.”<sup>13</sup> The Report’s emphasis on the rights of the child stresses that the law protecting these rights should be seen to *add* to the normative content of the general prohibition of torture and ill-treatment.<sup>14</sup>

In doing so, the Report provides important clarity as to some of the ways in which the prohibition against torture and cruel, inhuman, or degrading treatment or punishment applies differently to children, given their special status under international law and the developmental differences

<sup>11</sup> General conclusions and recommendations were first articulated by Sir Nigel Rodley in 1995. Although they did not reference the rights of children, the conclusions and recommendations, “merely reflect norms contained in instruments already adopted by the United Nations.” Commission on Human Rights, *Report of the Special Rapporteur, Nigel S. Rodley, submitted pursuant to Commission on Human Rights resolution 1992/32, E/CN.4/1995/34* (12 January 1995), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G95/100/85/PDF/G9510085.pdf?OpenElement>, at ¶ 992. These general recommendations were updated by Rodley at the close of his mandate. UN General Assembly, *Report of the Special Rapporteur on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/56/156* (3 July 2001), <http://www.un.org/documents/ga/docs/56/a56156.pdf>, ¶ 39. Theo van Boven first explicitly referenced the rights of children in the context of such general recommendations in 2002, with specific attention to corporal punishment and the right to physical and mental integrity of children. Commission on Human Rights, *Report of the Special Rapporteur on the question of torture submitted in accordance with Commission resolution 2002/38* (17 December 2002), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G02/160/49/PDF/G0216049.pdf?OpenElement>, ¶ 26(c). The current Special Rapporteur has maintained this reference to children. United Nations Special Rapporteur on Torture, *General Recommendations of the Special Rapporteur on torture*, <http://www.ohchr.org/Documents/Issues/SRTorture/recommendations.pdf>, ¶ (c).

<sup>12</sup> See, e.g., UN General Assembly, *Interim report of the Special Rapporteur of the Commission of Human Rights on the question of torture and other cruel, inhuman or degrading treatment or punishment, A/55/290* (11 August 2000) <http://www.un.org/documents/ga/docs/55/a55290.pdf>, at ¶¶ 10-17 (Report of Sir Nigel Rodley) (“The Special Rapporteur has continued to receive information regarding a significant number of instances where the victims of torture or cruel, inhuman or degrading treatment or punishment are children.”). The UN Committee Against Torture has likewise also engaged in important work recognizing the application of the rights of children. See, e.g., UN Committee against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties, CAT/C/GC/2* (24 January 2008), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT%2fC%2fGC%2f2&Lang=en), at ¶¶ 15, 23 (“General Comment No. 2”).

<sup>13</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/68* (5 March 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, at ¶ 19. For a discussion of the nature of *lex specialis* in international law, see UN International Law Commission, *Report of the Study Group of the International Law Commission: Fragmentation of International Law, A/CN.4/L.682* (13 April 2006) (“International Law Commission Report”) [http://legal.un.org/ilc/documentation/english/a\\_cn4\\_l682.pdf](http://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf), ¶ 56 (“The principle that special law derogates from general law is a widely accepted maxim of legal interpretation and technique for the resolution of normative conflicts”).

<sup>14</sup> As used in the Special Rapporteur’s report, *lex specialis* clearly refers to a situation in which “the specific rule should be read and understood within the confines or against the background of the general standard” (International Law Commission Report, *supra* note 13, at ¶ 56).

between children and adults.<sup>15</sup> As such, it provides guidance for those interpreting the general normative content of this prohibition, including under both customary international law and under treaty law (in addition to under the mandate of the Rapporteurship as an independent expert).<sup>16</sup> Future work of States, of the Rapporteurship, and of other UN mandate-holders, UN treaty bodies, and regional human rights bodies, would do well to reflect this view of the relationship between general and specific human rights protections and their application to children.

Another key contribution of the Report is its focus on when and how the fact of deprivation of liberty can itself be inconsistent with State obligations flowing from the prohibition against torture and ill-treatment. The Report concludes that because, “deprivation of liberty of children is intended to be an *ultima ratio measure*, to be used only for the shortest possible period of time, only if it is in the best interests of the child, and limited to exceptional cases,” deprivation of liberty can itself implicate State responsibility.<sup>17</sup> This is a powerful recognition of the application of the prohibition of torture and ill-treatment to children. It provides further normative clarity regarding the circumstances in which State responsibility is triggered by deprivation of liberty, given the special rights of children and the obligation of States to provide special measures of protection. Continued work of the Rapporteurship, and human rights defenders, will be vital to ensuring the application and protection of those rights in practice.

Finally, the Report makes a significant contribution in noting that, as a result of the duty of States to provide children with special measures of protection, the independent obligation to prevent torture has specific consequences for State obligations in the context of the deprivation of liberty of children.<sup>18</sup> The Report proposes that a “due diligence” standard is required in order for States to meet their obligations in this respect.<sup>19</sup> The Committee Against Torture has also discussed an obligation of “due diligence,” though this discussion has taken place within the context of general State duties to “prevent, investigate, prosecute, and punish” torture.<sup>20</sup> The Report’s linking of State obligations with respect to child status in the context of deprivation of liberty, on the one hand, and the obligation to prevent torture, on the other, is novel; and it constitutes a useful contribution to the progressive development of the law.<sup>21</sup> The Rapporteurship, States, and other actors, should

<sup>15</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Mendéz, A/HRC/28/68 (5 March 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, ¶ 70.

<sup>16</sup> In this respect, the Report provides a useful interpretive tool to be applied in evaluating the actions of the United States, which is not a party to the CRC, in respect of its treatment of children.

<sup>17</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Mendéz, A/HRC/28/68 (5 March 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, ¶ 72.

<sup>18</sup> *Id.* at ¶ 32. The Report draws on comments by the Human Rights Committee regarding the duties of States to protect the rights of children under the ICCPR. *Id.* citing UN Human Rights Committee, General Comment No. 35, Article 9 (Liberty and security of person), (16 December 2014) CCPR/C/GC/35 (“General Comment No. 35”), ¶ 62; General Comment No. 17, *supra* note 9, at 23.

<sup>19</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Mendéz, A/HRC/28/68 (5 March 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, at ¶¶ 70, 74.

<sup>20</sup> General Comment No. 2, *supra* note 12, at ¶ 18.

<sup>21</sup> There is a long-running debate regarding to what extent international law requires States to take positive steps to enforce the obligations of multilateral human rights treaties. The Office of the United Nations High Commissioner for Human Rights takes the view that States are required to *respect, protect, and fulfill* all fundamental human rights obligations. International Human Rights Law, see U.N. Office of the High Commissioner for Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx> (stating, “By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfil [sic] human rights.”). *See also* Shelton, D. & Gould, A., (2013), Positive and Negative Obligations. In *The Oxford Handbook of International Human Rights Law* 562-63

consider further the contours of this obligation of “due diligence” and the many areas of children’s rights protections to which it can be said to apply.

## Part II: Preventing Torture of Child Migrants and Children in Conflict with the Law

The Report adds normative clarity regarding how the prohibition against torture and cruel, inhuman, or degrading treatment or punishment applies to a number of specific contexts in which children are deprived of their liberty. In particular, the Report considers and advances the law in relation to the deprivation of liberty of children and the mistreatment of children deprived of their liberty in the contexts of child migration and children in conflict with the law. In this respect, the Report’s contributions specific to these detention contexts, as well as those general contributions discussed above, can be useful to advocates—as well as to State lawmakers and policymakers and those who manage children in detention.

### *The Detention of Children in Conflict with the Law*

The Report brings important clarity to the delineation of how the prohibition against torture and cruel, inhuman or degrading treatment or punishment applies to the deprivation of liberty of children in conflict with the law. In particular, the Report’s conclusions regarding detention as an *ultima ratio* measure, stress that seeking to use alternatives to detention, and always employing the least restrictive means, are legally-required, even when some restriction on liberty may be permissible in the case of a child found to violate the penal law. This suggests that States should scrutinize the frequency of use of detention of children in conflict with the law, in order to ensure compliance with obligations to prevent torture and cruel, inhuman or degrading treatment or punishment.

Importantly, the Report adds the direct consideration of the deprivation of liberty of children in conflict with the law in the adult criminal justice system to a robust discussion of juvenile justice. The Report states that children should “never” be “charged, tried, and sentenced” in the adult criminal justice system and, further, that “laws, policies and practices that allow children to be subjected to adult sentences are inherently cruel, inhuman or degrading.”<sup>22</sup> This view of how the prohibition against torture and cruel, inhuman or degrading treatment or punishment intersects with the right of children to special measures of protection pushes beyond the corpus of current international law.<sup>23</sup> Further, the Report states that life-without-parole sentences and other

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(Dinah Shelton ed.); (“Human rights law has a dual nature . . . the scope of state obligations is both negative and positive in nature, imposing not only a state duty to abstain from interfering with the exercise of the [a] right, but also to protect [a] right from infringement by third parties. Positive obligations are therefore considered to be obligations ‘requiring member states to... take actions,’ imposing a duty upon states to take affirmative steps to ensure rights protections.”). Çali, B. (2012), *Specialized Rules of Treaty Interpretation: Human Rights*. in *The Oxford Guide to Treaties*, (Duncan Hollis ed.) at 538-39 (“Though all human rights treaties have their own distinct context and wording, there is nevertheless significant convergence around the notion that the core interpretive task for any interpreter is to make human rights treaty provisions ‘effective, real, and practical’ for individuals as rights-holders under international law. This is sometimes called the principle of effectiveness”) (*ut res magis valeat quam pereat*).

<sup>22</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, A/HRC/28/68 (5 March 2015), available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, ¶ 73.

<sup>23</sup> For example, the United Nations Committee on the Rights of the Child has been interpreted to be somewhat less strict. *General Comment No. 10 (2007): Children’s Rights in Juvenile Justice*, 25 April 2007 (“*General Comment No.10*”), CRC/C/GC/10, <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf> suggests that the Convention permits comingling of children and adults, in narrow and exceptional circumstances and when consistent with the best interest of the child, and only recommends that States change their law to limit the charging and sentencing of children below the age of 18 as adults. See *General Comment No.10*, ¶ 38, 85.

lengthy sentences are declared to be disproportionate *per se* because they cause physical and psychological harm that constitutes cruel, inhuman or degrading treatment.<sup>24</sup> Furthermore, the Report also argues for an end to mandatory sentences for the punishment of crimes by juveniles within the framework of the obligation to prevent torture—because mandatory sentencing can result in disproportionate punishment.<sup>25</sup>

In addition to the Report's description of the ways in which the prohibition against torture and cruel, inhuman or degrading treatment or punishment impacts restrictions on the liberty of children generally, one of the Report's most significant contributions is in identifying a number of obligations regarding conditions of confinement in respect of children which flow from the prohibition. In this way the Report can serve as a ready resource to promote conditions of confinement which are compliant with international standards and children's rights, whenever children are deprived of their liberty. The Report suggests that these obligations include:

- An environment which does not amount to imprisonment, in which care and programming are tailored to children's needs, and which is administered by specialized staff, trained in dealing with children;
- Maintenance of an individualized case-management system, subject to careful data protection and privacy protection;
- Access to appropriate nutrition; health and other basic services; natural light; adequate ventilation; sanitary facilities that are hygienic and respect for privacy;
- Access, on a regular basis, to care from pediatricians and child psychologists with specialized trauma training;
- Accommodation in individual bedrooms rather than large dormitories;
- Placement in facilities that are as close as possible to the place of residence of their family;
- Ability to maintain contact with parents and family by means of telephone, electronic or other means, and the facilitation of regular parental and family visits;
- Dispensation of leave from detention facilities for the purpose of visiting home and family; as well as for educational, vocational or other important purposes;
- A full program of education, sport, vocational training, recreation and other engaging and age-appropriate out-of-cell activities, including physical exercise, for at least two hours every day in the open air, and preferably for a significant period of time;
- Ability to respond to the specific needs of groups of children that are at greater vulnerability to ill-treatment or torture, such as girls, lesbian, gay, bisexual, transgender and intersex children, as well as children with disabilities;
- A prohibition on solitary confinement of any duration and for any purpose;
- A prohibition on the use of corporal punishment;
- Strict regulation of the use of restraints or force, so that they are employed only when a child poses an imminent threat of injury to himself or herself or to others; only for a limited period of time and only when all other means of control have been exhausted;

<sup>24</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Mendéz, A/HRC/28/68 (5 March 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, ¶ 74.

<sup>25</sup> *Id.*

- Restriction on the use of strip searches except for on the basis of reasonable suspicion;
- The provision of confidential avenues of complaint in administrative systems and before an independent authority; and,
- Regular and independent monitoring of places where children are deprived of their liberty is a key factor in preventing torture and other forms of ill-treatment.<sup>26</sup>

These core conclusions and recommendations in respect of conditions of confinement thus reflect the Report's legal determination regarding how States should prevent torture and cruel, inhuman or degrading treatment or punishment whenever children are lawfully deprived of their liberty.

### *The Detention of Child Migrants*

The Special Rapporteur's Report also brings the deprivation of liberty of children in the context of human mobility under the ambit of torture and cruel, inhuman, or degrading treatment or punishment. This is a welcome emphasis, as the detention of child migrants is exceedingly widespread, with the limited available data suggesting that at least thousands of migrant children are detained each year.<sup>27</sup>

The best evidence suggests that both unaccompanied migrant children as well as migrant children in families can suffer significant rights abuses in detention; furthermore, in many circumstances detention itself can violate human rights law.<sup>28</sup> While much legal analysis to date has focused on the way that detention comports with the CRC or with norms mandating protection for refugees and asylum-seekers,<sup>29</sup> the Special Rapporteur's report adds a useful additional emphasis, concluding that:

[T]he deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.<sup>30</sup>

Accordingly, the Report urges States to "expeditiously cease" the detention of migrant children.<sup>31</sup> Suggesting that the fact of detention in the context of migration can constitute cruel, inhuman or degrading treatment is a strong statement, as a matter of law. In respect of adults, for example, human rights law holds that migration control can be consistent with the general right of liberty and security of person, so long as detention is based on an individual determination and justified

<sup>26</sup> Id. at ¶ 76-78, 82-85.

<sup>27</sup> See, Carolyn Hamilton, et al., *Administrative detention of children: a global report* 62-64 (February 2011), United Nations Children's Fund (UNICEF), Child Protection Section, New York, 2011 at [http://www.unicef.org/protection/files/Administrative\\_detention\\_discussion\\_paper\\_March2011.pdf](http://www.unicef.org/protection/files/Administrative_detention_discussion_paper_March2011.pdf).

<sup>28</sup> See, Alice Farmer, *The impact of immigration detention on children*, 44 *Forced Migration Rev.* 14 et seq. (September 2013), <http://www.fmreview.org/sites/fmr/files/FMRdownloads/en/detention/farmer.pdf>; International Detention Coalition, *Captured Childhood* 14-15, 48-55 (June 2012), <http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>.

<sup>29</sup> See, UN Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: the Rights of All Children in the Context of International Migration* (2012), <http://www2.ohchr.org/english/bodies/crc/docs/discussion2012/ReportDGDCChildrenAndMigration2012.pdf>; UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention* (2012), <http://www.unhcr.org/505b10ee9.pdf>.

<sup>30</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Mendéz, A/HRC/28/68 (5 March 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, ¶ 80.

<sup>31</sup> Id. at ¶ 80.

by the State as reasonable, necessary, and proportionate in light of the circumstances.<sup>32</sup> Linking the special rights of children—including the concept of best interests—with the right to be free from cruel, inhuman or degrading treatment thus provides a new legal argument against the detention of migrant children.

Importantly, the Report recognizes that States may in certain circumstances provide shelter or other accommodation “for the purpose of child care, protection and support,” though this accommodation must have “all the material conditions necessary and provide an adequate regime to ensure comprehensive protection from ill-treatment and torture.”<sup>33</sup> Practically, however, the Report stresses that alternatives to detention must never be a “proxy for expanded, unnecessary restrictions to liberty of child migrants.”<sup>34</sup>

While detention of migrant children implicates the prohibition *per se*, the Report’s recommendations regarding conditions of confinement for children whose liberty is restricted, discussed in the previous sub-section, applies to the context of migration as well. To those listed above, the Report adds two important additional considerations for States in the context of migration: the separation of child migrants from adults and from children accused of, or determined to be, in conflict with the law and ensuring that unaccompanied children are immediately provided with guardianship arrangements.<sup>35</sup>

### Part III: Reducing Detention and Improving Treatment of Children Deprived of Liberty in the United States

Some have described the rate of incarceration in the United States as an “addiction.”<sup>36</sup> There has been inadequate attention to the fact that the overuse of deprivation of liberty in the U.S. extends to children (and reaches beyond the context of crime and punishment). Children make up about a quarter of the U.S. population according to the US census of 2010.<sup>37</sup> The U.S. Department of Justice has calculated that, in the year of that census, about 1.6 million children were arrested—constituting approximately 1 child arrested for every 7 adults arrested.<sup>38</sup> U.S. Government data suggest that as many as 200,000 of the children who are arrested each year—immediately upon arrest, or within hours, days or weeks—are transmuted, for legal purposes, into adults; about half of those treated as adults are held in adult jails and prisons rather than in the juvenile justice system.<sup>39</sup> Further, U.S. Government data suggest that at any given time, there are as many as 54,000 children deprived of

<sup>32</sup> See, e.g., General Comment No. 35, *supra* note 18, at ¶ 18.

<sup>33</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, A/HRC/28/68 (5 March 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, at ¶ 80.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See, e.g., Jamie Fellner, HUMAN RIGHTS WATCH, *U.S. ADDICTION TO INCARCERATION PUTS 2.3 MILLION IN PRISON* (NOVEMBER 30, 2006), <https://www.hrw.org/news/2006/11/30/us-addiction-incarceration-puts-23-million-prison>.

<sup>37</sup> U.S. Census Bureau, *2010 Census Briefs: Age and Sex Composition: 2010 2* (May 2011), <http://www.census.gov/prod/cen2010/briefs/c2010br-03.pdf> (noting that there are approximately 74.2 million children in the United States).

<sup>38</sup> Dep’t Justice Bureau of Justice Statistics, *Arrests in the United States, 1990-2010*, <http://bjs.ojp.usdoj.gov/content/pub/pdf/aus9010.pdf>

<sup>39</sup> Attorney General’s National Task Force on Children Exposed to Violence, *Defending Childhood: Protect, Heal, Thrive: Report of the Attorney General’s National Task Force on Children Exposed to Violence*, (2012), <http://www.justice.gov/defendingchildhood/cev-rpt-full.pdf>; HUMAN RIGHTS WATCH & THE AMERICAN CIVIL LIBERTIES UNION, *Growing Up Locked Down: Youth in Solitary Confinement in Jails and Prisons Across the United States* 101-107 (appendix 1) (2012), <http://www.aclu.org/growinguplockeddown>.



their liberty in the juvenile justice system in the United States.<sup>40</sup> Tens of thousands of additional children are detained as a result of their or a family' members migration status (after migrating to the U.S. alone or with those family members).<sup>41</sup> In sum, merely considering only these two detention contexts—the detention of children in conflict with the law and the detention of migrant children—the data suggest that deprivation of liberty is not generally used an *ultima ratio* measure in the United States.<sup>42</sup>

In this context, the Special Rapporteur's report and its findings, conclusions, and recommendations should be of great interest to those working to reduce the deprivation of liberty of children in the United States and to improve conditions of confinement for children lawfully detained. Before considering how advocates might best use this new tool, it may be useful to consider briefly the status of the international prohibition against torture and ill treatment in the U.S.

The United States has signed and ratified both the Convention against Torture and the ICCPR; it has signed but not ratified the CRC. When ratifying the former treaties, the United States did so subject to reservations which directly addressed the right to be free from torture and cruel, inhuman or degrading treatment or punishment.<sup>43</sup> For example, the Convention against Torture reservation indicated:

That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States.<sup>44</sup>

The United States position, as a matter of international law, then, is that the prohibition on torture and cruel, inhuman or degrading treatment or punishment only binds the United States to the extent that it is coextensive with domestic law standards. While this position is not without controversy,<sup>45</sup> and raises legal questions that are beyond the scope of this article, US advocates can

<sup>40</sup> See, Annie E. Casey Foundation, *Youth Incarceration in the United States* (2013), <http://www.aecf.org/m/resourcedoc/aecf-YouthIncarcerationInfographic-2013.pdf>; Youth First Initiative, <http://www.youthfirstinitiative.org/the54000/#>.

<sup>41</sup> Available data suggests that tens of thousands have been detained each year in recent years. Unaccompanied children who are apprehended and detained in connection with immigration enforcement in the United States are transferred to the custody of the Office of Refugee Resettlement; whereas those who migrate with family members can be detained with their family members - see William Kandel, Congressional Research Service, *Unaccompanied Alien Children: An Overview* 3, 8-9 (May 11, 2016), <https://fas.org/sgp/crs/homsec/R43599.pdf> (based on a review of data covering the period of 2008-2014, which indicated that that the total time spent by minors in Office of Refugee Resettlement custody was as much as 710 days).

<sup>42</sup> Unfortunately, the quality of U.S. Government data on these issues is extremely poor.

<sup>43</sup> U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, US 38 CONG. REC. 8068 (1992) ("US ICCPR RUDs"); U.S. reservations, declarations, and understandings, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Cong. Rec. S17486-01 (daily ed., Oct. 27, 1990) ("US CAT RUDs").

<sup>44</sup> *Id.*, US CAT RUDs. See also, *Id.*, US ICCPR RUDs ("That the United States considers itself bound by Article 7 to the extent that "cruel, inhuman or degrading treatment or punishment" means the cruel and unusual treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.").

<sup>45</sup> The UN Committee Against Torture, for example, has noted in connection with the U.S. reservation that reservations which are inconsistent with the object and purpose of a given treaty are invalid as a matter of law. See, UN Committee Against Torture, *Concluding Observations on the Third to Fifth Periodic Reports of United States of America Para. 9*, UN Doc CAT/C/USA/CO/3-5 (November 20, 2014), <http://www.state.gov/documents/organization/234772.pdf>.

and should still make use of the Special Rapporteur's report as persuasive evidence of how U.S. international law obligations regarding torture must be given effect domestically.<sup>46</sup>

### *Children in Conflict with the Law in the United States*

Since the end of the nineteenth century, children in conflict with the law in the United States, if detained, have generally been deprived of their liberty in the juvenile justice system of each U.S. state. Most U.S. states permit juvenile court judges the discretion to "waive" jurisdiction over certain cases, on an individual basis, and send a child to be tried in the adult criminal justice system. In the early 1980s, U.S. state legislatures began creating various new mechanisms to transfer jurisdiction to adult courts on a class basis (seeking to be 'tough on crime'). Use of these 'exceptions' expanded rapidly, diverting tens of thousands of children each year into the adult criminal justice system.<sup>47</sup> Thus for many years in the United States, large numbers of children have been charged or sentenced as if they were adults—and often deprived of their liberty in adult jails and adult prisons.

The statutory mechanisms that, when applied, can result in a child being processed through the adult criminal justice system varies significantly between U.S. states, and even between local jurisdictions within states.<sup>48</sup> In many places in the U.S., for example, specific crimes are excluded from the jurisdiction of the juvenile justice system.<sup>49</sup> Furthermore, some prosecutors have discretion to decide whether to file charges in the adult or juvenile system—removing judges entirely from the process.<sup>50</sup> In some U.S. states, once convicted in the adult system, any subsequent conduct is necessarily addressed in adult court.<sup>51</sup> While in most parts of the country, the age of criminal majority begins at 18, ten U.S. states have an age of criminal majority below 18.<sup>52</sup>

One specific criminal sentence to which children have been subjected in recent years and that has been the attention of much advocacy at the domestic and international level is the sentence of life without parole. As of 2008, more than 2,400 young people were serving sentences of life with-

<sup>46</sup> For a representative discussion of how advocates can use international human rights law, including the work of the UN Special Rapporteur on Torture, as a part of advocacy in service of an end to the solitary confinement of children in the United States, see Ian Kysel, *Banishing Solitary: Litigating an End to the Solitary Confinement of Children in Jail and Prison*, 40 N.Y.U. REV. L. & SOC. CHANGE (2016).

<sup>47</sup> By 1997, and starting in the 1980s, all states in the United States but for three (Nebraska, New York, and Vermont) changed their laws to make it easier to try and sentence children in the adult criminal justice system. Snyder, H. N. & Sickmund M., *Juvenile Offenders and Victims: 1999 National Report, Office of Juvenile Justice and Delinquency Prevention: National Center for Juvenile Justice 1999*, <http://www.ncjrs.org/html/ojjdp/nationalreport99/toc.html>.

<sup>48</sup> Griffin, et al., Department of Justice Office of Juvenile Justice and Delinquency Prevention, *Trying Juveniles as Adults: An Analysis of State Transfer Laws and Reporting*, <https://www.ncjrs.gov/pdffiles1/ojjdp/232434.pdf> (2011) ("Trying Juveniles as Adults") (contains a detailed review of various state charging and sentencing regimes). For an analysis of the variation in the use of one particular form of 'transfer,' and prosecutorial 'direct file,' see Human Rights Watch, *Branded For Life: Florida's Prosecution of Children as Adults Under its "Direct File" Statute* (2014) ("Branded For Life Report"), [http://www.hrw.org/sites/default/files/reports/us0414\\_ForUpload%202.pdf](http://www.hrw.org/sites/default/files/reports/us0414_ForUpload%202.pdf).

<sup>49</sup> *Id.*, *Trying Juveniles as Adults* at 3 (noting that in 2011, 45 states allowed discretionary waiver and 29 had statutory exclusion mechanisms).

<sup>50</sup> *Trying Juveniles As Adults*, *supra* note 49, at 3 (noting that in 2011, 15 states gave prosecutors discretion to file at least some charges in either the juvenile justice or adult criminal justice system). For data regarding the varied use of prosecutorial discretion to charge children as adults in one state, Florida, see *Branded For Life Report*, *supra* note 49.

<sup>51</sup> *Trying Juveniles As Adults*, *supra* note 49, at 3 (noting that in 2011, 34 states prosecuted children as adults once they were convicted of a prior adult offense).

<sup>52</sup> Butts, J.A., & Roman, J.K., *John Jay College of Criminal Justice Research & Evaluation Center, Line Drawing: Raising the Minimum Age of Criminal Court Jurisdiction in New York* 5 (2014), <http://johnjayresearch.org/rec/files/2014/02/linedrawing.pdf>.

out parole for crimes committed while under the age of 18.<sup>53</sup> Since then, successive decisions by the U.S. Supreme Court have declared aspects of this practice unconstitutional. In 2010, the U.S. Supreme Court ruled in *Graham v. Florida* that a sentence of life without parole was unconstitutional for non-homicide offenses committed by a child.<sup>54</sup> In 2012, the U.S. Supreme Court ruled in *Miller v. Alabama* that mandatory life without parole sentences were unconstitutional for children for any offence.<sup>55</sup> In 2016, the U.S. Supreme Court ruled that this latter decision was “substantive” and thus applied retroactively, which has meant that many of those convicted as children and sentenced to die in prison have become eligible for resentencing.<sup>56</sup>

For the thousands of children detained in adult jails and prisons each year, these laws, policies and practices can have a further cost when conditions of confinement fail to meet minimum international standards. Among the most striking excesses in adult facilities is the pervasive use of solitary confinement to manage, punish, and treat young people deprived of their liberty.<sup>57</sup>

Finally, the United States also subjects many children to deprivation of liberty in the juvenile justice system—and far too readily.<sup>58</sup> This includes deprivation of liberty in detention centers while young people await adjudication in the juvenile justice system and then post-adjudication in a range of facilities.<sup>59</sup> The largest proportion of these youths are held in long-term youth correctional facilities.<sup>60</sup> Research by the U.S. Department of Justice reveals systematic failings with respect to conditions of confinement.<sup>61</sup> For example, data from 2003 suggests that an estimated 35,000 young people between the ages of 10 and 20 were held in isolation with over half of those young people—over 17,000 children—held more than 24 hours in a form of solitary confinement.<sup>62</sup>

As discussed above, in the view of the Special Rapporteur, laws, policies and practices, which subject children to adult sentences, are cruel, inhuman or degrading *per se*. This evaluation suggests that the United States bears international responsibility for tens of thousands of violations of the prohibition each year.

<sup>53</sup> See, HUMAN RIGHTS WATCH, *The Rest of Their Lives: Life Without Parole for Youth Offenders in the United States: Executive Summary 1* (May 2008), <https://www.hrw.org/sites/default/files/reports/us1005execsum.pdf>. For a comprehensive analysis of the prevalence of life without parole sentences for nonviolent offences in the United States see American Civil Liberties Union, *A Living Death: Life Without Parole For Nonviolent Offenses* (2013) <https://www.aclu.org/files/assets/111813-lwop-complete-report.pdf>.

<sup>54</sup> *Graham v. Florida*, 560 U.S. 48 (2010).

<sup>55</sup> *Miller v. Alabama*, 132 S. Ct. 2455 (2012).

<sup>56</sup> *Montgomery v. Alabama*, No. 14-280, slip op. (January 25, 2016).

<sup>57</sup> See generally, Georgetown Law Human Rights Institute, *Written Statement of Ian M. Kysel Before the United States Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights at 3* (February 25, 2014) (“Written Statement of Ian M. Kysel”), <http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/opportunities/upload/Ian-Kysel-Solitary-Confinement-Hearing-Testimony-FINAL.pdf>.

<sup>58</sup> It is important to note that research by the U.S. Department of Justice does reveal a positive trend in reduced numbers of young people in detention. See, U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention, *Juveniles in Residential Placement, 2011* (August 2014), <http://www.ojjdp.gov/pubs/246826.pdf>.

<sup>59</sup> For an overview of the use of the juvenile justice system in the United States, see National Academic of Sciences, *Reforming Juvenile Justice: A Developmental Approach* (2013), <http://www.nap.edu/catalog/14685/reforming-juvenile-justice-a-developmental-approach>.

<sup>60</sup> Annie E. Casey Foundation, *No Place for Kids: The Case for Reducing Juvenile Incarceration 4* (2011), <http://www.aecf.org/m/resourcedoc/aecf-NoPlaceForKidsFullReport-2011.pdf>.

<sup>61</sup> U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention, *Conditions of Confinement: Findings from the Survey of Youth in Residential Placement 9* (May 2010), <https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf>.

<sup>62</sup> U.S. Department of Justice Office of Juvenile Justice and Delinquency Prevention, *Conditions of Confinement: Findings from the Survey of Youth in Residential Placement 9* (May 2010), <https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf>; Georgetown Law Human Rights Institute, *Written Statement of Ian M. Kysel, supra note 58, at 3* (February 25, 2014).

In respect of sentencing, the Report also concludes that life without parole sentences and other lengthy sentences for children are disproportionate *per se* because they cause physical and psychological harm that constitutes cruel, inhuman or degrading treatment or punishment. Further, the Rapporteur has concluded that mandatory sentences—because they can result in disproportionate sentences—should also end, as an element of the obligation of States to prevent torture.<sup>63</sup> This suggests that significant sentencing reform—beyond merely prohibiting the sentence of life without parole for crimes committed while under age 18—is necessary in order to bring U.S. laws, policies, and practices, in line with international standards.

Finally, the prevalence of solitary confinement and other substandard conditions of confinement must end. To the extent that the existence of such practices can be taken as an indicator of systemic failure to provide adequate and developmentally-appropriate conditions to promote healthy growth and, where appropriate, rehabilitation, of children—the set of adequate minimum standards propounded by the Rapporteurship are a guide to what must change. At a minimum, the widespread prevalence of solitary confinement suggests that U.S. treatment of children in conflict with the law is far out of step with international law and standards.

Comparing the conclusions and recommendations of the Rapporteurship with the state of detention of children in conflict with the law provides a powerful indictment of the U.S. The Report should be used by advocates in the U.S. to push for national, state, and local actions to reduce the incarceration of children generally, including in the adult criminal justice system, and to improve conditions of confinement whenever and wherever youth are held.

### *The Detention of Child Migrants in the United States*

Recent years have seen a significant increase in the migration of children to the United States. In particular, large numbers of children have migrated from Honduras, Guatemala, and El Salvador, with parental accompaniment.<sup>64</sup> The issue has thus been of significant concern to civil society.

Migrant children are deprived of their liberty in the United States in a range of circumstances—but most commonly are detained in connection with an immigration enforcement action in circumstances in which they are not authorized to be in the United States (as a matter of federal immigration law).<sup>65</sup> By law, migrant children who are unaccompanied—present or migrating without a parent or legal guardian—are assigned to the custody of the Office of Refugee Resettlement (ORR) Division of Unaccompanied Children’s Services.<sup>66</sup> In recent years, ORR has received tens of

<sup>63</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Mendéz, A/HRC/28/68 (5 March 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, ¶ 74.

<sup>64</sup> See, e.g., Georgetown Law Human Rights Institute, *The Cost of Stemming the Tide* (April 2015), [http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF\\_English.pdf](http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF_English.pdf); UN High Commissioner for Refugees, *Children on the Run* (March 2014), <http://www.refworld.org/docid/532180c24.html>; Organization of American States, Inter-American Commission for Human Rights, *Refugees and Migrants in the United States* (July 2015), <https://www.oas.org/en/iachr/reports/pdfs/Refugees-Migrants-US.pdf>.

<sup>65</sup> For a succinct overview of these practices, see Women’s Refugee Commission, *Step-by-Step Guide on Apprehension and Detention of Juveniles in the United States* (July 2014), <https://www.womensrefugeecommission.org/images/zdocs/Step-by-Step-Guide-on-Apprehension-and-Detention-of-Juveniles-in-the-United-States.pdf>.

<sup>66</sup> Vera Institute of Justice, *The Flow of Unaccompanied Children Through the Immigration System: A Resource for Practitioners, Policy Makers, and Researchers* 6 (March 2012) (“Vera Institute Resource”), [www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf](http://www.vera.org/sites/default/files/resources/downloads/the-flow-of-unaccompanied-children-through-the-immigration-system.pdf).

thousands of referrals each year from immigration enforcement officials.<sup>67</sup> Children in ORR custody are supposed to be held in the least restrictive environment, but historically some percentage of children in federal custody are held in secure care (i.e., in detention).<sup>68</sup> There is limited information available about conditions of confinement at secure facilities operated by or for the ORR.<sup>69</sup>

Children who are accompanied by a parent can also be deprived of their liberty in the United States.<sup>70</sup> The subject of family detention of migrants has been controversial in the United States. The practice was ended in 2009 following concerted human rights advocacy and then reinstated by the Obama Administration in 2014.<sup>71</sup> In July 2016, the Obama Administration lost a court challenge, through which it sought to maintain the power to detain both parents and children, when the U.S. 9th Circuit Court of Appeals ruled that children must be held in the least restrictive setting (and thus be released from detention).<sup>72</sup> There have been significant concerns raised regarding conditions of confinement in family detention facilities.<sup>73</sup>

As noted above, the Report of the Special Rapporteur calls on States to “expeditiously cease” the detention of migrant children. In particular, the Rapporteur notes that detention of migrant children is never in the best interests of the child and, because it exceeds the requirement of necessity and can become disproportionate, can constitute cruel, inhuman or degrading treatment or punishment of migrant children. With respect to family detention, the Report notes that children should also not be detained on the basis of their parents’ migration status. Thus the detention of accompanied and unaccompanied migrant children in the United States is not consistent with international law and standards and may constitute cruel, inhuman or degrading treatment or punishment.

Importantly, the Report recognizes that States may, in certain circumstances, provide shelter or other accommodation for the purpose of childcare, protection and support. In this context, use by the United States of non-detention arrangements to provide for migrant children—rather than detention—can be consistent with international law and standards.

<sup>67</sup> U.S. Department of Health & Human Services, Office of Refugee Resettlement, *Facts and Data*, <http://www.acf.hhs.gov/programs/orr/about/ucs/facts-and-data#lengthofstay>.

<sup>68</sup> See, Vera Institute Resource, *supra* note 67 (noting that between October 2008 and September 2010, at least 588 children were held in secure care).

<sup>69</sup> See, e.g., Women’s Refugee Commission, *Forced from Home: The Lost Boys and Girls of Central America* 14-15, 21 (October 2012), [http://womensrefugeecommission.org/component/docman/doc\\_download/844-forced-from-home-the-lost-boys-and-girls-of-central-america](http://womensrefugeecommission.org/component/docman/doc_download/844-forced-from-home-the-lost-boys-and-girls-of-central-america). In 2009, the Women’s Refugee Commission investigated one such secure facility and raised concerns about conditions of confinement. See also, Women’s Refugee Commission, *Halfway Home: Unaccompanied Children in Immigration Custody* 17-19 (February 2009), [http://www.crin.org/docs/halfway\\_home.pdf](http://www.crin.org/docs/halfway_home.pdf).

<sup>70</sup> See, e.g., Human Rights First, *Family Detention: Still Happening, Still Damaging* (October 2015), <http://www.humanrightsfirst.org/sites/default/files/HRF-family-detention-still-happening.pdf>.

<sup>71</sup> See, Women’s Refugee Commission and Lutheran Immigration and Refugee Service, *Locking Up Family Values Again: A Report on the Renewed Practice of Family Immigration Detention* (October 2014), <https://www.womensrefugeecommission.org/resources/document/1085-locking-up-family-values-again>.

<sup>72</sup> The final outcome of this case is unknown at the time of writing. In brief, the case derives from an attempt by advocates to apply an earlier class action settlement regarding the treatment of unaccompanied children. Carcamo, C., *U.S. must release child migrants held in family detention, court says*, *Los Angeles Times*, July 6, 2016, <http://www.latimes.com/nation/la-na-migrant-children-20160706-snap-story.html>. See, *Flores v. Lynch*, D.C. No. 2:85-cv-04544-DMG-AGR (9th Cir. 2016), <https://cdn.ca9.uscourts.gov/datastore/opinions/2016/07/06/15-56434.pdf>. See also *Flores v. Meese, Stipulated Settlement Agreement Plus Extension of Settlement* (January 1997), <https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement>.

<sup>73</sup> See, e.g., Letter from CARA Family Detention Pro Bono Project to Megan Mack and John Roth, U.S. Department of Homeland Security (March 28, 2016), <http://www.aila.org/advo-media/press-releases/2016/cara-crcl-complaint-concerns-regarding-detention>.

Finally, while detention of accompanied and unaccompanied migrant children in the United States implicates the prohibition against torture and cruel, inhuman or degrading treatment or punishment *per se*, the Report's recommendations regarding conditions of confinement for children whose liberty is restricted in the context of migration shows that aspects of U.S. treatment of migrant children may in many circumstances be inconsistent with U.S. international law obligations.

Ultimately, U.S. law and practice with regard to children in conflict with the law and migrant children are not uniformly consistent with U.S. international obligations or the rights of children to be free from torture or cruel, inhuman or degrading treatment or punishment. Detention of children is not an *ultima ratio* measure, particularly not in the context of crime and punishment, and the available data suggests that conditions of confinement too often violate fundamental rights. These practices implicate U.S. responsibility under its international law obligations regarding the prohibition against torture. In this context, and as discussed in the section below, advocates could make use of the Report to promote change.

#### **Part IV: The Rapporteurship's Report as a Tool to Protect the Rights of Children**

Advocates in the United States and elsewhere rarely frame the need to reduce the deprivation of liberty of children in terms of a need to end or prevent torture or ill-treatment. Yet this report provides a new tool to do just that—in addition to promoting rights-respecting conditions of confinement for all children lawfully detained. There a number of ways that the Report and its conclusions can be used by advocates pushing the U.S. and other States around the world to limit their use of detention and ensure treatment which respects the rights of children, whenever their liberty is lawfully deprived or restricted.

Firstly, civil society can use the Report's conclusions to develop public education efforts and in work with the media. This includes both emphasis on the determination by the UN Special Rapporteur on Torture that States must eliminate a particular practice as cruel, inhuman or degrading treatment or punishment *per se*, and, further, that States must implement certain practices in order to fulfill their obligation to prevent violations of the prohibition against torture.

Secondly, civil society can work affirmatively with State officials responsible for the detention and care of children deprived of their liberty to promote the reform of standards and the development of better practices. Pointing to specific reforms as necessary to protect against violations of the prohibition against torture can be a powerful way to frame efforts with officials to promote change.

Similarly, civil society can work to craft legislation incorporating into law the minimum standards proposed by the Report. In States like the U.S., in which legislation or other affirmative government actions may be necessary to carry certain international treaty obligations into force, civil society can promote the implementation of the Report's conclusions and recommendations specifically as a mechanism to ensure implementation or compliance with the CRC, the Convention Against Torture or the ICCPR. In States, and in particular those, in which the CRC, Convention Against Torture or ICCPR have direct effect, civil society can use the report in a further way—in the context of litigation challenging practices that do not comply with reference to treaty law and the corresponding standards developed in this Report.

Finally, the Report can be used to encourage the creation of independent monitoring and oversight bodies and ensure that those bodies use the standards established in the Report as a minimum guide to determining whether deprivation of liberty of and conditions of confinement for children

are at all times rights-respecting and compliant with States' responsibility to detect, prevent and otherwise prohibit the torture, cruel, inhuman or degrading treatment or punishment of children.

## Conclusion

Far too many States deprive large numbers of children of their liberty without adequate basis as a matter of international law. Yet this has only rarely be seen to implicate the rights of children to be free from torture or ill treatment. This chapter has thus sought to show some of the most important general contributions that the Report makes to the corpus of human rights law protecting the rights of the child. This includes the vitally-important recognition that the rights of the child constitutes a *lex specialis* in respect of the prohibition on torture, cruel or inhuman or degrading treatment or punishment and that this right has very specific consequences for deprivation of liberty of children itself as well as conditions of confinement for those lawfully detained. This chapter has in particular sought to identify some of the ways in which the Report promotes the progressive development of these rights in specific areas, including in the context of children in conflict with the law and in the context of migration. This chapter then discussed the detention landscape in the United States, showing that children in conflict with the law and child migrants are treated in ways that may violate the prohibition, illustrating some of the contexts in which use of the Report could remedy systematic failures and promote compliance with international law and standards there. Finally, this chapter has identified some of the ways in which States, international organizations, and most importantly members of civil society can make use of the Report and those significant innovations reflected in its conclusions and recommendations to promote changes in law and practice. Advocacy and reform that recognizes the rights of children to be free from torture or ill-treatment—and that this necessarily means that deprivation of liberty must be an *ultima ratio* measure and, when appropriate, must carry with it rights-respecting conditions of confinement—is certain to drastically reduce the widespread violation of the rights of children worldwide. This Report, then, is a significant contribution.

# Translating International Children's Rights Standards into Practice: The Challenge of Youth Detention

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## Abstract

*Multiple international instruments set out the rights of children in conflict with the law and outline the corresponding obligations on states parties to protect these rights. Binding international treaties, including the United Nations Convention on the Rights of the Child, are complemented by soft law resolutions and rules, leading to a detailed and comprehensive array of standards governing the treatment of children deprived of their liberty. Reflective of good practice, these instruments provide important, detailed guidance to those who work with and for children deprived of their liberty. Generated through political consensus, these standards operate as ties that bind professionals and advocates in support of the progressive treatment of children in detention. Despite their many strengths, however, the gulf between international standards and the practice of youth detention is wide. Against this backdrop, this paper explores some of the difficulties experienced in translating the standards into solutions for the kind of problems that arise in youth detention. It then goes on to identify what measures can be taken to achieve greater levels of implementation in practice.*

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## Introduction

In 2015, the United Nations (UN) Special Rapporteur on Torture published a report with a special focus on children deprived of their liberty.<sup>1</sup> The Report was the latest to draw attention to serious shortcomings in the implementation of international legal standards on the protection of children from torture or other ill-treatment.<sup>2</sup> The report made two things very clear: first, there is now an extensive array of international instruments detailing the standards that apply to children deprived of their liberty and second, that there continues to be a major gap between these standards and the extent to which they are observed in practice. Despite the extensive and detailed nature of international standards on this subject, children continue to be deprived of their liberty in very large numbers<sup>3</sup> and continue to suffer violence, intimidation, isolation and multiple breaches of their rights while in detention.<sup>4</sup> The Special Rapporteur's report acts as a call to action, drawing attention to the extensive list of international instruments that set out the standards to be met by those who work with and for children deprived of their liberty.<sup>5</sup> It is implicit in this context that no further standard setting is required to advance the rights of children in detention and it is imperative that national authorities must now intensify their efforts towards better implementation of existing standards, so that detention is only imposed as a last resort and that children deprived of their liberty have their rights fully protected.

Following on from this report, and against the backdrop of a renewed focus internationally on the rights of children deprived of their liberty, this chapter seeks to consider how international standards might be translated into practice in this area. In doing so, it highlights the merits and positive features of the standards, identifying their potential as a roadmap for the protection of children's rights in detention. Next, this chapter examines some of the weaknesses in these standards, evident when they are applied to the practice of youth detention. Finally, this paper concludes by offering recommendations as to how these problems may be addressed in order to better protect children's rights in practice.

## Overview of the International Standards

The right to liberty is a core human rights value contained in all the main human rights treaties, equally applicable to children as to adults.<sup>6</sup> The first modern reference to the deprivation of liberty was included in the International Covenant on Civil and Political Rights (ICCPR), adopted in 1966,

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<sup>1</sup> United Nations, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/68*, available at [http://antitorture.org/wp-content/uploads/2015/03/Children\\_Report.pdf](http://antitorture.org/wp-content/uploads/2015/03/Children_Report.pdf)

<sup>2</sup> See also Office of the Special Representative of the Secretary General on Violence against Children (2013), *Toward a World Free from Violence: Global Survey on Violence against Children* (New York, SRSGVAC) and Inter-American Commission on Human Rights. *Rapporteurship on the Rights of the Child* (2011), *Juvenile Justice and Human Rights in the Americas* (OAS), available at <http://www.cidh.org> (accessed 22 August 2016).

<sup>3</sup> A widely used estimate, accepted to be low, is that 1 million children are deprived of their liberty worldwide. See Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system (A/HRC/21/25), p 7.

<sup>4</sup> See Office of the Special Representative of the Secretary General on Violence against Children (2013), *Toward a World Free from Violence: Global Survey on Violence against Children* (New York, SRSGVAC), pp.

<sup>5</sup> See further Liefaard, T. (2008) *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Cambridge: Intersentia).

<sup>6</sup> For a comprehensive overview see Liefaard, T. (2008) *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Cambridge: Intersentia), pp. 39-140.

which requires that all persons deprived of their liberty have the right to be treated with dignity and respect.<sup>7</sup> More specifically, Article 10(3) of the ICCPR provides that ‘juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status’. This was a significant, early acceptance of the particular circumstances of children deprived of their liberty, but for many years it stood as a somewhat isolated standard.<sup>8</sup> In 1989, the UN Convention on the Right of the Child (CRC) was adopted as the first binding international treaty on children’s rights<sup>9</sup> and since then it has been ratified by 196 states parties.<sup>10</sup> The CRC has unrivalled legal status as an almost universally ratified instrument in international law and can be said to have prompted the reform of national laws and policies around the world.<sup>11</sup> As a comprehensive legal instrument, the CRC sets out the rights to which children are entitled in all areas of their lives. It recognises a number of general children’s rights principles relevant to children in all situations, while also making specific provisions for the rights of children in particular settings. In the former category are the general principles of the CRC: the requirement that all children enjoy their rights equally (Article 2), that the best interests of the child are a primary consideration in all actions concerning children (Article 3), that every child enjoys the right to life, survival and development (Article 6) and that every child has the right to a say in all matters affecting the child (Article 12).<sup>12</sup> In terms of substantive rights that are particularly important for children deprived of their liberty, the CRC provides that all children are entitled to education (Articles 28 and 29), healthcare (Article 28), protection from harm (Article 19) and family life (Article 9). More directly relevant to detention is Article 37, which deals with both the use and the purpose of detention. Given its importance, it is worth recalling the provision here in some detail: first, Article 37(a) prohibits torture and other cruel, inhuman or degrading punishment, including capital punishment and life imprisonment without the possibility of release; next, Article 37(b) requires that arrest, detention and imprisonment must be in conformity with the law, used only as a measure of last resort and for the shortest appropriate period of time; third, Article 37 (c) requires that every child deprived of liberty be treated with humanity, respect and dignity and in line with the child’s needs. Children in most circumstances must be separated from adults and have the right to maintain contact with family through correspondence and visits. Finally, Article 37(d) recognises the child’s right to prompt access to legal and other assistance as well as the right to a prompt challenge of the legality of his/her detention

<sup>7</sup> Article 10, International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

<sup>8</sup> Interestingly, the Human Rights Committee’s General Comment on children focused exclusively on Article 24 (the rights of the child) and the General Comment on deprivation of liberty focused on Article 9, with the result that children deprived of their liberty were virtually excluded from both documents. See Human Rights Committee, General Comment No 17 (Article 24: Rights of the Child), 29 September 1989 and General Comment No 35 (Liberty and Security of the Person), 16 December 2014, CCPR/G/GC/35, available at <http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx> (accessed 21 August 2016).

<sup>9</sup> 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.

<sup>10</sup> The United States of America is now the only United Nations state party not to have ratified the Convention. See the current list of ratifications here: <http://indicators.ohchr.org/> (accessed 21 August 2016).

<sup>11</sup> These changes are evident from the Concluding Observations of the Committee on the Rights of the Child. See the Committee’s database at <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx> (accessed 21 August 2016). See also UNICEF Innocenti Research Centre, (2007) *Law Reform and Implementation of the CRC* (Florence: UNICEF), available at <http://www.unicef-irc.org> (accessed 22 August 2016) and Kilkelly, U. et al (2012), *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*. (London: UNICEF UK), available at <http://www.unicef.org.uk> (accessed 21 August 2016).

<sup>12</sup> Committee on the Rights of the Child, General Comment No 10 (the Rights of the Child in Juvenile Justice), 25 April 2007, CRC/C/GC/10, paras 6-12.

before a court. Article 40 deals with the due process rights relevant to children in conflict with the law. From the perspective of detention, it is also worth noting the requirement in Article 40(4) that states put in place a 'variety of dispositions', including community based measures and education and care programmes, in order to ensure that children are dealt with 'in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'. This provision is a cornerstone of the CRC in the context of youth justice, which makes clear not only that detention must be a measure of last resort but that less punitive, community based interventions based on education and care must be a priority for children in conflict with the law. Thus, although Article 37 is the key CRC provision in the context of youth detention, the implementation of Article 40 is also central both to reducing the use of detention and ensuring that when children are deprived of their liberty, their rights are adequately protected.

Supplementing the detailed and binding legal provision of the CRC is a range of additional instruments adopted by the UN and other regional bodies (notably the Council of Europe) over the years. These guidelines and rules provide even more detailed guidance as to how to ensure compliance with the core international principles of youth justice and detention. The most important of these are: the Rules on the Administration of Juvenile Justice ('the Beijing Rules'),<sup>13</sup> the Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines'),<sup>14</sup> and the Rules on the Protection of Juveniles deprived of their Liberty ('the Havana Rules').<sup>15</sup> The latter two instruments are referenced in the Preamble to the CRC. Their incorporation into the monitoring work of the CRC reinforces their importance.<sup>16</sup> The influence of these standards on the international juvenile justice landscape is evident from the fact that they have led to the adoption of multiple other instruments and guidelines adopted at both UN<sup>17</sup> and regional levels.<sup>18</sup> Taken together, these instruments paint a detailed and comprehensive picture of the principles that should inform the approach of states parties to the youth detention. Pointing the direction of national law and policy, they also provide practical guidance and instruction pertaining to how detention facilities should be organised so as to ensure maximum compliance with children's rights standards.<sup>19</sup>

Rather than going through these instruments in detail, which would be difficult given how extensive they are, the next section of this paper draws out the principal themes that emerge from an analysis of the instruments. The first is that detention is only to be imposed as a measure of last

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<sup>13</sup> United Nations (1985), Standard Minimum Rules for the Administration of Juvenile Justice. 'The Beijing Rules', Office of the High Commissioner for Human Rights. Adopted by General Assembly Resolution 40/33, 29 November.

<sup>14</sup> United Nations (1990) Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines'), Office of the High Commissioner for Human Rights. Adopted by General Assembly Resolution 45/112, 14 December.

<sup>15</sup> United Nations (1990), Rules for the Protection of Juveniles Deprived of their Liberty ('The Havana Rules'), Office of the High Commissioner for Human Rights. Adopted by General Assembly Resolution 45/113, 14 December.

<sup>16</sup> Committee on the Rights of the Child, *General Comment No 10 (the Rights of the Child in Juvenile Justice)*, 25 April 2007, CRC/C/GC/10, para 4.

<sup>17</sup> See for example, ECOSOC Resolution 2005/20 Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime and the United Nations Standard Minimum Rules for Non-custodial Measures (the Tokyo Rules), Adopted by General Assembly resolution 45/110 of 14 December 1990.

<sup>18</sup> See in particular, Recommendation CM/Rec (2008) 11 of the Committee of Ministers to member states on the European rules for juvenile offenders subject to sanctions or measures, 5 November 2008 and the Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (Adopted by the Committee of Ministers on 17 November 2010 at the 1098th meeting of the Ministers' Deputies).

<sup>19</sup> See in particular United Nations (1990), Rules for the Protection of Juveniles Deprived of their Liberty ('The Havana Rules'), Office of the High Commissioner for Human Rights. Adopted by General Assembly Resolution 45/113, 14 December.

resort and for the shortest appropriate period of time. This is related to the importance of diversion as a principle of youth justice, i.e. that children, due to their stage of development, should be protected from sanctions that seek to draw them into the punitive criminal justice system and instead directed away from offending. This requires that states parties make available to children in conflict with the law a range of community-based programmes focused on their welfare, education and constructive community participation. The next theme is that children deprived of their liberty must be treated as children first. This means that they are entitled to be treated with dignity and respect, in a manner consistent with their age, needs and developmental stage. The third theme relates to the fact that children are entitled to enjoy their rights even when they are deprived of their liberty. In fact, the rights to protection from harm and to education, health, care and positive family relationships are even more important for children deprived of their liberty who have often suffered disadvantage in these areas prior to entering detention. Moreover, children's successful release from detention, including the avoidance of further offending, will depend on the full realisation of these rights in detention. The final theme of the international standards includes specialisation, complaints and monitoring. While it is important to ensure that those who care for children in detention are suitably trained and supervised, ensuring that children's rights are effectively safeguarded in detention depends on there being transparent and effective monitoring and complaints handling systems in place. These structural measures are necessary to ensure state accountability for the treatment of children in detention is maintained.

## The Poor Record of Implementation

The fact that these basic principles have been repeated and elaborated throughout treaty and soft law is a clear indication of their acceptance at international level. At the same time, Liefwaard suggests that the proliferation of standards is, by itself, an admission of failure to protect the rights of children deprived of their liberty,<sup>20</sup> whereas Goldson and Muncie argue, along the same lines, that international consensus counts for nought without national implementation.<sup>21</sup> Indeed, fact-finding and monitoring reports have highlighted that the translation of international standards into practice at national level continues to pose an enormous challenge.<sup>22</sup> With a view to understanding and addressing this challenge, international organisations have set out to document various aspects of children's rights in the context of detention. For instance, in 2006 the Global Study on Violence against Children highlighted the extent to which children in custody and detention suffer violence and made a range of recommendations to address these problems.<sup>23</sup> It noted that children in detention suffer greater levels of violence than children in other forms of institutional care<sup>24</sup> and there

<sup>20</sup> Liefwaard, T. (2008) *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Cambridge: Intersentia), p 139.

<sup>21</sup> Muncie, J. and Goldson, B. (2012). Towards a global 'child friendly' juvenile justice? *International Journal of Law, Crime and Justice*, 40(1) 47–64.

<sup>22</sup> United Nations, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, A/HRC/28/68, available at [http://antitorture.org/wp-content/uploads/2015/03/Children\\_Report.pdf](http://antitorture.org/wp-content/uploads/2015/03/Children_Report.pdf); See also Office of the Special Representative of the Secretary General on Violence against Children (2013), *Toward a World Free from Violence: Global Survey on Violence against Children* (New York, SRSGVAC) and Inter-American Commission on Human Rights. *Rapporteurship on the Rights of the Child* (2011), *Juvenile Justice and Human Rights in the Americas* (OAS), available at <http://www.cidh.org> (accessed 22 August 2016).

<sup>23</sup> Pinheiro, S. (2006) *The Global Study on Violence against Children* (New York: UN) available at [www.unglobalstudy.org](http://www.unglobalstudy.org) (accessed 21 August 2016).

<sup>24</sup> Pinheiro, S. (2006) *The Global Study on Violence against Children* (New York: UN), p. 190.

exists little cause for optimism that the situation has improved according to the 2013 Global Survey published by the Special Representative of the Secretary General on Violence against Children.<sup>25</sup>

Frustratingly, the uses of detention—including immigration,<sup>26</sup> pre-trial<sup>27</sup> and administrative detention<sup>28</sup>—appear to be diversifying around the world, with the use of detention before or without trial becoming increasingly problematic. An analysis of the CPT records indicates that the placement of children in police detention for extensive periods is a growing trend<sup>29</sup> and as the Inter-American Commission of Human Rights has stated:

‘(e)ven though these (human rights) norms and standards are very clear, the information the Commission has received indicates that the use of preventive detention of children accused of violating criminal law is widespread within the hemisphere’.<sup>30</sup>

Yet, there is nothing to suggest that the increased numbers of children being deprived of their liberty is as a result of higher levels of criminality among young people. For example, according to the Global Study on Violence against Children:

[t]he vast majority of boys and girls in detention are charged with minor or petty crimes, and are first-time offenders. Very few have committed violent offences. Many have committed no offence at all, but have been rounded up for vagrancy, homelessness, or simply being in need of care and protection.<sup>31</sup>

The picture in the US is broadly similar. The Annie E Casey Foundation has noted that the rate of youth incarceration in almost all US states is declining, but the majority of youth confined have committed non-violent offences.<sup>32</sup> Far from being a last resort to deter serious crime and to promote public safety, therefore, the use of detention for these purposes appears disproportionate, unnecessary and contrary to Articles 37b and 40(f) of the Convention on the Rights of the Child which require detention as a last resort and the availability of a variety of measures to ensure that children in conflict with the law are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence.

In 2007, building on its experience of monitoring state party efforts to implement the CRC in the area of juvenile justice and drawing on the UN instruments to articulate how the standards must be implemented to ensure the rights of children in detention are protected,<sup>33</sup> the Committee on the

<sup>25</sup> Office of the Special Representative of the Secretary General on Violence against Children (2013), *Toward a World Free from Violence: Global Survey on Violence against Children* (New York, SRSGVAC). See also Mendel, R. (2015) *Maltreatment of Youth in US Juvenile Corrections Facilities* (Baltimore, Annie E. Casey Foundation) which documented an increase in systemic maltreatment of children in detention across the US since 2011.

<sup>26</sup> UNHCR (2014), *Beyond Detention A Global Strategy to support governments to end the detention of asylum-seekers and refugees 2014-2019* (Geneva: UN), available at [www.unhcr.org](http://www.unhcr.org) (accessed 22 August 2016)

<sup>27</sup> See further Open Society Justice Initiative (2014), *Presumption of Guilt: The Global Overuse of Pretrial Detention*. (London: Open Society Justice Initiative), available at <http://www.opensocietyfoundations.org> (accessed 23 August 2016)

<sup>28</sup> Hamilton, C et al (2011), *Administrative Detention of Children: A Global Report* (New York: UNICEF).

<sup>29</sup> See Kilkelly, U. (2012) *Children’s rights and the European Committee for the Prevention of Torture*, (Strasbourg, Council of Europe), available at [www.coe.int](http://www.coe.int) (accessed 21 August 2016), pp 15-16.

<sup>30</sup> Inter-American Commission on Human Rights. *Rapporteurship on the Rights of the Child* (2011), *Juvenile Justice and Human Rights in the Americas* (OAS), available at <http://www.cidh.org> (accessed 22 August 2016), para 78.

<sup>31</sup> Pinheiro, S. (2006) *The Global Study on Violence against Children* (New York: UN) available at [www.unglobalstudy.org](http://www.unglobalstudy.org) (accessed 21 August 2016), p. 191.

<sup>32</sup> Mendel, R. (2011), *No Place for Kids, the Case for Reducing Juvenile Incarceration* (Baltimore: The Annie E Casey Foundation).

<sup>33</sup> Committee on the Rights of the Child, *General Comment No 10 (the Rights of the Child in Juvenile Justice)*, 25 April 2007, CRC/C/GC/10.

Rights of the Child adopted a General Comment on the Rights of Children in Juvenile Justice. Here, the Committee noted that ‘States parties still have a long way to go in achieving full compliance with (the) CRC’, noting failure to comply with the use of deprivation of liberty only as a measure of last resort as a particular concern.<sup>34</sup> The General Comment focuses on recommendations designed to secure greater implementation of existing standards through the creation of a comprehensive juvenile justice policy, adopting legislative change and embedding the international standards into practice. In connecting concerns about the deprivation of liberty to other core principles of youth justice, the Committee sought to highlight to states parties that youth detention cannot be divorced from either its national youth justice policy or from children’s rights more generally. This kind of practical, problem-solving approach is reflected in the 1997 Guidelines for Action on Children in the Criminal Justice System, which was developed to support the UN and states parties to implement the Riyadh, Beijing and Havana standards.<sup>35</sup> This emphasis on taking practical measures to implement standards is also evident in a report on violence in the justice system published in 2012 by a number of international bodies working together to prevent and respond to violence against children in the justice system.<sup>36</sup>

Regional bodies like the Council of Europe have also been actively working to achieve this goal. For instance, in 2009, the Council of Europe’s Commissioner for Human Rights dedicated an ‘Issues Paper’ to the subject of juvenile justice, placing particular emphasis on detention.<sup>37</sup> Then, in 2012, the Council of Europe’s European Committee for the Prevention of Torture (CPT) published a report with the Council’s Children’s Rights Division that drew together the findings from its work monitoring places of detention and made recommendations as to how it could more effectively use its mandate to advance the rights of children in detention.<sup>38</sup> In summary, it is evident that there is now visible momentum behind the advocacy work on the rights of children deprived of their liberty at the international level. A growing number of international agencies and non-governmental bodies—like and the UN Office on Drugs and Crime,<sup>39</sup> Defence for Children International,<sup>40</sup> Penal Reform International<sup>41</sup> and the International Juvenile Justice Observatory<sup>42</sup>—have set out to share information about the rights of children in detention and have developed tools designed to improve

<sup>34</sup> Ibid, para 1.

<sup>35</sup> This was annexed to Economic and Social Council resolution 1997/30 of 21 July 1997, Administration of Juvenile Justice (‘Vienna Guidelines’).

<sup>36</sup> Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system (A/HRC/21/25), paras 52–55

<sup>37</sup> Hammarberg, T. *Children and juvenile justice: proposals for improvements*, Strasbourg, 19 June 2009, CommDH/IssuePaper(2009)1, available at [www.commissioner.coe.int](http://www.commissioner.coe.int) (accessed 21 August 2016). See also Hammarberg, T. (2008) ‘A Juvenile Justice Approach based on Human Rights Principles’ *Youth Justice* vol. 8 no. 3: 193–196.

<sup>38</sup> Kilkelly, U. (2012) Children’s rights and the European Committee for the Prevention of Torture, (Strasbourg, Council of Europe), available at [www.coe.int](http://www.coe.int) (accessed 21 August 2016).

<sup>39</sup> UN Office of Drugs and Crime (2006), *Manual for the Measurement of juvenile justice Indicators* (New York: United Nations).

<sup>40</sup> DCI (2015), *Practical guide, Monitoring Places where Children are Deprived of their Liberty* (Brussels: DCI), available at [www.childrensrightsbehindbars.eu](http://www.childrensrightsbehindbars.eu) (accessed 21 August 2016).

<sup>41</sup> See Prison Reform International (2011), *PRI Toolkit for Interviewing Children, their Guardians, and Staff of Juvenile Detention Facilities and Training Manual for Independent Monitors of Juveniles Deprived of their Liberty*, both available at [www.penalreform.org](http://www.penalreform.org) (accessed 21 August 2016). See also Penal Reform International (2013), *Protecting children’s rights in criminal justice systems A training manual and reference point for professionals and policymakers* (London: PRI).

<sup>42</sup> Kilkelly, U. (2011), *IJJIO Green Paper on Child-Friendly Justice: Measures of Deprivation of Liberty for young offenders: how to enrich International Standards in Juvenile Justice and promote alternatives to detention in Europe* (Brussels: International Juvenile Justice Observatory), available at <http://www.oijj.org> (accessed 22 August 2016).

the process of monitoring places where children are deprived of their liberty. Organisations like these have sought to use advocacy and training approaches to promote greater awareness of the relevant standards with the expectation that greater understanding will give rise to greater levels of implementation.

However, without adequate data documenting the use of detention and the treatment of children deprived of their liberty, it is difficult to determine and to routinely track what progress is made in the implementation of international standards. The work of international monitoring bodies like the Special Rapporteur on Torture and the CPT shine an important light on the reality of the lived experience for children in detention and they also contribute to an understanding of the trends in how children's rights are being protected in detention.<sup>43</sup> At the same time, the lack of a single comprehensive global dataset in this area reinforces the need for a world-wide study on children deprived of their liberty to establish a clear baseline from which progress can be properly mapped. The General Assembly gave its support for such a study in December 2014,<sup>44</sup> and in October 2016 it was announced that distinguished Austrian Manfred Nowak, former UN Special Rapporteur on Torture, has been appointed to lead the study.<sup>45</sup>

### Detention: Consistent with Children's Rights?

As is clear, international children's rights standards point the way towards rights-compliant detention. At the same time, the fact that they permit the use of detention at all has been criticised by leading international scholars like Goldson<sup>46</sup> who points to its reputation for causing harm to children and Feld<sup>47</sup> who highlights its failure to divert children from further offending. In 2011, a report from the US based Annie E Casey Foundation described the incarceration of juveniles in the US as 'dangerous, ineffective, unnecessary, obsolete, wasteful and unnecessary'.<sup>48</sup> According to Penal Reform International:

'removing children from their family and community networks as well as from educational and vocational opportunities at critical and formative periods in their lives, can compound social and economic disadvantage and marginalisation'.<sup>49</sup>

Evidence suggests that 'detaining young people makes them more, rather than less, likely to commit further offences'....and 'in the long term (such children) will find it more difficult to return

<sup>43</sup> United Nations, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/68*, available at [http://antitorture.org/wp-content/uploads/2015/03/Children\\_Report.pdf](http://antitorture.org/wp-content/uploads/2015/03/Children_Report.pdf).

<sup>44</sup> Resolution adopted by the General Assembly on 17 December 2014, 70/137. Rights of the child. On the campaign by civil society see <http://www.childrendeprivedofliberty.info/> (21 August 2016).

<sup>45</sup> Annual report of the Special Representative of the Secretary General on Violence against Children, A/HRC/31/20, available at <http://www.srsgvac.org> (accessed 23 August 2016), paras. 20-28. See the Press Release from the NGOs welcoming the appointment available at <http://www.childrendeprivedofliberty.info> (25 October 2016).

<sup>46</sup> Goldson, B. (2005), 'Child imprisonment: A case for abolition' *Youth Justice*, 5(2): 77-90.

<sup>47</sup> See Feld B.C. (1998). 'Juvenile and Criminal Justice Systems' Responses to Youth Violence'. *Crime and Justice*, 24: 189-261.

<sup>48</sup> Mendel, R. (2011), *No Place for Kids, the Case for Reducing Juvenile Incarceration* (Baltimore: The Annie E Casey Foundation), p 4.

<sup>49</sup> Penal Reform International & Interagency Panel on Juvenile Justice, (2012) *Ten-Point Plan for Fair and Effective Criminal Justice for Children* (London: Penal Reform International) p. 1, available at <http://www.penalreform.org> (last accessed 22 August 2016).

to school or obtain employment or vocational training'.<sup>50</sup> In addition to this lost opportunity for a meaningful life, detention is shown to pose a grave risk to children's physical integrity, development and in some cases their survival.<sup>51</sup> So in recognising the capacity of international standards to improve the protection of children's rights in detention, it is important to remember that detention may, of itself, be considered a challenge to the protection of children's rights.<sup>52</sup>

In addressing the gap between the theory and practice of children's rights in detention, it is clear that the true test of international children's rights standards lies in their implementation at national level.<sup>53</sup> Local application of such standards can be challenging for a number of reasons, not least because the standards themselves lack clarity or precision. The requirement to use detention as a last resort is a good example of this.

### *Detention as a Last Resort*

As Article 37 of the CRC makes clear, the detention of children is permitted as long as it is lawful and not arbitrary. Under most human rights instruments this requires adherence to the principle of lawfulness, implicit in which is a requirement that the limits of its use are not arbitrary, but rather clearly defined and strictly applied.<sup>54</sup> Avoiding arbitrary detention requires that a relationship of proportionality exists between any infringement of the child's right to liberty and the aim that a child's detention seeks to achieve. Article 37(b) of the CRC, which requires detention to be used as a measure of last resort, thus strikes a balance between a child's rights on the one hand, and the rights of society, on the other.<sup>55</sup> Yet while this phrase 'detention as a last resort' is clear in its intent, its scope and meaning is less clear. In other words, who deserves this sanction (and who does not?) and in what circumstances is detention the 'last resort'?

According to the Beijing Rules, a juvenile offender should not be incarcerated unless there is 'no other appropriate response'.<sup>56</sup> Furthermore, according to Rule 17, 'the [d]eprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response'.<sup>57</sup> As the Commentary to the Rules makes clear, 'no other appropriate response' relates to what is necessitated by the public safety.<sup>58</sup> In the penal context, the reference to the 'last resort' must demand that alternative sanctions and measures are put in place in line with Article 40(4) of the CRC. As the Committee on the Rights of the Child explains,

<sup>50</sup> Moore, M. (2013), *The European Council for Juvenile Justice White Paper: Save Money, Protect Society and Realise Youth Potential* (Brussels: International Juvenile Justice Observatory) p. 9, available at [www.oijj.org](http://www.oijj.org) (accessed 22 August 2016).

<sup>51</sup> See also *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Méndez, A/HRC/28/68, 5 March 2015, para 33.

<sup>52</sup> Goldson, B. and Kilkelly, U. (2013), 'International human rights standards and child imprisonment: Potentialities and limitations' *International Journal of Children's Rights* 21(2): 345-271.

<sup>53</sup> See Kilkelly, U., and Lundy, L.; (2006) 'Children's rights in practice: using the CRC as an auditing tool'. *Child and Family Law Quarterly*, 19 (3):1-19.

<sup>54</sup> Liefwaard, T. (2008) *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Cambridge: Intersentia), pp.173-187.

<sup>55</sup> Liefwaard considers this an additional requirement to the preconditions that detention must be lawful and not arbitrary. *Ibid.*, p 188.

<sup>56</sup> See Commentary to Rule 19 of the Beijing Rules, United Nations (1985), *Standard Minimum Rules for the Administration of Juvenile Justice. 'The Beijing Rules'*, Office of the High Commissioner for Human Rights. Adopted by General Assembly Resolution 40/33, 29 November, p 12.

<sup>57</sup> *Ibid*, pp 10-11

<sup>58</sup> *Ibid*, pp 10-11.



The laws must provide the court/judge, or other competent, independent and impartial authority or judicial body, with a wide variety of possible alternatives to institutional care and deprivation of liberty, which are listed in a non-exhaustive manner in article 40 (4) of CRC, to assure that deprivation of liberty be used only as a measure of last resort and for the shortest possible period of time (art. 37 (b) of CRC).<sup>59</sup>

It would appear from this context that Article 37 envisages detention only for punitive or penal purposes. In this way, it is not clear how the criterion of ‘last resort’ is to be applied in the context of detention for immigration or indeed for welfare, health or pre-trial purposes. What is clear from the guidance of the Committee on the Rights of the Child is that the availability of alternatives is key to ensuring that deprivation of liberty, in all its forms, is a ‘last resort’.<sup>60</sup>

According to the Beijing Rules, the ‘last resort’ determination also has another dimension. The Commentary provides that if a juvenile must be institutionalized, the loss of liberty should be restricted to ‘the least possible degree, with special institutional arrangements for confinement and bearing in mind the differences in kinds of offenders, offences and institutions.’<sup>61</sup> This would appear to be related to the final requirement under Article 37(b) which requires that detention is used ‘for the shortest appropriate period of time’. This means that in addition to being used in limited circumstances, it must also be used for a limited duration.<sup>62</sup> Again, the international standards do not provide a yard stick for what duration is excessive in this context. Although bodies like the Inter-American Commission of Human Rights and the Committee for the Prevention of Torture have criticised states for imposing periods of detention on children that are ‘too long’,<sup>63</sup> there is no explicit standard setting out what the optimum length is in this context. According to Liefwaard, the reference to ‘appropriate’ suggests a tailor made approach.<sup>64</sup>

Notwithstanding that this conveys a tension perhaps between these two standards—if detention is to be limited to be the most serious of cases (usually the most violent or persistent offenders), the requirement that it be as short as possible is also challenging—it also makes it difficult to put in place the kind of support programme that a serious offender might need. Shorter custodial sentences may make it difficult to undertake meaningful interventions with young people who might have suffered significant disadvantage or have complex unmet needs underlying their offending. While those detained pending trial can have their proceedings expedited to shorten the duration of their detention, it is difficult to see how those sentenced to detention ‘as a last resort’ can also be subjected to detention that is very short in duration.

It is notable that the international guidance on the standards stipulates that adjudication or sentencing processes must be informed by what is in the best interests of the child. As the Beijing

<sup>59</sup> Committee on the Rights of the Child, General Comment No 10 (the Rights of the Child in Juvenile Justice), 25 April 2007, CRC/C/GC/10, para 70. See also para 28.

<sup>60</sup> Committee on the Rights of the Child, General Comment No 10 (the Rights of the Child in Juvenile Justice), 25 April 2007, CRC/C/GC/10, para 23.

<sup>61</sup> See Commentary to Rule 19 of the Beijing Rules, United Nations (1985), Standard Minimum Rules for the Administration of Juvenile Justice. ‘The Beijing Rules’, Office of the High Commissioner for Human Rights. Adopted by General Assembly Resolution 40/33, 29 November, p 12.

<sup>62</sup> See the useful Commentary here to the European Rules for juvenile offenders subject to sanctions and measures (Strasbourg: Council of Europe), pp 38-39.

<sup>63</sup> Inter-American Commission on Human Rights. Rapporteurship on the Rights of the Child (2011), *Juvenile Justice and Human Rights in the Americas* (OAS), available at <http://www.cidh.org> (accessed 22 August 2016), para 293; Kilkelly, U. (2012) *Children’s rights and the European Committee for the Prevention of Torture*, (Strasbourg: Council of Europe), p. 16

<sup>64</sup> Liefwaard, T. (2008) *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards* (Cambridge: Intersentia), p. 197.

Rules stipulate, 'the well-being of the juvenile shall be the guiding factor in consideration of her or his case'.<sup>65</sup> According to the Committee on the Rights of the Child, 'the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly longterm needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC'.<sup>66</sup> The dilemma that this guidance poses, when determining whether a custodial sentence is appropriate for the child being adjudicated however, is how to strike an appropriate balance between what is in the interests of the individual child, according to his/her age and circumstances, and what the public interest demands. If a very young child has committed a violent offence for example, is it the public's safety or the child's vulnerability that should determine the outcome? If the offence is murder, wilful homicide, or an aggravated sexual assault, will a community sanction ever be appropriate bearing in mind the society's need for protection and the individual child's likely need for rehabilitation? The international standards offer little guidance to assist the balancing exercise on this level of specificity and indeed it is true that every state will have to find their own 'level' in balancing these interests.<sup>67</sup> In some jurisdictions, the public will not tolerate community based sanctions for young offenders and in others, this will be the expectation and the norm. This situation is worsened by the reality that discrimination and bias is institutionalised in many justice systems.<sup>68</sup> Changing these norms takes time and deliberate action and in addition to the lack of prescription, international standards do little, on their own, to support the process of change that many states have still to undergo.

### *Operational Challenges in Ensuring Children's Rights Protection*

The most serious breaches of children's rights—where children suffer violence, maltreatment, isolation and deprivation—often have multiple systemic causes.<sup>69</sup> Even where the meaning of international standards is clear, the process of translating the standards into good practice on the ground can be frustrated by structural problems and hardened attitudes to children in conflict with the law. Some of these issues are addressed below in the section that recommends action for implementation. In addition, there are some situations where operational challenges may frustrate the protection of children's rights. This appears, for example where the standards provide insufficiently detailed solutions to some of the nuanced problems that may arise. Although most breaches of children's rights cannot be traced back to a lack of clarity in the applicable standard, it is true that in some instances, vagueness or weaknesses in the standards makes their implementation difficult. This is particularly true around the margins of some highly problematic and sensitive areas like solitary confinement, restraint and searches.

Article 37(c) requires that every child deprived of his/her liberty shall be detained separately from adults. Despite the clarity of this requirement, its implementation poses a number of diffi-

<sup>65</sup> Rule 17(1)(d) of the Beijing Rules.

<sup>66</sup> Committee on the Rights of the Child, General Comment No 10 (the Rights of the Child in Juvenile Justice), 25 April 2007, CRC/C/GC/10, para 71.

<sup>67</sup> Pinheiro, S. (2006) *The Global Study on Violence against Children* (New York: UN) available at [www.unglobalstudy.org](http://www.unglobalstudy.org) (accessed 21 August 2016), p 192.

<sup>68</sup> See for example, Leiber, M. and Fox, (2005) 'Race and the Impact of Detention on Juvenile Justice Decision Making' *Crime & Delinquency* vol. 51 no. 4, 470-497.

<sup>69</sup> Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system (A/HRC/21/25), pp. 17-18.

culties. First, the most obvious challenge arises when the number of children in detention is so low as to make it impossible to provide them with a dedicated children's facility. Such is the case in Norway, for example, where the numbers of children in penal detention is too small to warrant their own detention facility.<sup>70</sup> No guidance is available as to what states should do in such circumstances to comply with Article 37(c).<sup>71</sup> According to the CPT, any placement of a child in an adult facility must be an exceptional measure and where it takes place the child must always be accommodated separately from adults, in a distinct unit.<sup>72</sup> In order to avoid such a child being placed in a situation akin to isolation, it might be possible for him/her to participate in out-of-cell activities with adults, on the strict condition that there is appropriate supervision by staff and that sharing sleeping accommodations should never occur.<sup>73</sup> The other scenario where a child might be detained alongside an adult is where the child turns 18 and is permitted to remain in the youth facility for a period of time. Although it will clearly be in the interests of the older child/young adult to remain in the youth facility rather than being transferred to adult prison, it is not clear how the rights of the child not to be detained with an adult can be protected in this context. The guidance from the Committee on the Rights of the Child is that a child who turns 18 should be able to continue his/her stay in the youth facility 'if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.'<sup>74</sup> Another dilemma not addressed by the standards is the consistency with the standards of mixed gender accommodation. In many jurisdictions, there are small numbers of girls in detention who experience the isolation that comes as a result of not being with other girls. Yet, there is no precise guidance available on how this might be managed and whether, accommodation alongside young boys, would be appropriate if in both group's interests.

According to the Havana Rules,<sup>75</sup> detention facilities should be decentralised and integrated into the social economic, and cultural environment of the community.<sup>76</sup> The education should be provided 'outside the detention facility in community schools wherever possible',<sup>77</sup> and medical care should, where possible, be provided to detained juveniles 'through the appropriate health facilities and services of the community in which the detention facility is located, in order to prevent stigmatization of the juvenile and promote self-respect and integration into the community'.<sup>78</sup> At the same time, there are undoubtedly complexities in securing access to education and healthcare rights in the community for children. Where detention was adjudicated to be the 'last resort' for a child, it is difficult to envisage how attending school in the community would be appropriate, even if the child's literacy or poor educational background did not demand very intensive educational support. Different issues arise with accessing community healthcare. Again, although the principle may be sound, the practical reality of taking a child—or multiple children—to healthcare facilities outside the detention centre might be very difficult. While not all children will pose a risk in such

<sup>70</sup> Committee on the Rights of the Child: Concluding Observations; Norway, CRC/C/NOR/4, paras. 57-58.

<sup>71</sup> Ibid. Nor was this issue addressed in General Comment No 10.

<sup>72</sup> Kilkelly, U. (2012) *Children's rights and the European Committee for the Prevention of Torture*, (Strasbourg: Council of Europe), p 15.

<sup>73</sup> Kilkelly, U. (2012) *Children's rights and the European Committee for the Prevention of Torture*, (Strasbourg: Council of Europe), p 15.

<sup>74</sup> Committee on the Rights of the Child, General Comment No 10 (the Rights of the Child in Juvenile Justice), 25 April 2007, CRC/C/GC/10, para 86.

<sup>75</sup> United Nations (1990), Rules for the Protection of Juveniles Deprived of their Liberty ('The Havana Rules'), Office of the High Commissioner for Human Rights. Adopted by General Assembly Resolution 45/113, 14 December.

<sup>76</sup> Ibid, para 30.

<sup>77</sup> Ibid, para 38.

<sup>78</sup> Para 49.

circumstances, it may be considered necessary in some cases to have security present and to use handcuffs/restraints although that would clearly be stigmatising to the child. It is not clear from the standards which approach would be more appropriate.

The limits of search methods are not clearly defined by the standards. For instance, where a young person has acquired drugs during home leave or during a family visit that a staff member suspects are hidden internally, the international standards provide little guidance as to how best to approach the situation. Invasive searches clearly require the young person to consent but if that is withheld a search can only be undertaken with a clear breach of the young person's physical integrity. Admittedly, a balance will have to be struck here between protecting the child's welfare by removing the drugs and violating the child's bodily integrity, but no such scenarios appear to have been contemplated in the standards.

The international standards prohibit the use of solitary confinement or separation where it is used for punishment purposes.<sup>79</sup> However, the CPT has noted that 'any form of isolation of juveniles is a measure that can compromise their physical and/or mental well-being' and has recommended that its use be 'highly exceptional' and 'last no longer than is strictly necessary'.<sup>80</sup> It supports a limit of three days and given the harm caused to the child's development by the deprivation of human contact, it has expressed concern about the duration of any form of segregation. Given the strength of the CPT's recommendations on this issue, it is remarkable that the UN children's rights standards are virtually silent on this issue. The strict limitations on the use of 'solitary confinement', where a young person is held in isolation without human interaction, are clear. However, the standards say nothing about the more subtle use of the separation of young people from their peers as a means of managing their behaviour (i.e. outside of any punishment context). Brought to the level of practice in youth detention, these challenges must be navigated from the position of principle, rather than prescribed standard.

## Structural Measures to Implement International Standards

For the most part, the international standards provide clear and detailed guidance for states parties as to how to divert children from detention so that it is a measure of last resort and how to protect the right of children in detention to the maximum extent. At the same time, it would appear that the translation of international standards into practice is a complex process, which will necessitate not only structural and legal change, but a sea-change in the attitudes, practices and behaviours of a wide variety of stakeholders. Given the gap that continues to exist between the theoretical standards and practice with regards to youth detention, it is timely to consider what measures might be taken to intensify the process of achieving their greater implementation.

The Committee on the Rights of the Child has set out, in General Comment No 5, the legal and non-legal measures necessary to secure greater implementation of CRC standards.<sup>81</sup> Although this is specific to the CRC, research and practice indicates that the measures identified by the Committee are applicable to the implementation of international standards more generally. Indeed, the com-

<sup>79</sup> Committee on the Rights of the Child, General Comment No 10 (the Rights of the Child in Juvenile Justice), 25 April 2007, CRC/C/GC/10, para 89.

<sup>80</sup> Kilkelly, U. (2012) *Children's rights and the European Committee for the Prevention of Torture*, (Strasbourg: Council of Europe), p 17.

<sup>81</sup> Committee on the Rights of the Child, General Comment No 5, General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, available at [www.ohchr.org](http://www.ohchr.org) (accessed 21 August 2016).

mentaries to the other instruments echo many of the Committee's recommendations making clear that, to a large extent, they reflect good practice and consensus here too.<sup>82</sup> Drawing on Article 4 of the CRC, which requires states to take all appropriate measures for the implementation of CRC rights, the Committee has stressed the importance of giving legal effect to these standards at domestic level.<sup>83</sup> This is important because it can give international standards the force of domestic law, binding the courts and the legislature as well as giving greater credibility to youth advocates campaigning for reform based on these standards.<sup>84</sup> The incorporation into national law of core principles, for example that detention must be used only as a measure of last resort, can help to drive down the use of detention as it becomes a visible national priority.<sup>85</sup> And yet, just over half of the governments that responded to the Global Survey conducted by the Special Representative of the Secretary General on Violence against Children in 2013 indicated that legal provisions are in place to address violence against children in the justice setting.<sup>86</sup> Clearly, this is a recommendation which could yield dividends if put into practice.

The Committee has also advocated non-legal measures in the implementation of the CRC, including raising awareness about their rights among children and their careers, and providing systematic children's rights education and training to all those who work with and for children.<sup>87</sup> This specialisation is underpinned by other international bodies too who stress the importance of ensuring that those who work in detention are suited to this work, selected in line with this suitability and trained both at induction and on an ongoing basis.<sup>88</sup> Effective oversight of detention services is vital too, regardless of whether they are publicly or privately managed, and such measures are important to ensure that public accountability for and trust in youth detention facilities is maintained. The international standards stress that independent and qualified inspectors should be empowered to conduct inspections on a regular, including unannounced, basis.<sup>89</sup> Ensuring that all detention facilities have routine, rigorous inspections by an independent body and that children are supported to contribute to this process is thus vital to ensuring that children's lived experience of detention is accurately and publicly documented. Those who undertake the monitoring function should undergo training to ensure that they engage appropriately and sensitively with children in detention and should establish protocols to ensure that all necessary follow up, including on complaints and child protection reports, is effectively undertaken. Although this is most important for those bodies routinely inspecting places of detention and who have an ongo-

<sup>82</sup> See Recommendation CM/Rec (2008) 11 of the Committee of Ministers to member states on the European rules for juvenile offenders subject to sanctions or measures, 5 November 2008, and its Commentary.

<sup>83</sup> Ibid, paras 19-20.

<sup>84</sup> See the example of Norway in Kilkelly, U. et al (2012), *The UN Convention on the Rights of the Child: A Study of Legal Implementation in 12 Countries*. (London: UNICEF UK), available at <http://www.unicef.org.uk> (accessed 21 August 2016), pp 59-60.

<sup>85</sup> Ireland is a good example here. See section 96 of the Children Act 2001, which incorporated detention as a last resort into Irish law and the Youth Justice Action Plan which makes the delivery of community sanctions a priority, to fulfil this goal. See Irish Youth Justice Service (2013), *Tackling Youth Crime: the Youth Justice action Plan* (Dublin: Department of Justice and Equality).

<sup>86</sup> Office of the Special Representative of the Secretary General on Violence against Children (2013), *Toward a World Free from Violence: Global Survey on Violence against Children* (New York, SRSGVAC), p.40.

<sup>87</sup> Committee on the Rights of the Child, General Comment No 10 (the Rights of the Child in Juvenile Justice), 25 April 2007, CRC/C/GC/10, paras 96-97.

<sup>88</sup> Kilkelly, U. (2012) *Children's rights and the European Committee for the Prevention of Torture*, (Strasbourg, Council of Europe), available at [www.coe.int](http://www.coe.int) (accessed 21 August 2016), p. 6; Office of the Special Representative of the Secretary General on Violence against Children (2013), *Toward a World Free from Violence: Global Survey on Violence against Children* (New York, SRSGVAC), p 43.

<sup>89</sup> Committee on the Rights of the Child, General Comment No 10 (the Rights of the Child in Juvenile Justice), 25 April 2007, CRC/C/GC/10, para 89.

ing dialogue with detention services, in fact, these recommendations are relevant to all bodies set up to inspect places of detention. In this way, international bodies such as those set up under the Optional Protocol to the Convention against Torture (OPCAT) and the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) should also consider themselves bound by these standards, setting an example in their work for other national bodies to follow.<sup>90</sup> Only robust and effective complaints and monitoring systems will ensure genuine accountability for the protection of children's rights.<sup>91</sup> Independent complaints mechanisms that are accessible to children are vital to ensure protection of their rights. According to the Havana Rules such complaints mechanisms must extend beyond recourse to the director of the detention facility to the establishment of an independent office such as an ombudsman which has the power to receive and investigate complaints made by juveniles deprived of their liberty and to assist in the achievement of settlements.<sup>92</sup> Without access to such mechanisms, 'these children face an increased risk of suffering abuse of authority, humiliation, ill-treatment and other unacceptable deprivations of rights'.<sup>93</sup> These structural reforms are thus vital to the translation of standards into practice.

Partnership is also crucial to better implementation of children's rights standards in practice and co-operation of all kinds can help to secure this goal. As the Committee on the Rights of the Child has explained, the duty to implement the Convention is a 'co-operative exercise' under Article 4 of the CRC and so international co-operation is vital to ensure that the standards are implemented evenly around the world.<sup>94</sup> Partnership with civil society has also been highlighted by the Committee as an important means of securing respect for children's rights. There are many examples of national and international non-governmental organisations whose collaboration have helped to achieve greater protection of children's rights in detention through advocacy and other activities. The United States has led the way in the achievement of youth justice reform using collaboration, especially in the supported partnerships between research and the legal system through strategic litigation supported by evidence-based philanthropy.<sup>95</sup> The development of alliances across professions, state agencies and at the cross-national and international levels is an effective way to collaborative and pool resources and ideas to advance implementation of children's rights standards.<sup>96</sup>

Overall, there are a wide variety of legal and non-legal measures that can be adopted with a view to improving implementation of children's rights standards in youth detention. Mapping out

<sup>90</sup> See the recommendations in Kilkelly, U. (2012) *Children's rights and the European Committee for the Prevention of Torture*, (Strasbourg, Council of Europe), available at [www.coe.int](http://www.coe.int) (accessed 21 August 2016), pp 33-34.

<sup>91</sup> Committee on the Rights of the Child, General Comment No 5, *General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, available at [www.ohchr.org](http://www.ohchr.org) (accessed 21 August 2016), paras 24, 53-55.

<sup>92</sup> See Havana Rules 69, 75-78.

<sup>93</sup> Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system (A/HRC/21/25), paras 52-55.

<sup>94</sup> Committee on the Rights of the Child, General Comment No 5, *General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, available at [www.ohchr.org](http://www.ohchr.org) (accessed 21 August 2016), para 60.

<sup>95</sup> See the work of Juvenile Law Center as an example in Kilkelly, U. (2016) 'Advancing the Rights of Young People in Juvenile Justice: The Impact of Juvenile Law Center' *Temple Law Review* 88(4) 629-652

<sup>96</sup> Committee on the Rights of the Child, General Comment No 5, *General measures of implementation of the Convention on the Rights of the Child* (arts. 4, 42 and 44, para. 6), CRC/GC/2003/5, 27 November 2003, available at [www.ohchr.org](http://www.ohchr.org) (accessed 21 August 2016), paras. 56-59.

how this could be achieved at a national level is arguably the ideal way to ensure that a progressive plan is in place to co-ordinate the delivery of higher standards in practice.

## Conclusion

International children's rights standards provide a coherent, comprehensive roadmap for states seeking to ensure that the detention of children is used as a measure of last resort and that the rights of children are protected in custody. This body of mostly soft law provides detailed and practical guidance as to how children can enjoy their various rights in detention and it sets out a series of benchmarks to measure progress. And yet, these instruments of youth justice are often known more in the breach than in the observance, at least where detention is concerned. As a result, the gap between the theory of the standards and the reality of the lived experience of children in detention appears as wide as ever. Just as the international community agreed to adopt the various standards on youth detention, international support now exists around the need for a global study on children deprived of their liberty, with agreement on the recommendations that are needed to translate standards into practice. Given the scale and complexity of the problem, no time or effort should now be spared in delivering on these goals in the interests of all children deprived of their liberty.

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# Access to Justice for Children Deprived of Their Liberty

DR. TON LIEFAARD\*

## Abstract

*A child deprived of his liberty finds himself in a highly vulnerable situation. This specific vulnerability has been recognized under international human rights law, in particular in the United Nations Convention on the Rights of the Child (CRC). Article 37 CRC provides that a child may only be deprived of his liberty as a measure of last resort and for the shortest appropriate period of time. If it is nevertheless regarded as necessary to deprive a child of his fundamental right to liberty, he must be treated with humanity and respect for his inherent human dignity, and in a manner that takes into account the needs of a person of his age. This places states under the obligation to ensure that each child deprived of his liberty is recognized as rights-holder in the first place, which includes the right to access justice and seek effective remedies in case of (alleged) unlawful or arbitrary treatment. This chapter focuses on access to justice for children deprived of their liberty. It explores the meaning of access to justice for these children, as a concept enabling them to seek effective remedies. It also identifies the key issues that ought to be considered when establishing such remedies at the domestic level, while taking into account the barriers children are confronted with, in general and specifically in the context of deprivation of liberty. The chapter concludes that access to justice for children deprived of liberty, which concerns both access to procedures and access to equitable and fair outcomes, is of great significance for the protection of their short- and long-term interests, including the protection against serious human rights violations. Access to justice must be considered an essential component of the legal status of children deprived of their liberty, regardless of the context. States are under an obligation to safeguard access to justice and enforce the right to an effective remedy in order to prevent a situation wherein the millions of children deprived of liberty today are confronted with a complete denial of their rights and/or with ineffective mechanisms that do not provide adequate protection against specific human rights violations.*

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## 1. Introduction

A child deprived of his<sup>1</sup> liberty finds himself in a highly vulnerable situation. Deprivation of liberty means that the child is placed in a detention centre, prison or other institution from which he cannot leave at will and which has generally been designed to prevent him from running away. Consequently, the child finds himself in a regime that lacks transparency, which makes oversight by family members and society as a whole challenging if not impossible and which makes the child particularly dependent and vulnerable. The specific vulnerability of children deprived of their liberty has been recognized under international human rights law. Article 37 of the UN Convention on the Rights of the Child (CRC) stipulates that a child may only be deprived of his liberty as a measure of last resort and for the shortest appropriate period of time (sub b). This core provision of international human rights law furthermore provides that if it is nevertheless regarded necessary to deprive a child of his fundamental right to liberty<sup>2</sup>, he must be treated with humanity and respect for the inherent dignity of the human person, and in a manner that takes into account the needs of person of his or her age. States parties<sup>3</sup> therefore are under the obligation to guarantee children deprived of liberty a legal status, which acknowledges:

- 1.) that the child remains entitled to all rights under international human rights law, including the CRC;
- 2.) that the enjoyment of rights can only be limited if strictly required by the objectives of the child's condition and only while respecting the general principles of the CRC, in particular the best interests of the child (art. 3 (1) CRC) and the child's right to be heard (art. 12 CRC);<sup>4</sup> and
- 3.) that the child has the right to an effective remedy against unlawful or arbitrary treatment.<sup>5</sup>

In practice, there are great concerns about the millions of children deprived of their liberty worldwide.<sup>6</sup> Various reports on the position of children in police cells, detention centers, prisons, jails, immigration centres, welfare institutions, psychiatric hospitals, military courts and other institutions show that the rights of many children are grossly violated and that this is happening in all parts of the world. Children are placed in institutions where there is overcrowding, no protection of privacy, no separation from adults,<sup>7</sup> lack of hygiene, lack of access to day light and fresh air, lack of access to (mental) health care services, no education and no family contact<sup>8</sup>; parents or other family members may not even know that their child is detained and where. Children in institutions across the globe are confronted with various forms of violence, including peer-to-peer violence and self-inflicted violence, without staff or the institution administration responding to it

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<sup>1</sup> Unless stated otherwise, this chapter refers to the child in the masculine form.

<sup>2</sup> See e.g. art. 9 (1) ICCPR.

<sup>3</sup> The CRC is the most widely ratified human rights treaty. All states but one, i.e. the United States, have embraced it.

<sup>4</sup> The other general principles, defined as such by the UN Committee on the Rights of the Child, are the prohibition of discrimination (art. 2 CRC) and the right to life, survival and development (art. 6 CRC); CRC Committee 2003, para. 12.

<sup>5</sup> Liefwaard 2015.

<sup>6</sup> The information provided here can be found in the many reports published on children deprived of their liberty worldwide since the beginning of the 21st Century. See among others Defence for Children International 2003; Cappelaere, Grandjean & Naqvi 2005; UN Violence Study 2006; Joint Report 2012; UN Rapporteur on Torture 2015; Human Rights Watch 2016a; Human Rights Watch 2016b; see also Liefwaard, Reef & Hazelzet 2014.

<sup>7</sup> Cf. art. 37 (c) CRC.

<sup>8</sup> Cf. art. 37 (c) CRC.

adequately. Staff may very well subject children to violence themselves, either through means that are unlawful or through legally sanctioned forms of violence, such as the use of force or restraint, screening methods and solitary confinement. As indicated by the UN Special Representative on Violence against Children, among others, there is a very thin line between illegal and legally sanctioned forms of violence,<sup>9</sup> but even the use of the latter can be problematic in light of the rights of children, which include the right to be protected against all forms of violence<sup>10</sup> and freedom from torture or other forms of cruel, inhuman or degrading treatment or punishment.<sup>11</sup> The widespread use of solitary confinement and weapons in institutions, even in institutions specifically designed for children, is particularly worrisome.<sup>12</sup> It is clear that the rights of children are seriously neglected and deliberately violated in institutions throughout the world, which jeopardizes the short- and long-term interests of the children and also of society.<sup>13</sup> Of course, there are also examples of good or promising practices, but these exceptions confirm the rule that there are too many children in institutions and that they are at serious risk. The great and on-going concerns about deprivation of liberty of children have resulted in the UN General Assembly calling upon the UN Secretary General to conduct 'an in-depth global study on children deprived of liberty'.<sup>14</sup>

There is international consensus that independent inspection and monitoring of institutions where children are deprived of their liberty and access to effective remedies, in particular to complaints mechanisms, are essential for the protection of the rights of these children. In addition, research indicates that fair and child-friendly treatment of children deprived of liberty can serve to address and prevent the violence in institutions. It contributes to a climate in which the rights of children are respected and in which children can engage with life in the institution and cope with it in a positive manner. Consequently, there is a point in creating opportunities to access justice for children in institutions. Moreover, access to effective remedies is an essential element of the human rights of all children deprived of their liberty. It subsequently falls under the responsibility of states under international human rights law, regardless of the context of their deprivation of liberty.

This chapter focuses on *access to justice for children*<sup>15</sup> deprived of their liberty. It explores the meaning of access to justice for these children, as a concept enabling children to seek effective remedies in cases of (alleged) unlawful or arbitrary treatment. It also identifies the key issues that ought to be considered when establishing such remedies at the domestic level, while taking into account the barriers children are confronted with, in general and specifically in the context of deprivation of liberty.

The chapter focuses on access to justice *during* deprivation of liberty.<sup>16</sup> The chapter starts by introducing the concept of access to and the right to an effective remedy, followed by an overview of the most important barriers for children in accessing justice mechanisms (para. 2). The third paragraph touches upon the specific barriers that children deprived of liberty face and gives an overview of international human rights standards providing guidance on the establishment of

<sup>9</sup> Joint report 2012, para. 36.

<sup>10</sup> Art. 19 CRC. See also CRC Committee 2011;

<sup>11</sup> Art. 37 (a) CRC. Joint Report 2012;

<sup>12</sup> UN Rapporteur on Torture 2015; Liefwaard, Reef & Hazelzet 2014.

<sup>13</sup> See e.g. CRC Committee 2007, paras. 13 and 14.

<sup>14</sup> UN GA Res. A/C.3/69/L.24/Rev.1 (para. 51.d). See further <http://www.childrendeprivedofliberty.info/> (last visited, 21 August 2016).

<sup>15</sup> This chapter refers to children as defined in art. 1 of the CRC: 'every person under the age of eighteen years.

<sup>16</sup> It does not address mechanisms in relation to the decision to deprive a child of his liberty or to prolong it, such as the right to *habeas corpus*; see art. 37 (d) CRC; see also art. 9 (4) ICCPR and regional equivalents such as art. 5 (4) ECHR.

complaints mechanisms and other remedies in and around institutions. The chapter subsequently elaborates on key issues that ought to be considered when enforcing international standards meant to safeguard access to effective remedies for children deprived of their liberty at the domestic level (para. 4). This could help domestic legislators address these issues in developing specific legislation for this group of children, something that should be considered one of the key priorities in safeguarding access to justice for these children. The chapter closes with some concluding observations (para. 5).

Much can be said about the definition of deprivation of liberty under international law. This chapter refers to deprivation of liberty as ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority’.<sup>17</sup> Consequently, deprivation of liberty covers a wide variety of forms of custodial placement in different legal contexts, including arrest, detention or imprisonment in context of criminal justice, placement in child protection or child welfare institutions or other facilities meant to protect children, placement in psychiatric institutions or hospitals, detention in the context of migration and detention for other administrative or military purposes.<sup>18</sup> Although the reasons and grounds for deprivation of liberty differ, children in all these institutions share the limitation of their fundamental right to personal liberty,<sup>19</sup> and based on article 37 (c) CRC, they are all entitled a human rights based and child specific treatment and protection, including the rights to access justice and seek effective remedies.

## 2. Access to Justice and the Right to an Effective Remedy

### 2.1 Access to Justice

In his 2013 report on access to justice for children, the UN High Commissioner for Human Rights (High Commissioner) defines access to justice as ‘the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards, including the Convention on the Rights of the Child’.<sup>20</sup> Access to justice ‘applies to civil, administrative and criminal spheres of national jurisdictions, including customary and religious justice mechanisms, international jurisdictions, as well as alternative and restorative dispute resolutions’.<sup>21</sup> It covers ‘all relevant judicial proceedings, affecting children without limitation, including children alleged as, accused of, or recognized as having infringed the penal law, victims and witnesses or children into contact with the justice system for other reasons, such as regarding their care, custody or protection’.<sup>22</sup> This reflects the common approach towards access to justice, emerging in the past two decades, which is primarily about the right to legal action against rights violations, but which ‘more broadly encompasses equitable and just remedies’.<sup>23</sup> Access to justice is consid-

<sup>17</sup> Rule 11(b) UN Rules for the Protection of Juveniles Deprived of their Liberty (JDLs). Similar definitions can be found in article 4 (2) of the Optional Protocol to the Convention against Torture (OPCAT) and rule 21.5 European Rules for juvenile offenders subject to sanctions or measures. This definition to a large extent covers ‘detention’ under article 5 European Convention on Human Rights (ECHR) as constructed under the case law of the European Court of Human Rights (ECtHR); see e.g. Trechsel 2005, p. 412ff.

<sup>18</sup> See also DCI Belgium 2016, p. 23ff.

<sup>19</sup> See e.g. art. 9 (1) ICCPR.

<sup>20</sup> UN High Commissioner 2013, para. 4 with reference to UN Common Approach to Justice for Children (UNICEF 2008), p. 4.

<sup>21</sup> UN High Commissioner 2013, para. 4.

<sup>22</sup> UN High Commissioner 2013, para. 4.

<sup>23</sup> UNICEF 2015, p. 18.

ered an ‘integral component of any good rule of law framework’ as well as ‘a prerequisite for sustainable development, the eradication of poverty, and greater equality’.<sup>24</sup> In light of this, the United Nations Children’s Fund (UNICEF) has defined access to justice as ‘the right to obtain a fair, timely and effective remedy for violations of rights, as put forth in national and international norms and standards, through adapted processes that protect children’s dignity and promote their development’.<sup>25</sup> Earlier the United Nations Development Programme (UNDP) provided similar definitions,<sup>26</sup> which also informed the ones mentioned here, and stated that access to justice is ‘much more than improving an individual’s access to courts, or guaranteeing legal representation’. ‘It must’, according to the UNDP, ‘be defined in terms of ensuring that legal and judicial outcomes are just and equitable’.<sup>27</sup> The broader notion of access to justice, which recognizes that it is not only a right but also a prerequisite for an unconditional respect for human rights and the rule of law and for sustainable development, has run rampant with the adoption of the Sustainable Development Goals (SDGs). Target 16.3 of the SDGs provides that ‘the rule of law’ should be promoted at the national and international levels and that ‘equal access to justice for all’ should be ensured. Access to justice has thus been incorporated into the international development agenda underscoring that it is important for adults and children alike and not only as a matter of procedure but also of fair and equitable outcomes. This makes the concept relevant for all children deprived of their liberty worldwide.

## *2.2 The Right to an Effective Remedy*

### *a. International human rights law*

Access to justice enshrines the right to an effective remedy, which can be regarded as a corner stone of international human rights law.<sup>28</sup> Article 8 of the Universal Declaration of Human Rights (UDHR) provides the right to an effective remedy to ‘[e]veryone’, and article 2 (3) of the International Covenant on Civil and Political Rights (ICCPR) stipulates that states parties are under the obligation to safeguard ‘that any person whose right and freedoms (...) are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity’. According to the Human Rights Committee this provision requires states parties to ensure that individuals can vindicate their rights through ‘accessible and effective remedies’.<sup>29</sup> And ‘[s]uch remedies should be appropriately adapted as to take account of the special vulnerability of certain categories of persons, including in particular children’.<sup>30</sup> Art. 2 (3) ICCPR also provides that states parties must ‘ensure that any person claiming (...) a remedy shall have his right (...) determined by competent, judicial, administrative and legislative authorities, or by any other

<sup>24</sup> UNICEF 2015, p. 18.

<sup>25</sup> UNICEF 2015, p. 13. Cf. UNICEF 2008.

<sup>26</sup> UNDP has defined access to justice as ‘the ability of people to seek and obtain a remedy through formal and informal institutions of justice, in conformity with human rights standards’; UNDP 2005, p. 5. See for a critical analysis of this definition Bedner & Vel 2010, who provide an analytical framework for empirical research on access to justice.

<sup>27</sup> UNDP 2004, p. 6; see furthermore UN Approach to Justice for Children 2008, p. 4 and UNICEF 2015, p. 18.

<sup>28</sup> See Shelton 2015 for a comprehensive analysis of remedies under international human rights law. Shelton refers to a slightly narrower concept of access to justice meant to ensure ‘the possibility of an injured individual or group to bring a claim before an appropriate tribunal and have it adjudicated’, which ‘increasingly means by judicial proceedings’ (Shelton 2015, p. 96); access to justice is as ‘the first part of providing domestic remedies’, i.e. an essential procedural element of remedies; see Shelton 2015, p. 17-18. See furthermore the study on access to justice by the Inter-American Commission on Human Rights (IACHR 2007).

<sup>29</sup> Human Rights Committee 2004, para. 15.

<sup>30</sup> Human Rights Committee 2004, para. 15. See also art. 24 ICCPR.

competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy'. Judicial remedies can safeguard the enjoyment of human rights through direct applicability of international or national law or the interpretation of national law in light of international law. The Human Rights Committee also underscores that '[a]dministrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies' (see further below). In this regard, National Human Rights Institutions (NHRI's), such as ombudspersons, can play an important role. Not only can they provide remedies for human rights violations, they can also play a preventive and investigative role.<sup>31</sup>

It is clear that remedies can have different forms and are not limited to judicial remedies. Consequently, individuals cannot always claim such remedies, at least not in first instance. The wording of article 2 (3)(c) ICCPR indicates that the possibility of a judicial remedy must be developed as a form of appeal. Article 25 of the American Convention on Human Rights (ACHR) provides the right to an effective judicial remedy, under the ACHR and the national constitution.<sup>32</sup> Under the European Convention on Human Rights (ECHR), however, the right to an effective remedy does not require access to a judicial remedy, 'since other remedies may present the required effectiveness'.<sup>33</sup> The type of remedy required is dependent upon the nature and gravity of the allegation<sup>34</sup> and is as will be further elaborated in paragraph 4 also related to the remedy's function.

Failure to investigate allegations of human rights violations may in itself violate international law, particularly in cases of allegations of serious violations, such as violations of the right to life and freedom from torture or other forms of ill-treatment. International human rights courts are in agreement in this regard and also provide that the complainant must be granted effective access to the investigative procedure.<sup>35</sup> The Human Rights Committee adds that '[c]essation of an ongoing violation is an essential element of the right to an effective remedy'.

Regardless of the body authorized to provide remedies, according to art. 2 (3) ICCPR states parties are under the obligation to ensure that 'the competent authorities shall enforce (...) remedies when granted'.<sup>36</sup> This concerns the effectiveness of remedies, which in essence comes down to the competence of the relevant authorities to take a decision on the merits of the complaints and to provide adequate redress for any violation found.<sup>37</sup> The state is subsequently held to make reparations, without which 'the obligation to provide an effective remedy, which is central to the efficacy of article 2, paragraph 3, is not discharged'.<sup>38</sup> The Human Rights Committee adds that where appropriate reparation can involve compensation as well as 'restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes

<sup>31</sup> For more on the role of NHRI's, also in preventing human rights violations see De Schutter 2010, p. 771ff; see also CRC Committee 2003, CRC Committee 2002 and UNICEF 2013.

<sup>32</sup> De Schutter 2010, p. 733.

<sup>33</sup> De Schutter 2010, p. 735 with reference to ECtHR, 5 February 2002, Appl. No. 51564/99 (Conka v. Belgium), para. 75.

<sup>34</sup> Shelton 2015, p. 94.

<sup>35</sup> Shelton 2015, p. 94-95 with reference to case law of the European Court of Human Rights (Aksoy v. Turkey) and the Inter-American Court of Human Rights (Velasquez-Rodriguez); see also Rodley & Pollard 2009, Van Zyl Smit & Snacken 2009 and Murdoch 2006.

<sup>36</sup> Art. 2 (3) ICCPR.

<sup>37</sup> De Schutter 2010, p. 737. See also Council of Europe *Recommendation Rec(2004)6 of the Committee of Ministers to Member States on the improvement of domestic remedies*.

<sup>38</sup> Human Rights Committee 2004, para. 16.

in relevant laws and practices'.<sup>39</sup> It also enshrines that perpetrators of rights violations are brought to justice and held to account.<sup>40</sup>

As far as reparation is concerned, a particularly strong position is taken by the Inter-American Court on Human Rights, which has provided that 'the objective of international human rights law is (...) to protect the victims and to provide for the reparation of damages'.<sup>41</sup> As Shelton puts it: '[i]t places reparations at the centre of the entire human rights project'.<sup>42</sup> Other human rights tribunals are less clear in their role in awarding remedies.

In conclusion, the right to an effective remedy has a procedural, as well as a substantive, component. The former encompasses the right to have one's complaint about an alleged rights violation dealt with (i.e. heard and decided) by a judicial, administrative or other competent body. The latter relates to the outcome of the proceedings and the reparation, relief or compensation offered to the individual.<sup>43</sup>

### *b. Children's right to an effective remedy*

The right to an effective remedy has not been explicitly recognized in the CRC, but according to the UN Committee on the Rights of the Child (CRC Committee) it is 'implicit in the [CRC] and consistently referred to in the other six major international human rights treaties'.<sup>44</sup> The right to an effective remedy complements specific legal safeguards that can be found in the CRC, such as the right to challenge the legality of a child's deprivation of liberty before a judicial or other competent, independent or impartial body (Art. 37 (d) CRC), and the Optional Protocol to the Convention on the Rights of the Child on a communications procedure (3<sup>rd</sup> Optional Protocol), which entered into force in 2014 and grants children the right to lodge individual communications at the international level.<sup>45</sup> It is too early to say how the CRC Committee, competent to receive individual communications under the 3<sup>rd</sup> Optional Protocol, approaches the issue of effective remedies and to what extent it will recognize the child's right to an effective remedy into its decisions. Children whose rights have indeed been violated should receive 'appropriate reparation, including compensation, and, where needed, measures to promote physical and psychological recovery, rehabilitation and reintegration, as required by article 39 [CRC]'.<sup>46</sup> This reiterates that appropriate reparation and compensation is regarded key for the efficacy of the right of the child to seek effective remedies.

## *2.3 Challenges and Barriers for Children*

The CRC Committee observes that '[c]hildren's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights'.<sup>47</sup> Therefore, states 'need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives'.<sup>48</sup> These procedures 'should include the provision of child-friendly information, advice, advocacy, including support for self-advocacy, and access to indepen-

<sup>39</sup> Human Rights Committee 2004, para. 16.

<sup>40</sup> Human Rights Committee 2004, para. 16.

<sup>41</sup> Shelton 2015, p. 1 with reference to Inter-American Court of Human Rights, *Velasquez Rodriguez v. Honduras* (1988) Series C, 28, ILM 291, para. 134. See also *Feria Tinta* 2015.

<sup>42</sup> Shelton 2015, p. 1.

<sup>43</sup> Shelton 2015, p. 16.

<sup>44</sup> CRC Committee 2003, para. 24; see also art. 41 CRC and regional treaties; see De Schutter 2010, p. 733ff.

<sup>45</sup> UN Doc. A/HRC/RES/17/18.

<sup>46</sup> CRC Committee 2003, para. 24.

<sup>47</sup> CRC Committee 2003, para. 24.

<sup>48</sup> CRC Committee 2003, para. 24.



dent complaints procedures and to the courts with necessary legal and other assistance'.<sup>49</sup> Indeed, children have significant interest in access to justice, because of their special status. In addition, they face barriers when it comes to remedies and this affects their effectiveness.<sup>50</sup> Barriers relate to the complexity of justice systems, which makes them difficult to understand for children. Children may also be unaware of their rights and lack essential information, also on how to acquire (legal) assistance. Moreover, justice mechanisms may not be adjusted to children (i.e. not child-specific or child-friendly) or they may even be discriminatory towards children or specific groups of children. Justice systems may very well be unsafe for children, intimidating or stigmatizing, and children may not have the trust and confidence that their complaints will be taken seriously or addressed in a fair manner.<sup>51</sup> Cultural and social norms can also stand in the way of accepting that children lodge complaints and claim redress or in recognizing that the rights of children are violated.<sup>52</sup> Violence against children, which is in practice at the local level not always perceived as a rights violation, despite article 19 CRC's prohibition of all forms of violence and the growing consensus at the international level that 'no violence is justifiable and all violence is preventable'.<sup>53</sup> Generally, children may be denied access to justice as well or the significance of access to justice for children is disregarded.<sup>54</sup> This relates, among others, to legal barriers, such as the lack of legal capacity to access to justice and ability to seek remedies, and practical barriers, such as costs of proceedings, lack of free legal assistance or physical distance to courts or other authorities.<sup>55</sup> Finally, certain groups of children face particular difficulties in accessing justice. Children deprived of their liberty can be considered one of them (see further below).<sup>56</sup>

To overcome these challenges and barriers, the UN High Commissioner of Human Rights, like the CRC Committee, emphasizes the importance of child-sensitive procedures and the legal empowerment of 'all' children, which encompasses access to 'legal and other services, child rights education, counselling or advice, and support from knowledgeable adults'.<sup>57</sup> With regard to the child-specificity, child-sensitivity or child-friendliness of remedies, the concept of child-friendly justice, which has found its way to a set of guidelines adopted by the Council of Europe in 2010, provides further guidance. The Guidelines on child-friendly justice,<sup>58</sup> which emerged under the influence of international children's rights, in particular children's right to be heard and participatory right and the case law of the European Court of Human Rights,<sup>59</sup> provides concrete guidance to states on how to make justice systems for children accessible and more effective.<sup>60</sup> "Child-friendly justice" refers to justice systems which guarantee the respect and the effective implementation of

<sup>49</sup> CRC Committee 2003, para. 24.

<sup>50</sup> UN High Commissioner 2013, para. 13ff. See also UNICEF 2015, p. 9-13 and 66ff.

<sup>51</sup> UN High Commissioner 2013, para. 15.

<sup>52</sup> UN High Commissioner 2013, para. 15; see also UNICEF 2015, p. 80ff.

<sup>53</sup> UN Violence Study 2006.

<sup>54</sup> See e.g. CRIN 2016.

<sup>55</sup> UN High Commissioner 2013, para. 16.

<sup>56</sup> UN High Commissioner 2013, para. 17.

<sup>57</sup> UN High Commissioner 2013, para. 5.

<sup>58</sup> Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, Strasbourg, 17 November 2010 (Guidelines on child-friendly justice).

<sup>59</sup> Liefwaard 2016, p. 905.

<sup>60</sup> Although the guidelines are only relevant for the 47 member states of the Council of Europe, the concept of child-friendly justice is used in other parts of the world as well; see Liefwaard 2016, p. 915. The concept of child-friendly justice somewhat overlaps with the 'child-sensitive approach' as 'an approach that [balances] a child's right to protection and that takes into account a child's individual needs and views'; art. 9 (d) United Nations Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime, Economic and Social Council Res. 2005/20, 22 July 2005. The High Commissioner's report also refers to child-sensitive information and procedures; UN High Commissioner 2013, paras. 18ff and 21ff.

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 case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity'.<sup>61</sup> Depending on the specific context in which the child finds himself, child-friendly justice has specific implications for the way children can be legally empowered to access justice on the one hand and for specific procedures revolving around effective remedies on the other. Deprivation of liberty is such a context.

### 3. Children Deprived of Their Liberty: Effective Remedies in International Standards

#### 3.1 *The Significance of Remedies for Children Deprived of Their Liberty*

Access to justice is relevant for children deprived of liberty, like it is for every other child.<sup>62</sup> As mentioned in the introduction to this chapter, children deprived of their liberty must be recognized as rights holder in the first place,<sup>63</sup> which includes the right to an effective remedy. The introduction also highlighted the specific relevance of access to justice for children deprived of liberty, including protection against violence and serious forms of ill-treatment. Access to justice can safeguard equitable and child-rights treatment for all children deprived of their liberty, which essentially revolves around respect for the child's best interests, his right to live, survival and development (art. 6 CRC), the right to be reintegrated into society where he can play a constructive role and fair treatment including engagement with and participation in life in the institution.<sup>64</sup> For children deprived of their liberty, the right to make requests and lodge complaints turns out to be particularly relevant. 'Without access to complaint mechanisms, these children face an increased risk of suffering abuse of authority, humiliation, ill-treatment and other unacceptable deprivation of rights', according to the High Commissioner.<sup>65</sup> It is precisely because of this that international human rights standards recognize the right to make requests and lodge complaints as an essential feature of the legal status of the child deprived of liberty.<sup>66</sup> In practice, however, children deprived of their liberty have particular problems with accessing information, receiving legal and other appropriate assistance, including assistance by family members, and accessing mechanisms in the institution's vicinity that are, among others, offering accessible, age appropriate, safe, speedy and sustainable remedies.<sup>67</sup> Also the substantiation of claims concerning and allegations of ill-treatment are often hard to make for individuals deprived of liberty and this might even be harder for children.<sup>68</sup> Furthermore, children deprived of liberty belong to the most stigmatized children in society<sup>69</sup> resulting in the denial of their human rights and access to justice.

<sup>61</sup> Guidelines on child-friendly justice, under II.c.

<sup>62</sup> Art. 2 CRC.

<sup>63</sup> Art. 37 (c) CRC.

<sup>64</sup> For more on the functions of the right to complaint see para. 4.

<sup>65</sup> UN High Commissioner 2013, para. 27.

<sup>66</sup> Murdoch 2006, p. 32. Liefwaard 2008.

<sup>67</sup> UN Violence Study 2006; see also Liefwaard, Reef & Hazelzet 2014.

<sup>68</sup> Murdoch 2006, p. 32 with references to examples related to case law of the European Court of Human Rights (Aksoy v. Turkey; Cotlet v. Romania; Labita v. Italy).

<sup>69</sup> Including children in conflict with the law, children in need of care, immigrant children, street children, children with (mental) health problems, drug addicted children, children with disabilities, children allegedly

### 3.2 International Standards for Children Deprived of Their Liberty: The Right to Make Requests and File Complaints

The position of the individual deprived of his liberty has received specific attention in international and regional human rights treaties and revolves around the requirement to treat them with respect for humanity and the inherent dignity of the human person<sup>70</sup> and to protect him against torture or other forms of cruel, inhuman or degrading treatment or punishment.<sup>71</sup> This also concerns children deprived of liberty, although article 37 CRC additionally and explicitly provides that the child deprived of liberty is entitled to be treated in a child-specific manner, which among others implies that he must – in principle – be separated from adults and has the right to maintain contact with his family.<sup>72</sup> The many international and regional standards developed for the treatment of prisoners and others deprived of liberty provided more detailed guidance on how to protect the substantive and procedural rights and interests and this includes access to complaints mechanisms.<sup>73</sup> Before going more into the specifics, it is important to note that most of the international standards reach out to different forms of deprivation of liberty. This is particularly true for the UN Rules for the Protection of Juveniles Deprived of their Liberty (JDLs; unofficially known as the Havana Rules), the most prominent international legal instrument for *children*, which is applicable to all forms of deprivation of liberty.<sup>74</sup>

The right to make requests and file complaints is recognized in all international human rights instruments affecting individuals deprived of liberty, including children, and this can be regarded as the most prominent recognition of access to justice. The JDLs provide that every child should have the opportunity to make requests and complaints to the director of the institution.<sup>75</sup> It also stipulates that ‘every juvenile should have the *right* [Italic – TL] to make a request or complaint,

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involved in radical groups or terrorist activities etc.

<sup>70</sup> See art. 10 ICCPR.

<sup>71</sup> See art. 7 ICCPR and the UN Convention Against Torture (CAT). For a more detailed analysis of the relevant international and regional instruments for individuals deprived of their liberty see Rodley & Pollard 2009, Van Zyl Smit & Snacken 2009, Murdoch 2006 and Morgan & Evans 2001. For a comprehensive analysis of the relevant international and regional instruments for children deprived of liberty see Liefwaard 2008.

<sup>72</sup> See art. 37 (c) CRC. The CRC is also firmer and more explicit on the requirement to use deprivation of liberty only as a measure of last resort and for the shortest appropriate period of time.

<sup>73</sup> Instruments that will be referred to in this chapter include both international standards, in particular the 1955 UN Standard Minimum Rules for the Treatment of Prisoners, revised in 2015 as the Nelson Mandela Rules and the 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty (GA Res. 45/113), and European standards developed by the Council of Europe, in particular the European Rules for juvenile offenders subject to sanctions and measures (European rules for juvenile offenders; Recommendation CM/REC(2008)11) and the ‘CPT-standards’ developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), the non-judicial monitoring body under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Council of Europe; *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 26 November 1987, ETS 126. For institutionalisation of children as form of alternative care (see art. 20 CRC), the Guidelines for the Alternative Care of Children adopted by the UN in 2010 (UN Doc. A / RES/64/142) are relevant, because provide guidance on the administration of institutions and the protection of the rights and interests of children placed in these forms of alternative care

<sup>74</sup> For the definition see rule 11 (b) and the introduction. Also the Nelson Mandel Rules concern ‘all categories of prisoners, criminal or civil, untried or convicted, including prisoners subject to “security measures” or corrective measures ordered by the judge’ (preliminary observation 3.1).

<sup>75</sup> Rule 75; Requests can, for example, concern decisions or policies regarding placement and transfer, contact with the outside world, including contact with family, leave and reintegration arrangements; they can also concern requests for investigation into matters related to rights violations. Complaints are likely to concern individual decisions (or the absence of decisions) concerning disciplinary measures, the use of restraint or force or screening methods, but also the way the institution is treating prisoners more generally. Complaints can also affect decisions taken upon requests made by individuals.

without censorship as to substance, to the central administration, the judicial authority or other proper authorities through approved channels, and to be informed of the response without delay'.<sup>76</sup> The JDLs furthermore stipulates that '[e]fforts should be made to establish an independent office (ombudsman) to receive and investigate complaints made by juveniles deprived of their liberty and to assist in the achievement of equitable settlements' (rule 77). The provisions in the JDLs correspond with provisions in general international and regional instruments concerning the treatment of prisoners, which more or less provide the same minimum requirements, albeit with some variations.<sup>77</sup> The significance of complaint mechanisms for children deprived of their liberty has also been underscored by the CRC Committee in its General Comment on juvenile justice and children's rights.<sup>78</sup> The Guidelines for the Alternative Care of Children also provide that '[c]hildren in care should have access to a known, effective and impartial mechanism whereby they can notify complaints or concerns regarding their treatment or conditions of placement', which underscores the need for the development of complaint mechanisms for children in alternative care (see art. 20 CRC), including forms of deprivation of liberty. The Guidelines add that '[s]uch mechanisms should include initial consultation, feedback, implementation and further consultation', that '[y]oung people with previous care experience should be involved in this process, due weight being given to their opinions' and that '[t]his process should be conducted by competent persons trained to work with children and young people'. This is meant to give more guidance on how to make complaint mechanisms child-specific and tailored to the particular context of care facilities. It also underscores that procedures like these are not only meant to be formal and can also include the involvement of peers.

#### 4. Key Issues with Regards to Children's Right to File Complaints

##### 4.1 Introduction

The previous paragraph made clear that international instruments provide that the right to make requests and file complaints should be awarded to all children deprivation of liberty. This right is not limited to a specific context, but includes all forms of deprivation of liberty. It has also become clear that the child specific instruments developed both internationally and regionally primarily build on already existing general international standards. However, all standards remain rather general and are not very detailed. More importantly, they do not provide much child-specific guidance, which can effectively contribute to overcome the barriers children experience when accessing remedies such as complaints procedures. Consequently, it is important to consider other standards that add to the international instruments meant to safeguard protection of children deprived of liberty, including the Council of Europe's European rules for juvenile offenders and the Guidelines on child-friendly justice and the General Comments of the CRC Committee. It furthermore requires that domestic legislators develop national legislation in which international standards are reflected and further guidance is provided. This has also the benefit of increasing the legal status of the rules, since many of the legal instruments are as such not legally binding or are not (yet) backed up by case law; incorporation in the domestic law will harden their legal value and provide children with a more solid ground to rely on.

<sup>76</sup> Rule 76.

<sup>77</sup> See e.g. Rule 56 (3) Nelson Mandela Rules. See also European Prison Rules, European Rules for juvenile offenders, 'CPT standards'.

<sup>78</sup> CRC Committee 2007, para. 89. See also Human Rights Committee 1992.

This paragraph elaborates on key issues that ought to be considered when enforcing international standards meant to safeguard access to effective remedies for children deprived of their liberty. These key issues relate to roughly two categories: 1) the forum and functions of complaint mechanisms, including connected issues such as independence and impartiality and the co-existence and interplay between complaint mechanisms and inspection and monitoring (para. 4.2) and 2) the legal empowerment of children, which, among others, reaches out to information and education (also for staff), legal and other appropriate assistance and child-friendly procedures (para. 4.3).

In practice, one comes across a wide variety of mechanisms for individuals deprived of their liberty to seek remedies or to access justice in other ways. And, in many countries, there is some kind of (formal or informal) complaint mechanism for prisoners, including children (see further below).<sup>79</sup> However, not much is known about how these complaints mechanisms for children operate in practice. In addition, there is hardly any evidence on what works or not, let alone that we understand how children experience these mechanisms themselves.<sup>80</sup> The following part is therefore largely based on international assumptions and consensus regarding what access to justice should entail—as a minimum—for children deprived of their liberty. However, one should be realistic; what is laid down in international regional human rights standards and subsequently called for by international (non)governmental organisations, including the CRC Committee, does not guarantee their effective application in practice<sup>81</sup> and much more research is needed.<sup>82</sup>

#### *4.2 Forum and Functions of Complaints Procedure*

The first category of issues relates to the forum or authority (hereinafter: forum) before which children can make requests or lodge complaints. As highlighted in paragraph 2, remedies can be sought and found through a wide variety of judicial and non-judicial mechanisms. International instruments too refer to different fora in- and outside the institution, but are not always consistent in this regard. This lack of clarity or guidance can be explained by (and explains in itself) the wide variety of complaints mechanisms one comes across at the country level. Van Zyl Smit & Snacken refer to four groups of mechanisms.<sup>83</sup> The first concerns *lay independent monitoring boards*, also called ‘board of visitors’, known in England and Germany. These boards can be approached informally and can mediate and resolve disputes. In general they cannot issue legally binding decisions, but they can make recommendations to the authorities on how to deal with complaints. The second mechanism is that of an *ombudsperson* for requests and complaints, a model that is for example present in many Central European countries. These ombudspersons, specialized in prisons or with a more general mandate, have the competence to investigate specific complaints and can make recommendations. The third model is the model in which local complaints committees can make binding decisions, which can be appealed to a central administrative organ, which also issues binding decisions. This model can be found in the Netherlands and Belgium<sup>84</sup> and include quasi-judicial elements. Fourth, there are examples of countries (e.g. Italy, France and Germany) in which judges and courts can play a role in matters concerning complaints or requests of individu-

<sup>79</sup> Van Zyl Smit & Snacken 2009; see also Liefwaard, Reef & Hazelzet 2014 and Dünkel & Sta do-Kawecka 2010, p. 1793.

<sup>80</sup> De Graaf, Christiaens & Durmortier 2016. See further Children’s Rights Alliance for England 2013.

<sup>81</sup> See e.g. Goldson & Kilkelly 2013.

<sup>82</sup> Hopefully, the envisaged global study in deprivation of liberty can make a contribution in this regard. See furthermore De Graaf, Christiaens & Durmortier 2016.

<sup>83</sup> Van Zyl Smit & Snacken 2009, p. 308-310.

<sup>84</sup> Cf. De Graaf, Christiaens & Durmortier 2016.

als deprived of their liberty. Of course, individuals deprived of liberty can have access to general remedies available to all citizens. Van Zyl Smit & Snacken refer to an 'increasing control over the legality, legitimacy and proportionality of (...) decisions [by prison administrations]' by the administrative courts and courts dealing with urgent matters.<sup>85</sup>

The choice for complaints mechanisms, formal or more informal, judicial or non-judicial, positioned in- or outside the institution, is connected to the diversity of functions complaints mechanisms can have, as well as to the seriousness and gravity of the allegation (see para. 2). The function helps to define the right forum. One could distinguish four functions.<sup>86</sup>

#### *a. Remedy against unlawful or arbitrary treatment by the institution*

First, complaint mechanisms offer a *remedy against unlawful or arbitrary treatment by the institution*. This function aims to offer protection against (serious) rights violations, including the most serious forms of ill-treatment, but also denial of family contact (article 37 (c) CRC), the use of disciplinary measures and the use of or inadequate protection against violence by staff or other inmates and the lack of fair treatment. It also aims to facilitate investigation, accountability, compensation, reparation and restoration. The mechanisms should, in order to be effective, enshrine ways to formally question his treatment, e.g. by security staff or group workers, before the director of institution, but also before the overarching competent authorities outside the institution, such as the central prison administration. Children should additionally be granted opportunities to lodge a formal complaint outside the institution before an independent and impartial authority. Independence and impartiality contribute to the effectiveness of the remedy in the sense that it prevents that human rights violations remain inside the institution or inside the government and therefore remain invisible for the outside world. As highlighted before, failure to investigate allegations of serious human rights violations and to offer effective participation in investigative procedures can in itself constitute a violation of international human rights law (see para. 2). In this regard, it is rather remarkable that international instruments are not utterly clear, at least not consistent, in their demands regarding independence and impartiality. As mentioned in paragraph 3, the JDLs provide that children should have access to an independent office/ombudsman competent to receive and investigate complaints and to assist in the achievement of equitable settlements.<sup>87</sup> However, this is one of the few references to the establishment of 'independent' institutions competent to receive complaints of children. Rule 70 JDLs furthermore provides that in case of disciplinary measures a child should have the right of appeal to a 'competent impartial authority' and the Nelson Mandela Rules underscore the importance of impartiality and independence in case of allegations of torture or other cruel, inhuman or degrading treatment or punishment of prisoners.<sup>88</sup> Furthermore, the European rules for juvenile offenders underscore, more firmly, that children or where applicable their parent or legal guardian 'shall have the right to appeal to an independent and impartial authority'.<sup>89</sup> The CRC Committee has also underscored the importance of independence by recommending states parties to grant every child deprived of his liberty the right to make request or complaints (...) to the central administration, the judicial authority or other proper *independent* [Italic – TL]

<sup>85</sup> Van Zyl Smit & Snacken 2009, p. 310.

<sup>86</sup> Liefwaard 2012.

<sup>87</sup> Rule 77.

<sup>88</sup> Rule 57 (3) Nelson Mandela Rules.

<sup>89</sup> Rule 122.3 European rules for juvenile offenders.

authority'.<sup>90</sup> It therefore seems fair to conclude that children deprived of their liberty should have access to an individual and impartial body. This is particularly prompted in cases of disciplinary proceedings and allegations of serious ill-treatment and in this regard the threshold for children seems lower than for adults.<sup>91</sup> As mentioned in paragraph 2, international human rights courts are in agreement that in case of allegations of serious human rights violations states are under the responsibility to effectively investigate the claim brought to its attention and that this investigation can actually result in investigation and punishment of those responsible.<sup>92</sup> This includes effective access to the procedure for the complainant. This is of particular relevance for children deprived of their liberty and implies that, for example in case of allegations of torture or other forms of cruel, inhuman or degrading treatment or punishment, but arguably also in case of violence more generally, children must be granted opportunities to inform the director of the institution as well as the central administration responsible for the institution (to make the authorities falling under responsibility of the state aware of the allegations) and access to independent authorities in case the institution administration do not respond appropriately or timely. In other words, the nature and seriousness of the allegations defines the remedy including the forum, which leaves open the opportunity that less serious issues or general issues relating to the conditions and regime in the institution can be dealt with by the institution administration or by the central prison administration. In such situation there may not be a need to grant access to a fully objective or even judicial authority.

The effectiveness of the remedy in light of this function, revolving around providing adequate protection against (serious) human rights violations, is also dependent on the actual remedies or the 'reviewing or remedial power'<sup>93</sup> of the mechanism. To what extent can the authority issue legally binding decisions (e.g. to overturn decisions taken by the institution or take interim measures that seize human rights violations), to what extent can it order reparation and or compensation and to what extent can it help to hold those responsible accountable? These questions should be addressed in domestic legislation.

### *b. Dispute settlement*

Complaints lodged by children deprived of their liberty are not necessarily about serious or less serious rights violations. They may very well be about to disputes or disagreements, which affect the well-being of children as well as the way they can cope with the institutionalisation.<sup>94</sup> In this regard complaints mechanisms can serve as a means to settle disputes or mediate between the child and the institution. The European rules for juvenile offenders have recognized this second function of complaints mechanisms by underscoring the importance of mechanisms that facilitate mediation and restorative conflict resolution in order to respond to disputes between the child and the institution or between the child and other children. One could argue that the settlement of dispute is a matter for the institution and there may be no need to safeguard access to mechanisms outside. However, as indicated by the JDLs in rule 77, there is reason to provide that children should have access to an independent office/ombudsman competent to receive and investigate complaints and

<sup>90</sup> CRC Committee 2009, para. 89. The CPT has also underscored the significance of independence in its CPT standards and country visits; Van Zyl Smit 2009, p. 310.

<sup>91</sup> UN Rapporteur on Torture 2015, para. 16ff; Liefaard 2008.

<sup>92</sup> Shelton 2015, p. 94.

<sup>93</sup> Rule 56 (3) Nelson Mandela Rules.

<sup>94</sup> See De Graaf, Christiaens & Dumortier 2016 with reference to literature on children's adaptation to institutional life.

to assist in the achievement of equitable settlements. This could concern complaints regarding the way the institution responded to a grievance of the child. In addition, mediation methods could also be used as part of the procedure concerning rights violations or arbitrary treatment.

For the settlement of disputes, speediness and diligence is key. The sooner conflicts or disputes can be solved, the better and more likely it is that this can happen through informal mechanisms than through formal mechanisms. By way of example: the Dutch Youth Custodial Institutions Act, which has been specifically designed to improve the legal status of children deprived of their liberty and provides detailed minimum guarantees including the right to complaint,<sup>95</sup> grants every child the right to lodge a request for mediation. This can concern both individual decisions as well as the way a child or children in general, are treated by the institution. The Dutch legislator underscored the significance of dealing with complaints as quick and as informal as possible and a mediation procedure like this one could facilitate that. The legislator also argued that it is up to the child to try to discuss grievances informally with group leaders before seeking access to more formal means. This may sound reasonable, but it is not safe to assume that this can be expected from children without receiving adequate information or education on how to access justice (see further below). Moreover, one should not disregard to the fact, the right to an effective remedy means that the child who wants to lodge a complaint should not be withheld from doing so.<sup>96</sup> Nevertheless, it points at a continuum between the communication inside institutions and complaints mechanisms, which relates to the 3<sup>rd</sup> function of complaints mechanisms:

*c. Safeguarding communication between the child and the institution:  
the right to be heard*

The possibilities to lodge complaints and make requests, for example concerning leave, contact with family or transfer to another facility, as recognized in international standards essentially revolve around safeguarding communication between child and institution. This can be regarded as a third function of these mechanisms. It is connected to children's participation in the institution, in general and in decision-making affecting them. Children should be able to connect with life in the institution<sup>97</sup> and to participate in decision-making affecting them. Children are entitled to be taken seriously and the child's right to be heard is key in this regard.<sup>98</sup> Every child has the right to be heard and his views must be given due weight in accordance with his age and maturity.<sup>99</sup> This has implications for all decisions affecting children, including for example the use of disciplinary measures. Complaints mechanisms can safeguard that children's view are indeed taken into consideration.

At the same time, communication between a child and the institution can assist in preventing the use of complaints mechanisms. Children may very well lodge complaints, because they do not feel respected. Proper communication might then take away their grievances. Institutions could, furthermore, work with youth councils in order to enable children to share their views and opinions with the director of the institution.

In sum, complaints mechanisms functions as part of the on-going communication with children; on-going communication with children fosters their feeling of belonging and respect and can serve

<sup>95</sup> See Liefwaard 2008 for more on this Act and its application in practice.

<sup>96</sup> Liefwaard 2012, p. 248-249; see also Liefwaard 2008.

<sup>97</sup> Van Zyl Smit & Snacken 2009, p. 305.

<sup>98</sup> See also CRC Committee 2009.

<sup>99</sup> Art. 12 CRC.



as a means to prevent disputes, which might require the use of formal means of settlement later on. The right to complaint might contribute to an institutional climate in which children's participation becomes more self-evident and an integral part of the institution regime and this may even contribute to the prevention of violence.<sup>100</sup>

#### *d. Increasing transparency and the visibility of the child*

A fourth function of complaints procedures is that they can make institutions more transparent and children more visible. Complaints procedures can facilitate the exchange of information regarding the treatment of children, which gives better insight in institution practices. In this regard, complaints or the outcomes of complaints procedures could give reason for further investigation into specific policies and/or practices. This is not necessarily limited to the situation of individual children, but could also concern the general state of the institution and the position of children as part of that. Complaints mechanisms can also be used as a tool for self-reflection for the institutions. Its outcomes can be used as part of the education and on-going training of institutional staff.<sup>101</sup> It needs no explanation that for transparency one needs mechanisms positioned outside the institution. In this regard, it is important to point at the co-existence and interaction between complaints mechanisms and inspection and monitoring mechanisms.

In many systems there is a strong connection between complaints and inspection mechanisms, and international standards underscore the significance of this link in encouraging states to set up independent inspection and monitoring mechanisms.<sup>102</sup> Like complaints procedures, inspection and monitoring mechanisms are considered an essential safeguard for the protection of children against ill treatment. As the the European Committee for the Prevention of Torture (CPT) has put it, such mechanisms 'can inter alia play an important role in bridging differences that arise between prison management and a given prisoner or prisoners in general'.<sup>103</sup> The CPT also attaches 'particular importance to regular visits to each prison establishment by an independent body (e.g. a board of visitors or supervisory judge) possessing powers to hear (and if necessary take action upon) complaints from prisoners and to inspect the establishment's premises'.<sup>104</sup> The CRC Committee has also underscored the importance of '[i]ndependent and qualified inspectors' who 'should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative'. These inspectors 'should place special emphasis on holding conversations with children in the facilities, in a confidential setting'. This role points at the significance of confidentiality and the opportunity of children to talk to the inspectors about anything they find important. This underscores the significance of a continuum between complaints mechanisms and independent monitoring; in other words, complaints mechanisms must be backed up by a system of independent monitoring.<sup>105</sup> It can help to make remedies accessible and pave the way to speedy dispute settlements and mediation. Inspection mechanisms can also assist in enabling children to find their way to formal proceedings if necessary.<sup>106</sup>

<sup>100</sup> Van der Laan & Eichelsheim 2013; Neubacher 2014. See also Children's Rights Alliance for England 2013.

<sup>101</sup> Murdoch & Jiricka 2015, p. 73.

<sup>102</sup> Van Zyl Smit & Snacken 2009, p. 306.

<sup>103</sup> Van Zyl Smit & Snacken 2009, p. 306 with reference to *CPT 2nd General Report [CPT/Inf (92) 3]*, para. 54.

<sup>104</sup> Van Zyl Smit & Snacken 2009, p. 306 with reference to *CPT 2nd General Report [CPT/Inf (92) 3]*, para. 54.

<sup>105</sup> See also Murdoch & Jiricka 2015, p. 73-74.

<sup>106</sup> Liefwaard 2012. Too close a connection between inspection and monitoring on the one hand and complaints mechanism on the other could also raise concern with regard to the independence and impartiality in complaint procedures.

### 4.3 Legal Empowerment of Children

Legal empowerment of children is a critical component of access to justice and consequently for children accessing complaints mechanism in institutions. It concerns key issues including information, child-friendly or child-sensitive proceedings and the importance to make remedies part of the institution's ongoing effort to respect the child's legal status as a whole including his right to be heard. This legal empowerment of children can help children to deal with the challenges and barriers they are confronted with when accessing justice.

#### *a. Information*

The CRC Committee underscores the importance of children knowing about mechanisms for complaints and to make requests, and to have easy access to these mechanisms.<sup>107</sup> This starts with adequate information. Rule 24 JDLs provides that children should receive *information* on the right to complaint, including the addresses of the authority competent to receiving complaints and of agencies or organizations that can provide legal assistance, upon admission. It also acknowledges that illiterate children require special assistance in this regard. Furthermore, rule 70 JDLs underscores the importance of adequate information to children in the context of disciplinary measures by providing that '[n]o juvenile should be [disciplinarily] sanctioned unless he or she has been informed of the alleged infraction in a manner appropriate to the full understanding of the juvenile, and given a proper opportunity of presenting his or her defence, including the right of appeal to a competent impartial authority'. This provision, although limited to the context of disciplinary measures, highlights the significance of children's ability to participate in and lodge objections against such procedures and adequate information is considered crucial in this regard. Similar provisions can be found in the more general instruments regarding individuals deprived of liberty. The Nelson Mandela Rules confirm the importance of adequate information as well as access to legal assistance for individuals deprived of liberty.<sup>108</sup> Rule 54 of the Nelson Mandela Rules provides that every prisoner shall be promptly informed in writing about the procedures for making requests or complaints, as well as about his or rights, including authorized methods of seeking information and to legal advice, including through legal aid schemes. As far as children are concerned, it is important to note that the requirement of adequate information on remedies places states under special obligations. Whereas the JDLs refer explicitly to illiterate children, children generally experience greater barriers in understanding (legal) information conveyed to them. This calls for child-friendly information on the existence of remedies and on how to make requests or lodge complaints, which takes into account the age and maturity of the child. It also means that children's 'evolving maturity and understanding when exercising their rights' should be given due regard.<sup>109</sup> In light of this, the European rules for juvenile offenders rightfully provide that '[p]rocedures for making requests or complaints shall be simple and effective' (rule 122.1). The Guidelines on child-friendly justice could be of further assistance since they elaborate on the information and advice for children before, during and after judicial proceedings.<sup>110</sup> Among others, the guidelines include recommendations to guarantee information on 'existing mechanisms for review of decisions affecting the child' and to 'obtain reparation from the offender or from the state through the

<sup>107</sup> CRC Committee 2009, para. 89. See also Penal Reform International 2013, p. 3.

<sup>108</sup> The same is true for its regional equivalents, in particular the European Prison Rules and the CPT Standards.

<sup>109</sup> UN High Commissioner 2013, para. 5. See also Art. 5 CRC.

<sup>110</sup> Guidelines on child-friendly justice, under IV.A.1.

justice process, through the alternative civil proceedings or through other processes'.<sup>111</sup> In addition, they highlight the importance of accessing services or organisation providing support. 'The information and advice should be provided to children in a manner adapted to their age and maturity, in a language which they can understand and which is gender and culture sensitive', according to the Guidelines.<sup>112</sup> Furthermore, information should be given directly to the child and '[c]hild-friendly materials containing relevant legal information should be made available and widely distributed'.<sup>113</sup> In practice, the provision of information is challenging and for that reason domestic legislation should make it compulsory for institutions to provide adequate information, in particular with regard to complaints mechanisms, to the child upon admission.<sup>114</sup>

### *b. Legal and other appropriate assistance*

The right to (legal) assistance of children deprived of their liberty is considered another prerequisite for effective access to remedies. Every child deprived of his liberty has the right to legal and other appropriate assistance on the basis of article 37 (d) CRC. Legal assistance is directly relevant for the legal empowerment of children, not only in relation to the legality of the deprivation of liberty as such,<sup>115</sup> but also to the right to an effective remedy during the deprivation of liberty. Children should have access to legal assistance<sup>116</sup> and they 'should be considered as fully fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child'.<sup>117</sup> Additional forms of assistance can be considered here as well. Rule 77 JDLs provides that children should have the right to request assistance 'from family members, legal counsellors, humanitarian groups or other where possible, in order to make the complaint' and that '[i]lliterate juveniles' should be provided with special assistance they need to lodge a complaint. However, it is important to recognize that article 37 (d) CRC grants children deprived of their liberty the right to legal *and* other appropriate assistance. Other forms of assistance should be considered in addition to legal assistance and the importance of legal assistance should not be denied; moreover, the relevance of legal assistance is not limited to complaints mechanism, but can also play a role in other matters concerning the deprivation of liberty, including for example medical care, treatment plans, leave arrangements and decisions concerning placement and transfer. Both the CRC Committee's general comment no. 10 and the Guidelines on child-friendly justice underscore the need for specialized legal assistance,<sup>118</sup> which includes the capability of communicating with children at their

<sup>111</sup> Guidelines on child-friendly justice, under IV.A.1.1.i and IV.A.1.1.j, resp.

<sup>112</sup> Guidelines on child-friendly justice, under IV.A.1.2.

<sup>113</sup> Guidelines on child-friendly justice, under IV.A.1.3. and IV.A.1.4.

<sup>114</sup> By way of example, the Dutch Youth Custodial Institutions Act stipulates in Art. 60 that each child, upon admission, must receive information on his rights and duties, in writing and in a language he understands. In particular, this information must inform the child about the right to complaint and appeal and to make requests. In addition, the Act provides that children must receive information in writing when certain specific decisions are made (e.g. in case of disciplinary procedures); this information must include the right to lodge a complaint regarding the decision made. Research revealed that Dutch institutions do provide information, but that children were not adequately informed about their right to complaint; children indicated that they primarily received information about this from other children. Research also indicates that children's education could contribute to their legal empowerment; Liefwaard 2008 with reference to Bruning, Liefwaard & Volf 2004; Liefwaard 2012.

<sup>115</sup> See the right to *habeas corpus*; art. 37 (d) CRC.

<sup>116</sup> CRC Committee 2007, para. 82.

<sup>117</sup> Guidelines on child-friendly justice, under IV.D.2.40.

<sup>118</sup> See CRC Committee 2007, para. 92.

level of understanding and requires 'ongoing and in-depth training' regarding 'children rights and related issues'.<sup>119</sup>

The JDLs refer to family members as the one who can assist the child in making requests and lodging complaints. This may include parents or legal guardians. It should be noted, however, that it is the child who has the right to an effective remedy and that parents can represent their child in accordance with his evolving capacities.<sup>120</sup> The European rules for juvenile offenders explicitly refer to parents' opportunities to lodge formal complaints, independently from their child, about the way they are treated by the institution, and provide that parents, like '[j]uveniles' have the right 'to seek legal advice about complaints and appeal procedures and to benefit from legal assistance'.<sup>121</sup>

*c. Child-friendly procedures: effective participation, speediness, confidentiality, safety, and protection*

A final set of issues discussed here relates to child-friendly or child-sensitive<sup>122</sup> complaints procedures. Complaints procedures should be speedy, confidential and safe. In addition, the authorities competent to receive complaints should be specialized and capable of communicating with children in order to enable children to participate effectively in the procedures. This also requires that children can exercise their right to be heard and are entitled to receive a duly reasoned decision, which they can understand.<sup>123</sup> Rule 76 JDLs underscores the importance of speedy proceedings; the child 'should have the right (...) to be informed of the response without delay'. Rule 57 of the Nelson Mandela Rules gives further guidance and provides for a possibility to approach a judicial or other authority in case of rejection of the complaint or in the event of undue delay. This possibility of appeal in case of undue delay cannot be found in the JDLs, but can indeed be regarded as an important legal safeguard, also for children deprived of their liberty. The requirement of undue delay is of critical importance for children, which is reason why the European Rules for juvenile offenders as well as the Guidelines on child-friendly justice also stress the need to avoid undue delay.<sup>124</sup>

Another important requirement of child-friendly complaint procedures concerns the confidentiality and the safety of the procedure. Children deprived of their liberty should be able to lodge a complaint 'without censorship as to substance'.<sup>125</sup> Confidentiality is considered crucial, particularly in case of allegations of serious forms of ill-treatment,<sup>126</sup> but also in light of the particular dependency and vulnerability of children and the risk of retaliation, intimidation or other negative consequences of having submitted a request or complaint.<sup>127</sup> The High Commissioner refers to private letterboxes in which children can deposit complaints, a practice that is widely used,<sup>128</sup> or child helplines, which can be called while in detention.<sup>129</sup> Confidentiality is directly linked to safety and protection, the absence of which has been identified as one of the barriers for access to

<sup>119</sup> Guidelines on child-friendly justice, under IV.D.2.39.

<sup>120</sup> Art. 5 CRC. Moreover, the best interests of the child, as laid down in art. 3 (1) CRC, may require that the child is represented by others than his parents.

<sup>121</sup> Rule 121 European rules for juvenile offenders.

<sup>122</sup> See UN High Commissioner 2013, para. 21ff.

<sup>123</sup> See e.g. Guidelines on child-friendly justice, under IV.D.2.44. See also CRC Committee 2009.

<sup>124</sup> European rules for juvenile offenders. See also Guidelines on child-friendly justice, under IV.D.4.50.

<sup>125</sup> Rule 76 JDLs.

<sup>126</sup> Murdoch & Jiricka 2015, p. 73-74.

<sup>127</sup> See rule 57 Nelson Mandela Rules.

<sup>128</sup> Dünkel & Staňdo-Kawecka 2010.

<sup>129</sup> UN Doc. A/HRC/C/25/35, para. 29.

justice for children (see para. 2). Confidentiality and safety are also considered prerequisites for the effective participation of children in procedures like these.<sup>130</sup> In light of this, it is quite remarkable that the JDLs do not explicitly refer to the need to prevent the risk of retaliation, intimidation or other negative consequences of having submitted a request or complaint. The European rules for juveniles offenders do stipulate that children shall not be punished for having made a request or lodged a complaint.<sup>131</sup> In a recent case concerning a fifteen year old boy in pre-trial detention, who was abused sexually and physically and did not want to lodge a formal complaint against his fellow inmates, the European Court of Human Rights underscored the need for safe ways to bring grievances or complaints to the attention of the institution administration. The court pointed at the culture of silence in detention centres and the fear for retaliation among inmates, which contribute to the particular vulnerability of children in such institutions. It also found that children deprived of liberty must be adequately protected against retaliation under Art. 3 ECHR, which among others means that the authorities must respond adequately to grievances brought forward by children, even if they do not want to formally lodge a complaint.<sup>132</sup>

## 5. Conclusions

The *acquis* of international and regional human rights standards concerning the position of children deprived of their liberty provides that all these children must be granted opportunities to lodge formal complaints and requests before authorities in- or outside the institution. This enables them to access justice and exercise their right to an effective remedy. Access to justice for children deprived of liberty, which concerns both access to procedures as well as to access to equitable and fair outcomes, is of great significance for the protection of their short- and long-term interests, including the protection against serious human rights violations. It must also be considered an essential component of the legal status of children deprived of their liberty, regardless of their (legal) context. States are under the obligation to safeguard access to justice and enforce the right to an effective remedy in order to prevent that the millions of children deprived of liberty today are confronted with a complete denial of their rights or with ineffective mechanisms that do not provide adequate protection.

International standards provide guidance on how to safeguard effective remedies through a system of complaints mechanisms supported by independent inspection and monitoring. They are, however, not always firmly grounded in or backed up by legally binding norms. Moreover, international standards lack consistency and are a bit shallow in their child-specificity. International standards do provide for the key parameters, which must be connected to the rights and principles of the CRC embraced by almost all countries in the world. It is up to domestic legislators to 'set out the entitlements in sufficient detail to enable remedies for non-compliance to be effective'.<sup>133</sup> Legislation that carries out the message that children deprived of liberty are entitled to the same level of human rights protection like any other child. By doing so, states can foster their empowerment, regardless of the specific context, and contribute to the realization of an unconditional respect for their human rights and fundamental freedoms.

<sup>130</sup> CRC Committee 2009.

<sup>131</sup> Rule 123 European rules for juvenile offenders.

<sup>132</sup> European Court of Human Rights, Judgment of 13 September 2016, Appl. No. 58271/10.

<sup>133</sup> CRC Committee 2003, para. 25. See also CRC Committee 2007, para. 88.

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# Child Deprivation of Liberty and the Role of the Council of Europe

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## ABSTRACT

*This article underlines the relevance of the Council of Europe's acquis in relation to solution-seeking for some of the challenges identified in the UN Special Rapporteur's report on torture and ill-treatment of children deprived of liberty. As a regional organization, the Council of Europe is ideally placed to concretize and take further international standards at the European level, and it has been at the forefront of work on child-friendly justice and (sexual) violence against children in all settings, including within institutions. Its significant legislative, political, monitoring and reporting powers make it ideal for generating legislative and policy changes, the collection and analysis of data and research and for supporting States in upholding human rights standards which are applicable to children as rights bearers. The Council of Europe standards, meanwhile, can have real "bite" in the light of enforcement mechanisms such as the European Court of Human Rights. Likewise, it has the capacity to interact with and stir political awareness of critical issues through the work of its institutions. Finally, its cooperation and mainstreaming efforts ensure focused and coordinated action, and are particularly strengthened by the new Strategy for the Rights of the Child (2016-21).*

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## 1. INTRODUCTION

For the Council of Europe, children, as real human rights bearers, should have the same access to rights and justice as adults. Founded in 1949, the Council of Europe is an international organization which brings together 47 European Member States to promote human rights, democracy and the rule of law. It seeks to develop common and democratic principles anchored within its key legal standards. Every country which joins the Council of Europe therefore agrees to be subject to independent monitoring of different kinds, which assess their compliance with human rights and democratic practices. To this end, children's human rights and children's rights are not an exception.

Today, the **European Convention of Human Rights** (ECHR) guarantees the rights of "everyone" within the jurisdiction of the Council of Europe's Member States. There is no footnote in the Convention which states "for adults only." This is the essence of the human rights legal framework that the Council of Europe provides to States when children deprived of liberty are concerned. Children and their particular vulnerability play a clear and visible role in the decisions of the European Court of Human Rights (ECtHR). Despite the fact that it is obviously difficult for children to make their way to an international court, the Court in Strasbourg has produced extensive case-law concerning children's rights including for children deprived of liberty. The cases have raised issues such as the prohibition of degrading and humiliating treatment (including corporal punishment), the right of children to a fair trial and the right to respect for private and family life.

But a Convention, however powerful, is not enough to make children's rights a reality for the 150 million children living in Europe. This is why the Council of Europe has been investing in the promotion of a child rights-based approach to policies, laws and decisions concerning children. Since the adoption of the UN Convention on the Rights of the Child (UNCRC) in 1989, all work has been based on this Convention, which has been ratified by all Member States of the Council of Europe.

The 2015 Report of the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (UN SRT)<sup>1</sup> is a significant document in highlighting the current state of standards, guidance, and implementation on children deprived of liberty. Its particular value lies in its identification of focus areas at the national level, as well as its recommendations for effectively implementing international human rights standards within these areas.

The Council of Europe seeks to protect children's human rights, primarily through the direction of its children's rights strategies. In 2016, the Council of Europe launched its third **Strategy for the Rights of the Child**,<sup>2</sup> which will be implemented over the next six years. It is fully in line with the principles of the UNCRC, as indeed are all relevant Council of Europe instruments.<sup>3</sup> This common directionality of both UN and Council of Europe bodies makes the latter ideal for assisting its Member States in designing legislation and policies that are human rights- and child rights-compliant. This Strategy<sup>4</sup> seeks to mainstream and concretize all Council of Europe work relevant to the

<sup>1</sup> UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, children deprived of their liberty from the perspective of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, UN Doc A/HRC/28/68 (2015) [hereinafter "A/HRC/28/68"].

<sup>2</sup> Council of Europe, Strategy for the Rights of the Child (2016-21) (2016), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168066cff8> [hereinafter "Council of Europe, Strategy for the Rights of the Child"].

<sup>3</sup> See e.g. Committee of Ministers Recommendation to Member States on the European Rules for Juvenile Offenders Subject to Sanctions or Other Measures, CM/Rec(2008)11, available at: [https://www.unicef.org/tdad/councilofeuroperec08\(1\).pdf](https://www.unicef.org/tdad/councilofeuroperec08(1).pdf) [hereinafter "European Rules for Juvenile Offenders"]

<sup>4</sup> Council of Europe, Strategy for the Rights of the Child, *supra* note 2.

rights of the child. The Strategy, and its interrelated goals, are overseen by the Ad Hoc Committee for the Rights of the Child (CAHENF).<sup>5</sup>

The work of the Council of Europe can therefore be used as an example for sharing its practices, strategies and legal standards with other regional organizations or non-Member States. Ways are sought to support a stronger child rights-focused agenda in relation to child-friendly justice, including in moving towards a policy of prohibiting detention of children.

This article first sets out the main UN and Council of Europe principles and standards which concern child deprivation of liberty, and highlights the strong levels of synergy between the two. Looking to the matter of implementation forms the crux of this article. This involves an elucidation of the institutional structures, competencies and tools which the Council of Europe has amongst its arsenal, and which Member States use as a benchmark in fulfilling the organization's human rights standards. This article then focuses on particular areas concerning child deprivation of liberty: namely, (1) diversion and prevention; (2) child-friendly justice guidelines; (3) training, complaints and monitoring; (4) conditions and practices; (5) protection against sexual abuse and sexual exploitation; (6) children in care; (7) child immigration detention.

### *1.1 The General principles and standards relevant to children deprived of liberty in the Council of Europe environment*

The phrase “**deprivation of liberty**,” both for the purposes of the UN SRT's report, and within the relevant Council of Europe instruments, includes more than detention within the criminal justice system. It involves any restriction of movement imposed by a public authority that goes beyond mere interference of freedom of movement, and includes “policy custody, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization and institutional custody”.<sup>6</sup> The term “**child**” refers to anyone under 18, regardless of the age of majority,<sup>7</sup> as reflected in all relevant Council of Europe documents.<sup>8</sup>

The main legal standard of direct relevance is **the European Convention for Human Rights** (ECHR) as well as its solid case-law, which helps shape the national legislation of each Member State and contributes to it being human rights-compliant. The prohibition of torture is an **absolute and non-derogable** human right,<sup>9</sup> which is reflected most notably within the Council of Europe in Article 3 of the ECHR. While deprivation of liberty is dealt with under Article 5 of the ECHR, a breach of Article 3 may occur within the context of children deprived of their liberty, under various circumstances, including the living conditions of detention,<sup>10</sup> as well as the protection from abuse within such facilities.<sup>11</sup>

<sup>5</sup> See Council of Europe, Ad Hoc Committee for the Rights of the Child (CAHENF), available at: <http://www.coe.int/en/web/children/cahenf>.

<sup>6</sup> A/HRC/28/68, *supra* note 1, at para. 21.

<sup>7</sup> *Ibid.* at para. 22.

<sup>8</sup> See e.g., Article 3(a) Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention), CETS No. 201, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/201> (hereinafter the “Lanzarote Convention”); European Rules for Juvenile Offenders, *supra* note 3, Rule 21.1; Council of Europe, Committee of Ministers, Guidelines on Child-Friendly Justice (2011), Rule IIa, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5a9> [hereinafter “Guidelines on Child-Friendly Justice”].

<sup>9</sup> A/HRC/28/68, *supra* note 1, at para. 23.

<sup>10</sup> *Güvöç v Turkey*, European Court of Human Rights (App. No. 70337/01) [hereinafter “*Güvöç v Turkey*”].

<sup>11</sup> *Çoçelav v. Turkey*, European Court of Human Rights (App. No. 1413/07) [hereinafter “*Çoçelav v. Turkey*”].

Provisions within the UNCRC and the Havana Rules<sup>12</sup> **prohibit any member of a detention facility or care institution from inflicting, instigating or tolerating any form** of inhuman or degrading treatment, punishment, correction or discipline under any circumstance,<sup>13</sup> as does, at the regional level, the Guidelines of the Committee of Ministers on Child-Friendly Justice,<sup>14</sup> and the European Rules for juvenile offenders subject to sanctions or measures,<sup>15</sup> among others.

Children, due to their age and specific needs, are particularly vulnerable in the context of deprivation of liberty. Accordingly, the threshold for violating a detained child's right not to be subjected to torture or ill-treatment is higher than in the case of an adult.<sup>16</sup> This is recognized in the jurisprudence of the ECtHR, which has stated the need for a heightened "due diligence" standard where children's liberty and security are involved.<sup>17</sup> Moreover, this means that child deprivation should be seen as an *ultima ratio* and to be exercised for the shortest period only;<sup>18</sup> a principle which is repeated throughout the relevant Council of Europe documents, including the Guidelines on Child-friendly justice,<sup>19</sup> the European Rules for juvenile offenders,<sup>20</sup> and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) standards.<sup>21</sup>

Where deprivation of liberty *can* be justified, the detained child must be treated with respect for his/her dignity, and in a way which takes into account individual needs, age and maturity.<sup>22</sup> Once more, this is clearly reflected in the grounding principles of the regional standards,<sup>23</sup> and especially within the Guidelines on Child-friendly justice, which contains an entire chapter devoted to elucidating principles such as "dignity," thereby furthering the guidance for Member States and making it more practical.<sup>24</sup> The recent Grand Chamber decision of *Bouyid v Belgium*<sup>25</sup> also emphasizes the relationship between dignity and Article 3 of the ECHR: detention of children renders them in a state of vulnerability and under complete control of those in authority. The abuse of that control, therefore, can constitute a violation of the individual's dignity and a corresponding Article 3 violation.

<sup>12</sup> UN General Assembly Rules for the Protection of Juveniles Deprived of their Liberty, UN Doc A/RES/45/113 (1990), available at: <http://www.un.org/documents/ga/res/45/a45r113.htm>.

<sup>13</sup> A/HRC/28/68, *supra* note 1, at para. 24.

<sup>14</sup> Guidelines on Child-Friendly Justice, *supra* note 8, at para. C.2

<sup>15</sup> European Rules for Juvenile Offenders, *supra* note 3, Rule 95.2

<sup>16</sup> A/HRC/28/68, *supra* note 1, at para. 32.

<sup>17</sup> *Z and Others v UK*, European Court of Human Rights (App No. 29392/95) at paras. 74-75; *Çoççelav v. Turkey*, *supra* note 11.

<sup>18</sup> United Nations Convention on the Rights of the Child, Article 37(b), available at: <http://www.ohchr.org/Documents/ProfessionalInterest/crc.pdf> [hereinafter "UNCRC"]; UN Committee on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, UN Doc CRC/C/GC/10 (2007), available at: <http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.10.pdf>.

<sup>19</sup> Guidelines on Child-Friendly Justice, *supra* note 8, Rule 19.

<sup>20</sup> European Rules for Juvenile Offenders, *supra* note 3, Rule 10.

<sup>21</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), CPT/InfE(2002)1—Rev.2015 (2015), available at: <http://www.cpt.coe.int/en/documents/eng-standards.pdf>, p. 83 [hereinafter "CPT Standards"].

<sup>22</sup> A/HRC/28/68, *supra* note 1, at para. 26; International Covenant on Civil and Political Rights, Article 10, available at: <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> [hereinafter "ICCPR"]; UNCRC, *supra* note 18, Article 40.

<sup>23</sup> See e.g. Council of Europe, European Prison Rules (2006), available at: <http://www.coe.int/t/DGHL/STANDARDSETTING/PRISONS/PCCP%20documents%202015/EUROPEAN%20PRISON%20RULES.pdf> [hereinafter "European Prison Rules"]; European Rules for Juvenile Offenders, *supra* note 3, Rule 88.1.

<sup>24</sup> Guidelines on Child-Friendly Justice, *supra* note 8, Chapter III.

<sup>25</sup> *Bouyid v Belgium*, European Court of Human Rights (App No. 23380/09), where minors held in detention were slapped by a police officer.

While the UN SRT comments on the fact that the Havana Rules indicate how States should go beyond the Standard Minimum Rules for the Treatment of Prisoners,<sup>26</sup> due to the vulnerability of children, a similar specialization is seen at a regional level, with the European Rules for Juvenile Offenders<sup>27</sup> imposing obligations which go beyond the standard European Prison Rules.<sup>28</sup> In particular, the European Rules for Juvenile Offenders are highly detailed (and containing an overall 142 rules), which thereby offer more concrete and practical assistance to Council of Europe Member States in implementing the standards found within the relevant UN Rules and Guides.

The UN SRT also recommends that States **respond to the specific needs of groups of children particularly vulnerable to ill-treatment or torture**, such as girls, LGBTI children, and children with disabilities.<sup>29</sup> All major Council of Europe instruments contain non-discrimination clauses for the access to and enjoyment of the rights and protections contained therein.<sup>30</sup> Furthermore, the Council of Europe boasts several instruments which are specifically aimed at ensuring that Member States protect and ensure access to rights for these groups. This includes notably, the Convention against violence against women and domestic violence (Istanbul Convention),<sup>31</sup> which tackles gender-based violence.

Finally, the UNCRC, as well as the ECHR, as interpreted by the ECtHR, state that the decision to deprive a child of their liberty, in terms of its necessity and appropriateness, must be subject to periodic review,<sup>32</sup> and, of course, any procedures relating thereto must be child-appropriate.<sup>33</sup> This has been further transplanted into regional standards, with the Guidelines on Child-friendly justice elaborating upon measures which can make any such procedures appropriate for the needs and interests of the child.

As a general principle, the **best interests of the child** must be the primary consideration in both the decision to detain a child, as well as in its continuation (UNCRC Article 3(1)). As well as this being, as usual, emphasized in the relevant Council of Europe standards,<sup>34</sup> the concept of best interests features in provisions relating to all procedures involving or affecting children,<sup>35</sup> and in more specific legislation relating to, for example, the protection of children from sexual violence in all

<sup>26</sup> N.B. The recent revision of the Standard Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules), UN Doc E/CN.15/2015/L (2015), available at: [https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ\\_Sessions/CCPCJ\\_24/resolutions/L6/ECN152015\\_L6\\_e\\_V1503048.pdf](https://www.unodc.org/documents/commissions/CCPCJ/CCPCJ_Sessions/CCPCJ_24/resolutions/L6/ECN152015_L6_e_V1503048.pdf).

<sup>27</sup> European Rules for Juvenile Offenders, *supra* note 3.

<sup>28</sup> European Prison Rules, *supra* note 23.

<sup>29</sup> A/HRC/28/68, *supra* note 1, at para. 86(g).

<sup>30</sup> See e.g. Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, Article 14 [hereinafter "ECHR"]; Council of Europe, European Social Charter, ETS No. 163, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/163> [hereinafter "European Social Charter"]; European Prison Rules, *supra* note 23, Rule 13; European Rules for Juvenile Offenders, *supra* note 3, Rule 11.

<sup>31</sup> Convention against violence against women and domestic violence (Istanbul Convention) CETS No. 210, available at: <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210>.

<sup>32</sup> UNCRC, *supra* note 18, Article 37(d); A/HRC/28/68, *supra* note 1, at para. 31.

<sup>33</sup> UN Human Rights Committee, International Covenant on Civil and Political Rights: General Comment No. 35, UN Doc CCPR/C/GC/35, available at:

<sup>34</sup> European Rules for Juvenile Offenders, *supra* note 3, Rule 5; Guidelines on Child-Friendly Justice, *supra* note 8, Rule 20

<sup>35</sup> Guidelines on Child-Friendly Justice, *supra* note 8, Chapter V

settings.<sup>36</sup> The Council of Europe has also compiled a publication from experts which seeks to elucidate the concept of the child's best interests, and how best to implement this principle in practice.<sup>37</sup>

### *1.2 Specialized monitoring and other mechanisms of the Council of Europe impacting national law reforms and practice*

The Council of Europe, which has set the legal human rights scene in its Member States, has therefore contributed largely to the increase and the honouring of its human rights legal framework. With that said, it has been observed that "the 'problem' of juvenile justice standards therefore does not lie at the legislative end, but rather in their practical implementation and/or in the lack of instruments and tools that allow us to evaluate the degree of their implementation in practice."<sup>38</sup>

A key factor, as the UN SRT makes clear, is the monitoring of existing legal standards and their implementation. To this end, a number of important monitoring human rights bodies which observe and evaluate how the standards are implemented in practice. Overall, the Council of Europe boasts "at least eight monitoring and other mechanisms."<sup>39</sup> Not only does monitoring work assist in identifying the state of implementation in Member States, but it also serves as a source of reliable data collection (which forms a further recommendation of the UN SRT).<sup>40</sup>

The system of individual applications afforded by the ECHR, and enforced through the ECtHR, offers a strong form of protection. The European Committee of Social Rights (ECSR) permits collective applications for the purposes of alleged breaches of the European Social Charter (ESC).<sup>41</sup> These bodies often refer to international standards and other forms of "soft" law in determining the extent and interpretation of obligations, thereby further ensuring the efficacy of UN-level standards from the regional perspective. Protecting the rights of children is high on the agenda of the **Commissioner for Human Rights**. He regularly visits care institutions, schools, facilities where children are detained, places where children live in precarious conditions, and organizations providing services to children. He addresses recommendations to national authorities on how they could improve their records on children's rights. On numerous occasions, he has flagged the shortcomings affecting juvenile justice as including: lack of access to justice, lack of child friendly judicial procedures, programmes of crime prevention, and the weakening of non-judicial remedies, such as Ombudspersons.<sup>42</sup>

<sup>36</sup> See Lanzarote Convention, Preamble, *supra* note 8, Article 30(1).

<sup>37</sup> Council of Europe, *The Best Interests of the Child—A dialogue between theory and practice*, compilation of conference presentations edited by Milka Sormunen (2016, Council of Europe Publishing, Strasbourg), available at: <https://book.coe.int/eur/en/children-s-rights-and-family-law/6862-the-best-interests-of-the-child-a-dialogue-between-theory-and-practice.html>.

<sup>38</sup> European Council for Juvenile Justice, *The Evaluation of the Implementation of International Standards in European Juvenile Justice Systems: IJJO Green Paper on Child-friendly justice* (2011), p. 41, available at: [http://www.oijj.org/doc/inf/Green\\_Paper\\_Administration\\_Section.pdf](http://www.oijj.org/doc/inf/Green_Paper_Administration_Section.pdf) [hereinafter "European Council for Juvenile Justice"].

<sup>39</sup> See, e.g., Council of Europe Strategy for the Rights of the Child, *supra* note 2, at para. 10, namely, the European Committee of Social Rights (ECSR); Lanzarote Committee, *supra* note 8; the Committee for the Prevention of Torture (CPT); European Commission against Racism and Intolerance (ECRI); Advisory Committee on the Framework Convention for the Protection of National Minorities (ACFC); Group of Experts on Action against Trafficking in Human Beings (GRETA); European Commission for Democracy through Law (Venice Commission); Committee of Experts of the European Charter for Regional or Minority Languages (ECRML). The Human Rights Commissioner is also tasked with a monitoring role.

<sup>40</sup> A/HRC/28/68, *supra* note 1, at para. 85(t).

<sup>41</sup> European Social Charter, *supra* note 30.

<sup>42</sup> See Council of Europe, Commissioner for Human Rights, *Children's Rights*, available at: <https://www.coe.int/en/web/commissioner/thematic-work/children-rights>.

Another example is the **CPT**,<sup>43</sup> which regularly makes unannounced visits to its 47 Member States, and a diverse range of places of deprivation of liberty, including police establishments and prisons, psychiatric hospitals, detention facilities for migrants, juvenile detention centers and social care homes.<sup>44</sup> Visits can be ad hoc and, if necessary, at very short notice. The CPT issues country reports and encourages State cooperation and follow-up, and compiles general annual reports; these reports dedicate specific attention to juveniles deprived of their liberty,<sup>45</sup> and migration detention. Through its work, it has compiled an extensive collection of standards, with a focus upon children in detention.<sup>46</sup>

For its part, the **ECSR** verifies that the rights to housing, health, education, employment and freedom of movement guaranteed by the ESC are implemented. This has been applied to numerous aspects of child deprivation of liberty, including the criminal age of responsibility,<sup>47</sup> adapting criminal procedures to suit the needs and interests of children and young persons, and enforcing the exceptionality and shortest duration possible of detention for children.<sup>48</sup> With reference to the existing Guidelines and standards, the Committee asks the States Parties to the Charter to take all possible measures to reduce the maximum length of prison sentence for young offenders, as well as to ensure that they make the best possible use of their right to education and vocational training, with a view to their reintegration into the society, once the sentence has been served.<sup>49</sup>

Of significance is the political element of the Council of Europe. The **Parliamentary Assembly of the Council of Europe (PACE)** is formed of nationally elected representatives from Member States. It passes Resolutions and Recommendations on pertinent matters. The adoption of these instruments represents the political focusing and commitment of Council of Europe Member States upon the issues-at-hand, and offers some practical guidance in tackling them. Such documents are based upon the work of specialized committees, which draw on research and expertise regarding both the emergence or continuing trends in pressing European issues, and their appropriate responses. The Parliamentary Assembly also carries out and participates in campaigns to raise political awareness on issues which it deems of significant importance. In this context, it has participated in two highly visible campaigns directly related to children's rights: namely the ONE in FIVE Campaign against sexual violence,<sup>50</sup> and the campaign to End Immigration Detention of Children.<sup>51</sup>

The collection of reliable data should also **include the voices of children** themselves: especially if one is to implement a form of child-friendly justice. The Council of Europe launched its program

<sup>43</sup> See the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, ETS No. 126, available at: <http://www.cpt.coe.int/en/documents/eng-convention.pdf> [hereinafter "CPT"].

<sup>44</sup> European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT), 24th General Report of the CPT (2015), available at: <http://www.cpt.coe.int/en/annual/CPT-Report-2013-2014.pdf>, p. 5 [hereinafter "24th General Report of the CPT"].

<sup>45</sup> *Ibid.* p. 49ff.

<sup>46</sup> CPT Standards, *supra* note 21, Chapter V.

<sup>47</sup> European Social Charter, *supra* note 30, Article 17. European Committee of Social Rights, Conclusions XX-4 2015 on the United Kingdom (2016), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805939f3>.

<sup>48</sup> European Committee of Social Rights, Conclusions 2011 (France) (2012), available at: <http://hudoc.esc.coe.int/eng?i=2011/def/FRA/17/1/EN>.

<sup>49</sup> European Committee of Social Rights, Conclusions 2015 (2016), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593904>.

<sup>50</sup> See, Council of Europe, the Parliamentary Dimension of the ONE in FIVE campaign, available at: [http://www.coe.int/t/dg3/children/1in5/PACE/About\\_en.asp?expandable=5](http://www.coe.int/t/dg3/children/1in5/PACE/About_en.asp?expandable=5).

<sup>51</sup> See, Council of Europe parliamentary Assembly, Parliamentary Campaign to End Immigration Detention of Children, [http://website-pace.net/en\\_GB/web/apce/children-in-detention](http://website-pace.net/en_GB/web/apce/children-in-detention) [hereinafter "Parliamentary Campaign to End Immigration Detention of Children"]; and see *infra*, section 2.7.



“Building a Europe for and With Children” 10 years ago, with the program-title clearly referencing the emphasis upon child-participation in these efforts. The Council of Europe has accordingly made significant efforts to involve the voices of children on matters including child deprivation of liberty. In this respect, it has launched a large-scale consultation on child-friendly justice which received feedback from 3,700 children in over 25 European countries, in addition to the input of focus groups.<sup>52</sup> Most strikingly, the report revealed children’s mistrust of authorities, and the corresponding emphasis upon a need for more open, accountable and trained members of staff working with children in these institutions. This hammers home the relevance of the UN SRT’s recommendations on all of these points.<sup>53</sup> The results of the consultation fed directly into the finalization of the Guidelines of Child-friendly justice adopted in 2010.<sup>54</sup> These Guidelines have not only inspired other continents to focus on child-friendly justice, but have also sharpened the focus of the European governance structures and Member States to step up their work in making the justice system more child-focused and respectful of children’s rights.

The new Strategy for the Rights of the Child resulted from consultation with a broad range of stakeholders, including children themselves. A secondary analysis of over 130 consultations with children in Council of Europe Member States was prepared specifically for the purpose of informing the Strategy, and the results will be used as a point of reference throughout the strategy’s implementation.<sup>55</sup> In particular, this study includes sections on violence in custody, children in conflict with the law, and children in care.

These monitoring and coordinative capacities stand the Council of Europe in good stead to support the Global Study on children deprived of their liberty,<sup>56</sup> as recommended by the UN SRT.<sup>57</sup> The Council of Europe’s previous work in the area of child deprivation of liberty endow it with proven capabilities and successful experience to draw upon, for the purposes of study. Indeed, several documents of the Council of Europe have also highlighted specific areas within this context that require further research and data collection.<sup>58</sup>

The Council of Europe offers a further **arsenal of tools** to assist States in implementing their human rights obligations. These include previously mentioned guidelines and recommendations, which further concretize standard provisions, toolkits and resources, research, collection and sharing of good practice, training, campaigns and awareness-raising efforts, as well as monitoring mechanisms. Moreover, the new Strategy on children’s rights states the Council of Europe’s

<sup>52</sup> Council of Europe, Listening to children about justice: Report of the Council of Europe consultation with children on child-friendly justice, report prepared by Dr Ursula Kilkelly, CJ-S-CH (2010) 14 rev. (2010), available at: [http://www.coe.int/t/dghl/standardsetting/family/CJ-S-CH%20\\_2010\\_%2014%20rev.%20E%205%20oct.%202010.pdf](http://www.coe.int/t/dghl/standardsetting/family/CJ-S-CH%20_2010_%2014%20rev.%20E%205%20oct.%202010.pdf).

<sup>53</sup> A/HRC/28/68, *supra* note 1, at para. 85(e).

<sup>54</sup> Guidelines on Child-Friendly Justice, *supra* note 8; see discussion of the Guidelines on Child-Friendly Justice, *infra*, section 2.2.

<sup>55</sup> Council of Europe, Challenges to children’s rights today: What do children think? Study prepared by Dr Aoife Daly, Sandy Ruxton and Mieke Schuurman (2016), available at: <https://m.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680643ded>.

<sup>56</sup> UN General Assembly, Resolution 69/157: Rights of the Child, UN Doc A/Res/69/157 (2015), available at: [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=A/RES/69/157](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/69/157) [hereinafter “General Assembly Resolution 69/157”].

<sup>57</sup> A/HRC/28/68, *supra* note 1, at para. 85(u).

<sup>58</sup> Council of Europe, European Committee on Crime Problems & Council for Penological Co-Operation Report on violence in institutions for juvenile offenders, document prepared by Prof Dr. Ton Liefwaard, Dr. Joni Reef and Maryse Hazelzet, PC-CP(2014)13rev2 (2014), available at: <https://www.universiteitleiden.nl/en/research/research-projects/law/violence-in-institutions-for-juvenile-offenders>.

intention to further develop the website, [www.coe.int/children](http://www.coe.int/children), into a European hub, which will provide easy and comprehensive access to these and other children's rights resources.<sup>59</sup>

The UN SRT, in his concluding recommendations, encouraged States to ratify all relevant UN standards,<sup>60</sup> as well as to adhere to its Rules and Guidelines on juvenile justice and delinquency.<sup>61</sup> In this respect, all relevant Council of Europe instruments are explicitly grounded upon UN standards, thereby complementing implementation at the regional level.

A further benefit of the Council of Europe's regional dimension is that its recommendations "can be—due to the comparatively stronger degree of uniformity of systems in Europe—more concrete and precise than the UN-rules [sic]"<sup>62</sup> as the Council of Europe standards are made for the pan-European region, where it may be easier to obtain certain consensus. The European Rules for juvenile offenders are an example of this regional progress responding to the needs of a particular region.

Finally, all of the Council of Europe's work can have an impact beyond the European level. Its Conventions and Agreements are open to the 47 Member States<sup>63</sup> for signature and ratification, and where appropriate, to the European non-Member States, as well as non-European non-Member States, and the European Union.<sup>64</sup>

## 2. SPECIFIC AREAS

### 2.1 *Diversion and prevention*

The Rapporteur urges States to **ensure that deprivation of liberty is used only as a matter of last resort**, and only if in the best interests of the child.<sup>65</sup> This means that **preventive mechanisms, such as diversion, early identification, and alternative measures**, should all be promoted.<sup>66</sup>

This priority of diversion is echoed in the European Rules for juvenile offenders.<sup>67</sup> Even in cases of more serious offending, for example, the Rules recommend that community sanctions should be available.<sup>68</sup> This is because child-justice systems should be based on the principles of restoration and welfare, rather than on seeking justice, especially bearing in mind the child's particular vulnerabilities and needs, and their age of maturity, which renders them less morally culpable than adults.<sup>69</sup>

One can see examples of good practice across Member States, too, as collected for example in the previous **Human Rights Commissioner's** 2009 Issue Paper.<sup>70</sup> Thus, in Scotland, which employs

<sup>59</sup> Council of Europe, Strategy for the Rights of the Child, *supra* note 2, at para. 75.

<sup>60</sup> A/HRC/28/68, *supra* note 1, at para. 84(a).

<sup>61</sup> *Ibid.* at para. 84(b).

<sup>62</sup> European Council for Juvenile Justices, *supra* note 38, at 11.

<sup>63</sup> See Council of Europe, Our Member States, <http://www.coe.int/en/web/about-us/our-member-states>

<sup>64</sup> See Council of Europe, Complete List of the Council of Europe's Treaties, available at: <http://www.coe.int/en/web/conventions/full-list>

<sup>65</sup> *Ibid.*

<sup>66</sup> *Ibid.* at para. 85(c)

<sup>67</sup> European Rules for Juvenile Offenders, *supra* note 3, Rules 3,5,9,12,13, 23(1)

<sup>68</sup> *Ibid.*, Rule 8

<sup>69</sup> See e.g. Guidelines on Child-Friendly Justice, *supra* note 8, Explanatory Memorandum, at 80.

<sup>70</sup> Commissioner for Human Rights, Issue Paper: Children and juvenile justice: Proposals for improvements, CommDH/IssuePaper(2009)1 (2009), available at: <https://wcd.coe.int/ViewDoc.jsp?p=&id=1460021&direct=true> [hereinafter "Commissioner for Human Rights Issue Paper"].

‘Children’s Hearings’, there is the possibility of diverting children in conflict with the law into the welfare system, and to appropriate health and social services.<sup>71</sup>

In terms of prevention measures, the fact that juvenile offending has many underlying causes is recognized across the board. The previous Council of Europe Commissioner for Human Rights elucidated the matter in detail,<sup>72</sup> while various Recommendations seek to tackle juvenile delinquency from a social and holistic perspective. This **Parliamentary Assembly of the Council of Europe’s** Resolution on a dynamic social policy for children and adolescents in towns and cities<sup>73</sup> places urban youth malaise within the context of acute familial poverty and break-up, as well as the weakening of social welfare and adequate community support, among others.<sup>74</sup> In 2016, the Parliamentary Assembly adopted a specific Resolution on Preventing the radicalization of children and young people by fighting the root causes.<sup>75</sup>

Further Council of Europe efforts in this regard include **research-based methodologies** on how to approach early detection and prevention measures regarding perpetrators of child sexual abuse and those exhibiting sexually harmful behavior, compiled by experts in the field.<sup>76</sup>

The UN SRT recommends that the **minimum age of criminal responsibility is set to no lower than 12 years**, and that consideration could be made for progressively raising this.<sup>77</sup> The Guidelines on Child-friendly justice contain a clause on minimum age of criminal responsibility, although it is arguably vaguer than the UN rules: stating only that it “should not be too low and should be determined by law.”<sup>78</sup> Indeed, if we look to the Member States of the Council of Europe, the age of criminal responsibility varies greatly, beginning at 10 years of age in England and Wales, and at 18 in Belgium.<sup>79</sup> The ways in which these criminal ages of responsibility are implemented vary diversely in practice, however; in England and Wales, for example, detention in young offenders’ institutions is rarely imposed upon children under 15 years of age.<sup>80</sup> This diverse minimum age of criminal responsibility is therefore a persistent challenge for Council of Europe Member States as it appears to be difficult to obtain a high minimum age of criminal responsibility. This is in spite of the concern raised in 2009 by the Human Rights Commissioner<sup>81</sup> and the clear message of the Parliamentary Assembly of the Council of Europe that the minimum age should be set at 14 years.<sup>82</sup>

<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Council of Europe, Parliamentary Assembly Recommendation on a dynamic social policy for children and adolescents in towns and cities, Rec1532(2001), available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=16939&lang=en>.

<sup>74</sup> *Ibid.* at 3-4.

<sup>75</sup> Council of Europe, Parliamentary Assembly Resolution on Preventing the radicalization of children and young people by fighting the root causes, Res2103 (2016), <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=22701&lang=en>.

<sup>76</sup> See e.g. Philip Jaffé (Chapter 17) and Vernon Jones (Chapter 18) in Council of Europe, Protecting children from sexual violence—A comprehensive approach (2011, Council of Europe Publishing, Strasbourg), available at: <https://book.coe.int/eur/en/children-s-rights-and-family-law/4730-protecting-children-from-sexual-violence-a-comprehensive-approach.html> [hereinafter “Protecting Children from Sexual Violence”].

<sup>77</sup> A/HRC/28/68, *supra* note 1, at para. 85(f).

<sup>78</sup> Guidelines on Child-Friendly Justice, *supra* note 8, Rule 23.

<sup>79</sup> European Council for Juvenile Justice, *supra* note 38, page 20

<sup>80</sup> *Ibid.*

<sup>81</sup> Commissioner for Human Rights Issue Paper, *supra* note 70.

<sup>82</sup> Council of Europe, Parliamentary Assembly Resolution on Child-friendly juvenile justice: from rhetoric to reality, Res2010 (2014), available at: <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=21090&lang=en> [hereinafter “Parliamentary Assembly Resolution on Child-friendly justice”].

## 2.2 Guidelines on Child-friendly justice

Key to the UN SRT's Report is **the adoption of child-friendly administrative and criminal court procedures.**<sup>83</sup> The UN SRT concludes, for example, that children deprived of their liberty due to conflict with the law "should be **charged, tried and sentenced within a State's system of juvenile justice.**"<sup>84</sup> Of particular note is the fact that the Rapporteur recommends the establishment of **clear guidelines for law enforcement agencies** dealing with children on these matters.<sup>85</sup> In the light of these recommendations, the Council of Europe Guidelines on child-friendly justice are particularly relevant.<sup>86</sup>

These guidelines, adopted by the Committee of Ministers in 2010, are intended as a practical tool for Member States in adapting their justice systems to the needs of children and they apply in all circumstances in which a child might have contact with the justice system, be it criminal, civil or administrative. The guidelines are based on international and European human rights standards, and are guided, in particular, by the best interests of the child.

Implementation is supported by the European Committee on Legal Cooperation (CDCJ).<sup>87</sup> Child-friendly justice has also been mainstreamed and integrated into the work carried out by numerous other Council of Europe sectors; the Parliamentary Assembly of the Council of Europe, for example, has called on Member States to bring their laws and practice into conformity with the human rights standards in this field.<sup>88</sup> The ECtHR has also had recourse to the Guidelines,<sup>89</sup> which is of particular significance given the binding nature of the ECtHR's decisions upon the States concerned.

Dissemination of the Guidelines has been aided greatly by the creation of a booklet-publication, as well as through an easy-to-read leaflet.<sup>90</sup> The Guidelines have also been translated into approximately 25 Member State languages to date.

Child-friendly justice is, yet again, a core priority in the 2016-21 Council of Europe Strategy for the rights of the child.<sup>91</sup> Within the pillar of child-friendly justice, there is specific mention of protecting children in the context of deprivation of liberty.

<sup>83</sup> A/HRC/28/68, *supra* note 1, at paras 75, 81, 85(j).

<sup>84</sup> *Ibid.* at paras 73, 85(f).

<sup>85</sup> *Ibid.* at para. 85(j).

<sup>86</sup> Guidelines on Child-Friendly Justice, *supra* note 8.

<sup>87</sup> Council of Europe, European Committee on Legal Co-operation, available at: [http://www.coe.int/t/DGHL/STANDARDSETTING/CDcj/default\\_en.asp](http://www.coe.int/t/DGHL/STANDARDSETTING/CDcj/default_en.asp); Council of Europe, 89th meeting of the European Committee on legal Cooperation: Child-friendly justice guidelines—orientations on promoting and supporting their implementation, CDCJ(2014)15, (2014), available at: [http://www.coe.int/t/dghl/standardsetting/cdcj/Child%20friendly%20justice/Conference%20on%20handling%20child%20evidence/CDCJ\(2014\)15E.pdf](http://www.coe.int/t/dghl/standardsetting/cdcj/Child%20friendly%20justice/Conference%20on%20handling%20child%20evidence/CDCJ(2014)15E.pdf).

<sup>88</sup> Parliamentary Assembly Resolution on Child-friendly justice, *supra* note 82.

<sup>89</sup> See Council of Europe, Child friendly-justice guidelines: Recent judgments of the European Court of Human Rights (2014), available at: <http://www.coe.int/t/dghl/standardsetting/cdcj/Child%20friendly%20justice/Conference%20on%20handling%20child%20evidence/child%20friendly%20justice%20guidelines%20recent%20judgments.pdf>.

<sup>90</sup> Council of Europe, Guidelines on Child-friendly justice [Leaflet], available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168045f5aa>.

<sup>91</sup> Council of Europe Strategy for the Rights of the Child, *supra* note 2, at paras. 48—51.

### 2.3 Training, complaints and monitoring

The UN SRT recommends that States **train all of those who may come into contact with children deprived of their liberty**.<sup>92</sup> This includes police officers, border guards, detention staff, judges and others. They should be trained in child-protection principles, and on the vulnerability of children to human rights violations, with a particular focus on particularly vulnerable groups of children, such as girls, minorities, disabled children and migrant or refugee children.<sup>93</sup>

The Council of Europe's HELP (Human Rights Education for Legal Professionals) Network<sup>94</sup> is currently designing a curriculum and e-learning training course for judges and other legal professionals surrounding the Guidelines on Child-friendly justice. This includes for example, training the guiding principles of child-friendly justice, and how to apply them, as well as on the ECHR and its relevant case-law within the field. There will be a specific module on deprivation of liberty, as well as on violence against children, in particular sexual violence, as well as migration and asylum, with a focus on unaccompanied children. As the HELP Network is composed of representatives of bar associations and national training institutions across the 47 Member States, the sharing of such training sources will be greatly assisted through the HELP Platform.

As the Rapporteur states, **medical and forensic science** can be instrumental in preventing torture or ill-treatment of children deprived of liberty.<sup>95</sup> Children should also be ensured **access to pediatricians and child psychologists with trauma-informed training** on a regular basis.<sup>96</sup> Once more, these are mandated by the Council of Europe's standards and guidelines. In this regard, the CPT standards on documenting and reporting medical evidence of ill-treatment, based upon the results of their country monitoring work, are insightful.<sup>97</sup> The CPT consistently highlights the need for improved medical screening and recording of injuries, especially since children may be more easily discouraged than adults from making complaints and because allegations of ill-treatment are not always properly followed up or taken seriously by the judiciary, in the absence of such safeguards.<sup>98</sup>

The UN SRT's Report recommends that children deprived of their liberty, as well as their parents and/or legal representatives, should have **access to administrative complaint mechanisms, and should be entitled to have their complaints addressed confidentially and by an independent authority**.<sup>99</sup> This access, of course, requires support, including in the form of legal and representation, as well as information provision. These procedural safeguards form the basic tenets of the ECHR right to a fair trial (Article 6), which applies equally to children. All of the relevant guidelines, including the Guidelines on Child-friendly justice, the European Rules for juvenile offend-

<sup>92</sup> A/HRC/28/68, *supra* note 1, at paras. 81, 85(e).

<sup>93</sup> *Ibid.* at para. 81

<sup>94</sup> See Council of Europe, Human Rights Education for Legal Professionals, Resources, available at <http://help.ppa.coe.int/>.

<sup>95</sup> A/HRC/28/68, *supra* note 1, at para. 28

<sup>96</sup> *Ibid.*

<sup>97</sup> CPT Standards, *supra* note 21, Chapter VII.

<sup>98</sup> See e.g. 24<sup>th</sup> General Report of the CPT, *supra* note 44; Council of Europe, Children's rights and the European Committee for the Prevention of Torture, by Dr Ursula Kilkelly, including the integrated expert comments provided by Dr Silvia Casale (2012) [hereinafter "Children's Rights and the CPT"], available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/sso/SSODisplayDCTMContent?documentId=090000168045d229>, pp. 13, 22.

<sup>99</sup> A/HRC/28/68, *supra* note 1, at para. 82.

ers, and the Convention on Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention),<sup>100</sup> further concretize these rights in the context of children.

The Report recommends that places in which children are deprived of liberty should be subject to **regular and independent monitoring**, by bodies which have authority to receive and act on complaints, and to assess whether the establishments operate in compliance with national and international standards.<sup>101</sup> These bodies draw on **multidisciplinary work**.<sup>102</sup> Their visits should be regular and unannounced, and include civil society organizations in the monitoring process.<sup>103</sup>

Within the Council of Europe Member States, the monitoring work of the CPT is therefore highly valuable. The 2012 publication on Children's Rights and the European Committee for the Prevention of Torture,<sup>104</sup> which itself examined the potential of the CPT's work in protecting the rights of children deprived of their liberty, highlighted the particular authority of the CPT's work, given its direct exposure to the experiences of detained children.<sup>105</sup> In addition to its visits, the CPT has developed a body of standards, including, significantly, safeguards against ill-treatment, and conditions of detention facilities.<sup>106</sup> These standards also incorporate and provide examples of good practice found during monitoring visits. It has also worked in cooperation with Defence for Children International (DCI)—Belgium and within the European Commission project "Children's Rights Behind Bars,"<sup>107</sup> which has resulted in the Practical Guide for Monitoring places where children are deprived of their liberty.<sup>108</sup> The project was co-funded by the Council of Europe, and the resultant guide seeks to assist in the implementation of the UN and Council of Europe rules and guidelines; it both draws upon and is intended for multidisciplinary areas of work within the context of monitoring places of deprivation of liberty for children.

## 2.4 Conditions and practices

There should be **appropriate separation** of minors; this includes separation between children in conflict with the law and children in need of care, pre-trial and convicted cases, boys and girls, younger and older children, children with disabilities and those without.<sup>109</sup> In addition, children should never be held together with adults.<sup>110</sup> Indeed, the ECtHR has found that non-separation of children and adults may lead to a breach of Articles 3<sup>111</sup> or 5 (deprivation of liberty),<sup>112</sup> as has the ECSR in its interpretation of Article 17 ESC. The European Rules for juvenile offenders, for example, contain several provisions on appropriate separation.<sup>113</sup> As the UN SRT's Report states, detain-

<sup>100</sup> Lanzarote Convention, *supra* note 8, Article 31.

<sup>101</sup> A/HRC/28/68, *supra* note 1, at para. 83.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Ibid.* at para. 85(r).

<sup>104</sup> Children's Rights and the CPT, *supra* note 98.

<sup>105</sup> *Ibid.* at page 36

<sup>106</sup> CPT Standards, *supra* note 21, Chapter V.

<sup>107</sup> See Human Rights of Children Deprived of Liberty, Improving Monitoring Mechanisms, <http://www.childrensrightrbehindbars.eu/>.

<sup>108</sup> Defence for Children International—Belgium, Practical Guide: Monitoring places where children are deprived of liberty (2016), available at: [http://www.childrensrightrbehindbars.eu/images/Guide/Practical\\_Guide.pdf](http://www.childrensrightrbehindbars.eu/images/Guide/Practical_Guide.pdf).

<sup>109</sup> A/HRC/28/68 at para. 86(a).

<sup>110</sup> *Ibid.* at para. 76, although N.B. at 86(a).

<sup>111</sup> *Güveç v Turkey*, *supra* note 10.

<sup>112</sup> *Nart v Turkey*, *European Court of Human Rights*, (App No. 20817/04)

<sup>113</sup> European Rules for Juvenile Offenders, *supra* note 3, Rules 59.1, 60.

ing children and adults together leads to numerous negative results, including a five-fold risk of children experiencing sexual violence, as well as other forms of violence.<sup>114</sup>

Additionally, the Rapporteur concludes that **other certain detention conditions** should be fulfilled, such as access to hygienic facilities which respect privacy,<sup>115</sup> and with adequate resources such as nutrition, etc. In principle, children should be given individual bedrooms, and large dormitories should be avoided.<sup>116</sup> In this area, the CPT, in particular, provides detailed standards. Reference to the CPT's monitoring work and reports are in turn considered by the ECtHR in its determination of Article 3 violations for detention conditions.<sup>117</sup> The European Rules for juvenile offenders<sup>118</sup> and the CPT standards<sup>119</sup> also state that children should be held in institutions which are specifically designed for persons of this age.

At the same time, however, the UN SRT recommends that States **consider, on a case-by-case basis, whether it is appropriate for a particular inmate to be transferred to an adult institution upon reaching the age of majority.**<sup>120</sup> As usual, this is mirrored in the Council of Europe standards and guidelines; indeed, the European Rules for juvenile offenders elaborate upon and extend beyond this recommendation, stating that "juveniles who reach the age of majority...shall normally be held in institutions for juvenile offenders or in specialized institutions for young adults unless their social reintegration can be better effected in an institution for adults."<sup>121</sup>

The Rapporteur further states that children should be **provided with an educational, sportive and vocational training program**, with recreation and other meaningful activities. This should encompass at least two hours of access to the open air.<sup>122</sup> The CPT provides in-depth standards on regimes for children deprived of their liberty: for example, in addition to minimum recommendations for access to open air, it recommends that these spaces should be suitably equipped for the purposes of sports practice, and for shelter against bad weather conditions.<sup>123</sup> These are supported, in addition to the Council of Europe's standards, by its research work, and in particular, its 2014 Report on Violence in Institutions for Juvenile Offenders.<sup>124</sup> This draws on literature which shows that lack of stimulation may lead children to feel frustrated and bored, and which can in turn lead to violent behavior.<sup>125</sup> Given the report's focused and comprehensive manner, it is able to provide even further recommendations for conditions that assist in the prevention of violence within juvenile institutions. Its inclusion of empirical research, gathered from Member State representatives working within the area of prisons or child protection, renders it of further value.<sup>126</sup>

While the rights to education and healthcare are enshrined in, notably, the ESC,<sup>127</sup> there is also specific mention within the relevant Council of Europe Rules and Guidelines on access to education within detention.<sup>128</sup> Furthermore, the three prongs of social integration, education, and prevention

<sup>114</sup> A/HRC/28/68, *supra* note 1, at para. 43.

<sup>115</sup> *Ibid.* at para. 76.

<sup>116</sup> *Ibid.* at para. 86(b).

<sup>117</sup> See e.g., *Güveç v Turkey*, *supra* note 10, at paras. 60-64.

<sup>118</sup> European Rules for Juvenile Offenders, *supra* note 3, Rule 59.1

<sup>119</sup> CPT Standards, *supra* note 21, Chapter V.

<sup>120</sup> A/HRC/28/68, *supra* note 1, at para. 86(a).

<sup>121</sup> European Rules for Juvenile Offenders, *supra* note 3, Rule 59.3.

<sup>122</sup> A/HRC/28/68, *supra* note 1, at paras. 78, 86(f).

<sup>123</sup> CPT Standards, *supra* note 21, at p. 87.

<sup>124</sup> Co-Operation Report, *supra* note 58 at 13.

<sup>125</sup> *Ibid.* at 17.

<sup>126</sup> *Ibid.* at 4.

<sup>127</sup> See European Social Charter, *supra* note 30, Article 17.

<sup>128</sup> E.g., European Rules for Juvenile Offenders, *supra* note 3, Rule 28

of recidivism, are clearly emphasized as basic principles in the European Rules for juvenile offenders, among others.<sup>129</sup> Once more, the CPT offers detailed assistance within this area: education and vocational training of juveniles should be similar to that found in the community, and they should obtain the same types of certifications or diplomas. Measures should also be taken to avoid school certificates bearing any indication of the child's institutional links. The CPT provides examples of good practice, including juveniles attending schools in the outside community.<sup>130</sup>

The CPT emphasizes the importance of child-friendly, multidisciplinary healthcare services within places of detention.<sup>131</sup> This includes, *inter alia*, appropriately trained staff,<sup>132</sup> recognition of juveniles' tendency to engage in risk-taking behavior, and appropriate strategies to deal with such in detention centers,<sup>133</sup> and the provision and monitoring of adequate food and nutrition, especially for children who are still in their growth phase.<sup>134</sup> Lack of adequate medical care for children deprived of their liberty may also constitute an Article 3 ECHR violation.<sup>135</sup>

The UN SRT states that certain practices, **such as corporal punishment, should be prohibited completely.**<sup>136</sup>

These are echoed, particularly, within the European Rules for juvenile offenders,<sup>137</sup> and the CPT standards.<sup>138</sup> The ECtHR, too, has ruled that corporal punishment within institutions constitutes a breach of Article 3 (protection from torture or inhuman and degrading treatment).<sup>139</sup> The ECSR has held that Member States should provide clear, binding and precise prohibition of corporal punishment.<sup>140</sup> Regrettably, the CPT still records instances in several establishments across Member States of physical chastisement against juveniles.<sup>141</sup>

The Council of Europe and its various bodies have consistently recommended and campaigned for a total prohibition of corporal punishment within all contexts. A highly visible campaign, "Raise your hand against smacking!", was initiated across the Member States, which sought to raise awareness of the harms of corporal punishment. Campaign materials include various publications,<sup>142</sup> while the Council of Europe developed a repository of tools and resources on the subject.<sup>143</sup> It also forms a part of the new Strategy's key priority in tackling violence against children.<sup>144</sup>

<sup>129</sup> *Ibid.*, Rules 2, 23.2

<sup>130</sup> CPT Standards, *supra* note 21, at p. 87.

<sup>131</sup> *Ibid.* at 114.

<sup>132</sup> *Ibid.*

<sup>133</sup> *Ibid.* at 117.

<sup>134</sup> *Ibid.* at 118.

<sup>135</sup> *Güveç v Turkey*, *supra* note 10; *Blockhin v Russia*, European Court of Human Rights (App No. 47152/06).

<sup>136</sup> A/HRC/28/68, *supra* note 1, at paras. 86(d), 86(e). Solitary confinement and the use of restraints are also mentioned and thoroughly dealt with by, e.g., the European Rules for Juvenile Offenders, *supra* note 3, and the CPT Standards, *supra* note 21.

<sup>137</sup> European Rules for Juvenile Offenders, *supra* note 3, Rule 95.2.

<sup>138</sup> CPT Standards, *supra* note 21, at p. 91.

<sup>139</sup> *Tyler v UK*, European Court of Human Rights (App. No. 5856/72); *Campbell and Cosans v UK*, European Court of Human Rights (App., No. 7511/76; 7743/76); *Costello-Roberts v UK*, European Court of Human Rights (App. No. 13134/87).

<sup>140</sup> See e.g. *Approach v Belgium*, European Court of Human Rights (App. No. 98/2013)

<sup>141</sup> CPT Standards, *supra* note 21, at p. 91.

<sup>142</sup> See Council of Europe, Corporal Punishment, available at: <http://www.coe.int/en/web/children/corporal-punishment>

<sup>143</sup> See Council of Europe, Children's Rights, Repository of Good Practices, available at: <http://www.coe.int/en/web/children/repository-of-good-practices>.

<sup>144</sup> Council of Europe, Strategy for the Rights of the Child, *supra* note 2, at para. 47.



In this regard, the Council of Europe will continue its work in supporting Member States to make legal reforms within this area, and to attain higher collective awareness about the issue.<sup>145</sup>

## 2.5 Protection against sexual abuse and sexual exploitation

The UN SRT's Report refers on several occasions to the oft-denied and hidden phenomenon of sexual abuse within detention settings which is a somber reality for too many children deprived of liberty.<sup>146</sup>

Tackling sexual violence in all settings is a key priority area in the Council of Europe's previous and new Strategy for the Rights of the Child.<sup>147</sup> In particular, this work is carried out through the lens of the Lanzarote Convention. It has been signed by all Council of Europe Member States and ratified by 42. In addition, any non-Member State of the Council of Europe can request accession to this Convention, as, for example, the Kingdom of Morocco has requested.

The Convention is the most ambitious and comprehensive international legal instrument on the protection of children against sexual exploitation and sexual abuse. It is based, as usual, upon the relevant UN and Council of Europe standards, and extends these to cover all possible kinds of sexual offences against minors.<sup>148</sup> It obliges States to establish specific legislation and take measures, with the best interests of the child as a primary consideration, to prevent sexual violence, as well as to protect child victims and prosecute perpetrators. Moreover, the effectiveness of its implementation is carried out through the monitoring work of the Lanzarote Committee.<sup>149</sup>

The Convention stipulates that persons working in contact with children should be screened and trained (Article 5). The reporting of suspicion of sexual exploitation or sexual abuse should be encouraged (Article 12), through legislative or other measures. This complements the work of other monitoring and complaints mechanisms, such as the CPT or Ombudspersons for children, within the context of detention facilities, as well as those working within the medical profession, who may carry out screenings on children.

Member States should ensure that children are made aware of the risks of sexual exploitation and sexual abuse, as well as how to best protect themselves against such risks (Article 6). Member States should, in addition, ensure that the entire judicial process surrounding children in the context of sexual violence cases, is child-friendly, such as by limiting the number of interviews for the purpose of criminal proceedings, and by offering child-appropriate environments (Article 35).

The Convention also contains a provision on preventive intervention programs or measures directed at potential offenders (Article 7). This could strengthen the recommendations on early detection and the provision of adequate support to minors in detention who display sexually harmful behaviors, especially vital given the possibility of peer-to-peer violence within places of detention.<sup>150</sup> This is further emphasized by the CPT's standards, which make clear that "[i]t is the responsibility of the establishments' administration to take special precautions to protect juveniles

<sup>145</sup> *Ibid.* at para. 43.

<sup>146</sup> A/HRC/28/68, *supra* note 1, at para. 43.

<sup>147</sup> Council of Europe, Strategy for the Rights of the Child, *supra* note 2, at paras. 44–46.

<sup>148</sup> Committee of the Parties to the Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, Briefing: The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (2016), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168062fcf7>.

<sup>149</sup> See Council of Europe, Children's Rights, Lanzarote Committee, available at: <https://www.coe.int/en/web/children/lanzarote-committee>.

<sup>150</sup> Co-Operation Report, *supra* note 58.

from all forms of abuse, including sexual or other kinds of exploitation. Staff members should be alert to signs of bullying...and should know how to respond accordingly.”<sup>151</sup>

The Convention further mandates both Member States and the Lanzarote Committee to collect, analyze and exchange information and good practice between Member States in order to improve capacity to prevent and combat sexual violence (Articles 10 and 41). The Lanzarote Committee has held several capacity-building activities in this regard.<sup>152</sup> The Parliamentary Assembly of the Council of Europe has compiled a Compendium of Good Practices to build the capacity of national parliamentarians to be vehicles of change in their home countries, contributing to building a solid legal framework to prevent sexual violence, protect children from such violence and to fight impunity.<sup>153</sup> Moreover, the Council of Europe has published a compilation of essays written by experts in the field, “Protecting children from sexual violence—A comprehensive approach.”<sup>154</sup>

Finally, the Convention contains provisions on awareness-raising activities (e.g. Article 8), which further support effective implementation. In this regard, the Council of Europe has initiated many awareness-raising efforts surrounding the topic of sexual violence. A European Day on the Protection of Children against Sexual Exploitation and Sexual Abuse was celebrated for its second year on 18 November 2016,<sup>155</sup> and aims to bring light to the issue, encourage discussion around the phenomenon and practical ways of tackling it, as well as to promote ratification of the Lanzarote Convention. The Council has also carried out a highly successful ONE in FIVE Campaign to raise awareness on the prevalence of sexual violence. It is supported by the Parliamentary Assembly of the Council of Europe, which has compiled a Handbook on the Convention,<sup>156</sup> for national parliamentarians.

Article 3 of the ECHR encompasses cases of sexual abuse. Where a child is detained in institutions run by public authorities, their protection clearly falls under the remit of the Convention.<sup>157</sup> Even in private institutions, where the threshold for inhuman and degrading treatment is met, the State will have positive obligations to protect children against such,<sup>158</sup> including through conducting effective investigations into abuse.

## 2.6 Children in care

Especially with regard to children with disabilities, it should be recalled that child-deprivation of liberty can occur not only in the context of the criminal justice system, but also in alternative care facilities. In this regard, numerous instruments exist at the Council of Europe, including

<sup>151</sup> CPT Standards, *supra* note 21, at p. 89.

<sup>152</sup> See Council of Europe, Children’s Rights, Good Practices, <http://www.coe.int/en/web/children/good-practices>.

<sup>153</sup> Council of Europe, Compendium of action and good practices (2011-2015) of the PACE and the Network of Contact Parliamentarians involved in the Council of Europe ONE in FIVE Campaign to stop sexual violence against children (2016, Council of Europe Publishing, Strasbourg), available at: <https://edoc.coe.int/en/children-s-rights/6808-compendium-of-action-and-good-practices-2011-2015-of-the-pace-and-the-network-of-contact-parliamentarians-involved-in-the-council-of-europe-one-in-five-campaign-to-stop-sexual-violence-against-children.html>.

<sup>154</sup> Protecting Children from Sexual Violence, *supra* note 76.

<sup>155</sup> See Council of Europe, Children’s Rights, Events, available at: <https://www.coe.int/en/web/children/events>.

<sup>156</sup> Council of Europe, Handbook for parliamentarians: The Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention) (2013), available at: [http://www.coe.int/t/dg3/children/1in5/Source/Assembly/Handbook\\_en.pdf](http://www.coe.int/t/dg3/children/1in5/Source/Assembly/Handbook_en.pdf).

<sup>157</sup> *Nencheva and Others v Bulgaria*, European Court of Human Rights (App No. 48609/06).

<sup>158</sup> See e.g. *O’Keefe v Ireland*, European Court of Human Rights (App No. 35810/09).

the Committee of Ministers' Resolution on Safeguarding adults and children with disabilities against abuse,<sup>159</sup> which defines and recommends steps for tackling institutional violence, including increased public awareness, increased cooperation between authorities, and the implementation and monitoring of legislation concerning care settings.<sup>160</sup> Also pertinent is the Recommendation on the rights of children living in residential institutions,<sup>161</sup> which in many respects places the provisions of the European Rules for juvenile offenders into the context of residential institutions.

The Recommendation on the rights of children living in residential institutions also emphasizes that placement therein should be an exception, for a period that is no longer than necessary, and subject to periodic review which accords with the best interests of the child.<sup>162</sup> This Recommendation is in line with the earlier ECtHR decision of *K.A. v Finland*,<sup>163</sup> which states that the removal of the child interferes with the Article 8 right to family life, and that, in most cases, the child must ultimately be reunited with their family. Due to the engagement of Article 8, the Court has further stated that any decision-making process to place a child in alternative care must sufficiently involve the parents,<sup>164</sup> and, where appropriate, hearing from the child themselves.<sup>165</sup>

The Recommendation on de-institutionalization and community living of children with disabilities encourages Member States to take appropriate measures to replace institutional care with community-based services; once more, it emphasizes that children should live with their own family in the absence of exceptional circumstances.<sup>166</sup>

All of this reflects the UN SRT's recommendation that legislation should be amended so that there is **a presumption of community living, with support, for children with disabilities**.<sup>167</sup> Moreover, given the emphasis upon community support as an alternative to institutional care, the Committee of Ministers Recommendation on Children's rights and social services friendly to children and families,<sup>168</sup> and its recent implementation report,<sup>169</sup> can be of value in the area.

<sup>159</sup> Council of Europe, Committee of Ministers Resolution on Safeguarding adults and children with disabilities against abuse, ResAP(2005)1, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805daf83](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805daf83).

<sup>160</sup> *Ibid.* at II3.

<sup>161</sup> Council of Europe, Committee of Ministers Recommendation to member states on the Rights of children living in residential institutions, CM/Rec(2005)5, available at: [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Rec\(2005\)5&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true\)&direct=true](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=Rec(2005)5&Language=lanEnglish&Ver=original&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true)&direct=true).

<sup>162</sup> *Ibid.*

<sup>163</sup> *K.A. v Finland*, European Court of Human Rights (App No. 27751/95).

<sup>164</sup> *W v UK*, European Court of Human Rights (App No. 9749/82) [64]; *McMichael v UK*, European Court of Human Rights (App No. 16424/90).

<sup>165</sup> *B v Romania (No.2)*, European Court of Human Rights (App No. 1285/03); *BB and FB v Germany* (app Nos. 18734/09 and 9424/11).

<sup>166</sup> Council of Europe, Committee of Ministers Recommendation to member states on Deinstitutionalisation and community living of children with disabilities, CM/Rec(2010)2, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805cfa92](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cfa92).

<sup>167</sup> A/HRC/28/68, *supra* note 1 at para. 85.

<sup>168</sup> Council of Europe, Committee of Ministers Recommendation to member states on Children's rights and social services friendly to children and families, CM/Rec(2011)12, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805afddf](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805afddf).

<sup>169</sup> Council of Europe, Children's Rights and Social Services: Report on the implementation of the Council of Europe Recommendation on children's rights and social services friendly to children and families, report prepared by Ana Isabel Fernandes Guerreiro and Vanessa Sedletzki (2016), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680649301>.

Finally, and in terms of training and knowledge, the Council of Europe has co-authored a practical guide for professionals working within the area named “Securing Children’s Rights”;<sup>170</sup> as well as a child-friendly guide to alternative care and the child’s rights therein.<sup>171</sup>

## 2.7 Children affected by migration

The Report, in its conclusions, states that it is clear that **deprivation of liberty solely based upon their, or their parents’ migration status, is never in the best interests of the child**, exceeds the requirement of necessity, and may constitute cruel, inhuman or degrading treatment.<sup>172</sup> States should therefore **completely cease to detain children, with or without their parents, on this basis**.<sup>173</sup>

The ECtHR has stated that detention of migrant children should be seen as a measure of last resort.<sup>174</sup> The fact that the ECtHR permits detention as a last resort appears, therefore, to fall short of the UN SRT’s recommendation. In practice, however, the standard set by cases such as *Mubilanzila Mayeka* and *Rahimi v Greece*<sup>175</sup> is so high as to make detention of unaccompanied children practically always unlawful. In other cases, the Court has found a violation of Article 3 even where the child is accompanied by a parent in detention.<sup>176</sup> The Guidelines on Child-friendly justice, for example, make clear that migrant children should not be detained solely on the basis of their residence status.

There have been significant, further political and awareness-raising efforts in this regard in the Council of Europe context. With the most recent migratory flows into the Council of Europe Member States the organization has stepped up its focus in a swift manner. In January 2016, Mr. Tomáš Boček was appointed Special Representative on Migration and Refugees of the Council of Europe.<sup>177</sup> He has been entrusted with gathering information on the situation of the basic rights of migrants and refugees in Europe, and to develop proposals for action. One of the key priorities of his mission is to protect the worryingly high number of child refugees who are currently in Europe. In March 2016, for his first fact-finding visit, he went to hotspots and migrant and refugee camps in the Balkans. The Secretary General of the Council of Europe proposed in the same month a set of priority measures<sup>178</sup> to Member States, underlining that children should not be placed in immigration detention centers, apart from in exceptional circumstances and for the shortest period of time. Rapid procedures for appointing legal guardians for unaccompanied children, providing suitable and safe accommodation, and improving age assessment procedures were also proposed.

<sup>170</sup> SOS Children’s Villages International & Council of Europe, *Securing Children’s Rights: A guide for professionals working in alternative care* (2013), available at: [https://www.sos-childrensvillages.org/getmedia/313a610a-e688-4347-8921-427ffe0ee4e0/SecuringChildrensRights\\_GBR.pdf](https://www.sos-childrensvillages.org/getmedia/313a610a-e688-4347-8921-427ffe0ee4e0/SecuringChildrensRights_GBR.pdf).

<sup>171</sup> SOS Children’s Villages International & Council of Europe, *Children and young people in care: Discover your rights!* (2009), available at: <http://www.sos-childrensvillages.org/getmedia/9d807ca9-6a8e-4708-9b28-1596bcc53317/0911-Booklet-children-in-care-English.pdf?ext=.pdf>.

<sup>172</sup> A/HRC/28/68, *supra* note 1, at para. 80.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Mubilanza Mayeka and Kaniki Mitunga v Belgium*, European Court of Human Rights (App. No. 13178/03).

<sup>175</sup> *Mubilanzila Mayeka and Rahimi v Greece*, European Court of Human Rights (App No. 8687/08).

<sup>176</sup> *Muskhadzhiyeva and Others v Belgium*, European Court of Human Rights (App No. 41442/07); *Popov v France*, European Court of Human Rights (App. Nos. 39472/07 and 39474/07).

<sup>177</sup> See Special Representative of the Secretary General on Migration and Refugees—Tomáš Boček, available at: <http://www.coe.int/en/web/portal/special-representative-secretary-general-migration-refugees-tomas-bocek>.

<sup>178</sup> Council of Europe, *Information Documents: Protecting children affected by the refugee crisis: A shared responsibility—Secretary General’s proposals for priority actions*, SG/Inf(2016)9Final (2016), [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectID=09000016805c5ee7](https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c5ee7) [hereinafter “Protecting Children Affected by the Refugee Crisis”].

The Secretary General has furthermore requested his Special Representative to draw up an Action Plan for all relevant Council of Europe entities to coordinate and to mobilize the organization to assist its Member States in addressing the pressing human rights concerns that persist in relation to the vulnerable situation of children in its Member States.

The Human Rights Commissioner has released a Position Paper stating that detention of minors cannot be justified solely on the basis of the child's or parents' irregular status, and that, in principle, migrant children should not be subjected to migration at all.<sup>179</sup> Meanwhile, the End Immigration Detention of Children campaign was launched at the Parliamentary Assembly of the Council of Europe-level in mid-2015.<sup>180</sup> The campaign supports the signing of a global petition to end immigration detention of children, and has held seminars on the matter, including a recent event regarding the alternatives to child immigration detention.<sup>181</sup>

In terms of data collection on the practice of child immigration detention, the Parliamentary Assembly Campaign has also launched a study on immigration assessment detention practices of children in Council of Europe Member States which are not members of the EU.

Particularly vital for this endeavor is the use of **child-appropriate age determination procedures**, with a presumption that a person claiming to be a minor is under 18 years of age unless and until proven otherwise.<sup>182</sup> Where these assessments are carried out through invasive physical examinations of children, this may fall within Article 3 of the ECHR.<sup>183</sup>

The **facilities and accommodation** provided for migrant children should all have the material conditions necessary and provide an adequate regime to foster protection of the child and their holistic development.<sup>184</sup> Again this involves appropriate separation of children, as well as non-separation from unrelated adults where this could otherwise result in harm, through depriving children of interaction with others.<sup>185</sup> In this area, the ECtHR has also found several violations by Member States, including for the lack of child-adapted facilities.<sup>186</sup>

Moreover, the UN SRT invites states to **take into consideration any trauma or exposure to torture or ill-treatment** that child migrants might have experienced prior to their detention.<sup>187</sup> In addition to the work of the CPT, the Istanbul Convention and the Council of Europe Convention on Action against Trafficking,<sup>188</sup> as well as their attendant monitoring bodies, GREVIO<sup>189</sup> and GRETA,<sup>190</sup> are particularly relevant here. The Anti-Trafficking Convention, for instance, highlights the risk of re-traumatization of victims (Article 16(5)), and obliges States to adopt measures and provide training on the identification of victims, or potential victims, of trafficking (Article 10),

<sup>179</sup> Commissioner for Human Rights, Position Paper: Positions on the rights of minor migrants in an irregular situation, CommDH/PositionPaper(2010)6 (2010), available at: <https://wcd.coe.int/com.instranet.InstraServlet?Index=no&command=com.instranet.CmdBlobGet&InstranetImage=1738243&SecMode=1&DocId=1608284&Usage=2>.

<sup>180</sup> See Parliamentary Campaign to End Immigration Detention of Children, *supra* note 51.

<sup>181</sup> *Ibid.*

<sup>182</sup> A/HRC/28/68, *supra* note 1, at para. 85(b).

<sup>183</sup> *Yazgüil Yılmaz v. Turkey*, European Court of Human Rights (App No. 36369/06).

<sup>184</sup> A/HRC/28/68, *supra* note 1, at para. 80.

<sup>185</sup> *Ibid.* at para. 86(a).

<sup>186</sup> See e.g. *Mubilanzila Mayeka*, *supra* note 174 at para. 103.

<sup>187</sup> A/HRC/28/68, *supra* note 1, at para. 85(p).

<sup>188</sup> Council of Europe Convention on Action against Trafficking in Human Beings, CETS No. 197, available at: <https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/197>.

<sup>189</sup> Council of Europe, Group of Experts on Action against Violence Against Women and Domestic Violence, available at <http://www.coe.int/en/web/istanbul-convention/grevio>.

<sup>190</sup> Council of Europe, Group of Experts on Action against Trafficking, <http://www.coe.int/en/web/anti-human-trafficking/home>.

among other things. These instruments are of high value in the context of child migration, given their particular vulnerability to violence and trafficking.<sup>191</sup>

On 17 June 2016, the Lanzarote Committee launched an urgent monitoring round on what the 41 States Parties to the Lanzarote Convention are doing to protect children affected by the refugee crisis from sexual exploitation and abuse. States Parties and any other stakeholders are expected to reply to a focused questionnaire by 15 September. The findings and recommendations to States Parties will be adopted by the Lanzarote Committee by the end of November 2016.

Further standard-setting work is also underway in the Council of Europe directly related to the situation of children affected by migration or children on the move. The CDCJ is currently codifying standards on general administrative detention, with an expected chapter on children, while the Steering Committee on Human Rights (CDDH) is working on effective alternatives to detention. The Secretary General has also compiled a list of priority actions,<sup>192</sup> including, notably, entrusting his Special Representative on Migration and Refugees with fact-finding missions, and with the drawing up of a concrete action plan in cooperation with relevant sectors of the Council of Europe. He has also set out additional roles for CAHENF in the context of children and the refugee crisis, and with a focus on guardianship, as well as on methods to improve age assessment procedures.

Many of these provisions have been emphasized in high-level documents, such as the Secretary General's letter addressed to the 47 Member States' heads of government, and urging them to take action in the context of child refugees and migrants.<sup>193</sup>

## 2.8 A never-ending story with a long-term hope—What is missing?

The lack of comprehensive data on children deprived of liberty at the international level is undisputed, limiting reflection on the matter of protecting such children from human rights violations. The need to collect comprehensive data on children deprived of liberty is necessary, in Europe and beyond, as has been indicated and supported by the Parliamentary Assembly of the Council of Europe, which called on States to support the call for a global study on children deprived of liberty.<sup>194</sup> Given the resources and capabilities that the Council of Europe has developed within this area, and which has been discussed throughout this contribution, it could constitute an important platform in feeding into the preparation of such a study.

<sup>191</sup> See e.g. Council of Europe, Group of Experts on Action against Trafficking in Human Beings: 5th General Report on GRETA's activities (2016), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/sso/SSODisplayDCTMContent?documentId=090000168063093c>.

<sup>192</sup> Protecting Children Affected by the Refugee Crisis, *supra* note 178.

<sup>193</sup> Secretary General of the Council of Europe, Protecting refugee children: Secretary General calls on member States to take urgent action, 2 March 2016, available at <http://www.coe.int/en/web/portal/-/protecting-refugee-children>.

<sup>194</sup> General Assembly Resolution 69/157, *supra* note 56; Parliamentary Assembly Resolution on Child-friendly justice, *supra* note 82.

### 3. CONCLUSION

The Council of Europe's role is multi-faceted, and of great potential. Firstly, it is a body which, with 47 Member States, commands a large intergovernmental platform. In upholding the human rights of the pan European continent, the Council of Europe contributes towards sharp international legal standards, and the development of intergovernmental programs where States collaborate, on the basis of consensus, in a democratic manner to achieve the result of ensuring that children have equal access to their rights and are protected from harm. Its cooperation with non-Member States, and including other international bodies, only seeks to further this influence. Secondly, it is a body with vast monitoring powers, which makes it ideal, moreover, for the collection and analysis of data within this particular area. Moreover, as a legislative body, its work can have "bite": especially within the context of its individual petition systems, and the ECtHR. Likewise, it has the capacity to interact with and stir political awareness of critical and controversial issues, given the work of the Parliamentary Assembly of the Council of Europe, in particular. As a regional institution, it is ideally placed to further concretize the work of the UN at the European level. As a body with multiple sectors, it can produce a multi-faceted approach to issues; while its intensive cooperation and mainstreaming efforts ensure focused and coordinated action. This is also strengthened by the Strategy for the Rights of the Child, and the CAHENE, which will steer all such work over the coming years. In particular, the Council of Europe has been at the forefront of work concerning child-friendly justice, and sexual abuse and sexual exploitation: two areas which are key in the fight against ill-treatment of children in detention. Its response to the migrant and refugee crisis, moreover, is also of note.

Finally, its extensive wealth of knowledge and experience in this area, places it in a prime position to provide future assistance, where appropriate, to contributing to the Global Study on children deprived of liberty.

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# Meaningful Participation of Children and Adolescents in the Framework of the Recommendations to the Committee on the Rights of the Child and the Universal Periodic Review (UPR) on issues of Juvenile Justice and Cruel and Inhuman Treatment

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## Abstract

*An important recommendation of the Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, (Juan E. Mendez, 2015) was to include civil society organisations in a more active monitoring role, which is relevant in order to achieve a greater impact of the outlined goals. Therefore, the article intends to demonstrate that this demanding and monitoring role (particularly in the implementation of the recommendations of the Committee on the Rights of the Child (CRC) and of the Human Rights Council through the Universal Periodic Review (UPR) on issues like deprivation of liberty, juvenile justice, and on issues regarding torture, cruel and inhuman treatment addressed to the Member States) can be clearly exercised by child-led organisations with the support of civil society organisations. In this sense, this article focuses on meaningful participation, mainly as an “opportunity to express a view, influence decision-making and achieve change”<sup>1</sup>, and provides a conceptual framework of participation, achievements, challenges and successful experiences that have been reached in advocacy actions on issues of deprivation of liberty, among others. Moreover, the article provides details of more than 50 recommendations both from the Committee (CRC) and from the UPR on these matters, and finally it informs on the reactions of the very children and adolescents represented by the Executive Secretary of the REDNNYAS and in four countries in region: Ecuador, El Salvador, Honduras, and Uruguay.*

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<sup>1</sup> Save the Children Sweden. (2015). Mapping and Analysis of Children’s Participation: Global Report 2015. Claire O’Kane.

## I. Introduction

*“Children know what’s going on. We know our reality. Adults already lived this stage.”*

*“Advocating, following-up Governments so we can be consulted in the development of public policies. Let’s assemble one single force, a team with civil society organisations.”<sup>2</sup>*

These statements were made by the adolescents consulted for the elaboration of this article. Both declarations show the potentials the very boys and girls have to participate in advocacy actions and decision-making in public policies and in different subjects, including deprivation of liberty and issues related to torture and abuse.

Likewise, they make two points clear, which the present article addresses: the first one is to acknowledge that their voices are crucial for decision-making at high levels of public policies in the framework of a protagonist participation that the Convention on the Rights of the Child particularly promotes and includes. In other words, the State, along with civil society, should promote and guarantee the citizenship and civil rights of adolescents, including those deprived of their liberty. Secondly, the State should guarantee that civil society, including necessarily adolescents, should be able to demand accountability through clear, democratic, participatory and inclusive mechanisms. Both issues, citizenship and accountability, have also been collected by the Concluding Observations that the members of the Committee on the Rights of the Child have recommended to the region (Latin America and the Caribbean) in general.

## II. Meaningful participation of children and adolescents, especially in advocacy actions

Save the Children and other partner organisations, especially organised networks of children and adolescents from Latin America and the Caribbean-REDNNYAS,<sup>3</sup> are promoting and demanding States to assemble appropriate channels of communication to achieve a true protagonist participation. In other words, currently this protagonist participation is addressed from different themes according to the prioritised agendas of the very children and adolescents, including the issue of adolescents deprived of liberty.

Article 12 of the Convention on the Rights of the Child states: “States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child...For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.”

Save the Children has defined participation<sup>4</sup> as an opportunity to express a view, influence decision-making and achieve change. Participation is the informed and willing involvement of all children, including the most marginalised and those of different ages and abilities, in any matter

<sup>2</sup> Testimonials of adolescents from Honduras and Ecuador, respectively.

<sup>3</sup> REDNNYAS: Red de Niños, Niñas, y Adolescentes de América Latina y el Caribe. (Retrieved from: <http://renaesenaccion.org/rednnyas/>  
<http://www.redlamyc.info/index.php/rednnyas/1412-reglamento-interno-de-rednnyas-y-documentos-de-interes>.)

<sup>4</sup> Save the Children Sweden. (2015). Mapping and Analysis of Children’s Participation: Global Report 2015. Claire O’Kane.

concerning them. Participation is a way of working and an essential principle that cuts across all arenas—from homes to Government, from local to international levels.

Additionally, there are several recommendations that Save the Children Sweden has pointed out through a new mapping and analysis process (2015).<sup>5</sup> Among the most important ones for the issue of this article are: (i) “Increase awareness-raising and meaningful engagement with adults to identify and build upon existing positive traditions and to transform negative attitudes to increase value for and practices which encourage the expression and participation of girls and boys (especially the most marginalised) in families, schools, communities, municipalities and in national, regional or global decision making processes...” (ii) Increase advocacy and partnerships with Government stakeholders in local and national authorities to plan, budget and monitor efforts to increase laws, policies, practices and mechanisms that support the realisation of children’s participation and civil rights. (iii) “Advocate for legal and policy changes which institutionalise children’s participation in national governance, local governance, and school governance, and which allow registration of child-led organisations.” (iv) Increase collaboration with other child-focused agencies, coalitions and child-led organisations to advocate with government and school authorities...” and (v) “Advocate for and support the development and dissemination of child friendly information on laws, policies, practices, budgets and issues affecting children and young people; and child friendly tools for girls and boys of different ages and abilities...”<sup>6</sup>

Not only the literature, but practices indicate that the participation approach contributes to children’s personal development. Through participation, they acquire skills and awareness, and gain confidence. It also leads to better decision-making and outcomes. Children have a unique body of knowledge about their lives, their needs and concerns, along with ideas and views based on their direct experiences. Decisions that are fully informed by children’s own perspectives will be more relevant, more effective and more sustainable.<sup>7</sup>

Once again, as pointed out in the introduction, accountability carried out by the very children and adolescents towards their States and decision makers can only be accomplished when protagonist participation includes mechanisms of enforceability, transparency and a framework of good governance. In other words, governments and other adults in positions of power (duty-bearers) are responsible for fulfilling, protecting and respecting children’s rights. However, the process is only complete if children are empowered to hold these duty-bearers to account. Children and young people need access to policy-makers as well as to courts and to complaints and redress mechanisms to ensure that violations of their rights are challenged.<sup>8</sup>

Likewise, it is important to highlight some of the advocacy actions aiming to promote the meaningful participation of children and adolescents exposed to violence. Experience has shown, for instance, that it is important to ensure the creation of permanent channels between child-led organ-

<sup>5</sup> The mapping and analysis of children’s participation was undertaken in 18 countries and/or regional programmes which are priority countries for Save the Children Sweden. A multimethod approach was applied including use of: excel questionnaires; interviews; a desk review; consultations with staff and children; and an e-discussion on critical issues. 353 participants were involved in the mapping process, including 92 women, 70 men, 105 girls and 86 boys. The children were primarily involved through consultations in Cote d’Ivoire, Paraguay, Peru, Philippines, Senegal and Zambia.

<sup>6</sup> Save the Children Sweden. (2015). Mapping and Analysis of Children’s Participation: Global Report 2015. Claire O’Kane.

<sup>7</sup> Save the Children UK. (2010). Speaking Out, Being Heard. Experiences of Child Participation and Accountability to Children from Around the World.

<sup>8</sup> Save the Children UK. (2010). Speaking Out, Being Heard. Experiences of Child Participation and Accountability to Children from Around the World.



isations and governmental areas, and make alliances with NGOs to influence socially and politically. Participation mechanisms may turn into a means that allow channelling some concerns and worries towards the responsible authorities; guaranteeing the visibility of children and adolescents, emphasising human rights in the media.<sup>9</sup>

Protagonist participation does not always have the greater impact children and adolescents wish to achieve. This is because —regrettably— there are obstacles that hinder the regular process of participation.

Examples that can be clearly highlighted: children and adolescents used to have a low level of awareness of their condition as subjects of rights—for this reason, it is important to see them and to make them see themselves as a power; protection as the dominant paradigm; laws, programmes and plans in force limit youth and are focused on protection and punishment; lack of policies that promote participation of children and adolescents in decision-making spaces; lack of participation channels for children and adolescents in their social spaces; lack of a democracy-building culture from social relations at all levels; lack of trained human resources to promote participation; the legal obstacle of the coming of age, which is 18 or older; the individualistic spirit of society does not promote participation; lack of a citizenship education, among others.<sup>10</sup>

Another crucial element to highlight is children as citizens performing their participation. Hence, participation promotes children’s capacities for civic engagement, tolerance and respect for others. Effective States and stable societies need citizens with the understanding, skills, and commitment to promote accountability and good governance. Participation enables children to develop those capacities —starting with negotiations over decision-making within the family, through conflicts resolution in schools, contributing to policy developments at the local or national level, and ensuring their representation through developing their own clubs, councils and parliaments. Respecting children and providing them with opportunities to participate helps them to negotiate decisions through non-violent conflict resolution. It enables them to speak out to challenge injustice, to build a stronger civil society, and to make a positive difference in other people’s lives.<sup>11</sup>

This participation is also at the high level of global decisions-makers; recently the United Nations Human Rights Council, in their 32<sup>nd</sup> Session, heard the OHCHR report on ‘Practical recommendations for the creation and maintenance of a safe and enabling environment for civil society, based on good practice and lessons learned’ and in this context Save the Children, CIVICUS and other organisations made the following statement: “Children (...) have the right to be heard and participate in different spheres of society.<sup>12</sup> Children want to participate in public processes.<sup>13</sup> We need them to speak out to better respond to their situation. Despite this, children’s voices are often marginalised. (...) To ensure that civil society is also a safe, meaningful and enabling space for children, we call on UN Member States to: (...) Create avenues for *children to participate in policy development, planning and decision-making*, including through the establishment and resourcing of

<sup>9</sup> Save the Children Sweden. (2008). Promotions of Protagonist and Meaning Participation of Children and Adolescents Exposed to Violence.

<sup>10</sup> Save the Children Sweden. (2008). Promotions of Protagonist and Meaning Participation of Children and Adolescents Exposed to Violence.

<sup>11</sup> Save the Children UK. (2010). *Speaking Out, Being Heard. Experiences of Child Participation and Accountability to Children from Around the World.*

<sup>12</sup> Convention on the Rights of the Child, arts. 12, 13, 15, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

<sup>13</sup> Centre for Children’s Rights and Save the Children. (2016). *Enabling the exercise of civil and political rights: The views of children*; Centre for Children’s Rights. (2015). *Towards Better Investment in the rights of the child: The views of the children.*

child-friendly, age-appropriate and safe formal mechanisms and spaces where they can engage with decision-makers at all levels. (...) Children want to engage in civic action.<sup>14</sup> We need to ensure that all children, including the most excluded groups of children, have the space, support and respect for their rights to become equal actors for change in their societies.”<sup>15</sup>

Within this framework, there is a final Human Rights Council resolution (A/HRC/32/L.29) called “Civil society space” adopted on June 27, 2016. It is a progress that has recognised the important role of civil society at local, national, regional and international levels, in processes of governance and in promoting good governance, including through transparency and accountability, which is indispensable for building peaceful, prosperous and democratic societies. Also among other issues, this Resolution reminds States of their obligation to respect and fully protect the civil, political, economic, social and cultural rights of all individuals and emphasised promoting the rights of the child, advancing social justice and consumer protection, among others.

On the other hand, there are certain criteria and recommendations to promote children’s and adolescents’ participation in regional settings which organisations—REDLAMYC, the Inter American Children’s Institute and Save the Children—have developed in the document called *Children’s and Adolescents’ Participation in Regional Advocacy Spaces* (2013).<sup>16</sup>

This document reveals that participation in regional advocacy settings is sometimes viewed from an adult-centred viewpoint, promoting or strengthening dynamics, activities, results, and even behaviours which are usual in adults or mainstream institutions. Likewise, it emphasises that oral and written expression are the most common; nevertheless, for children and adolescents images and music are the easiest to use, as well as technological innovations. It also states that the participation process extends to the school, the community and the family relations under a back-and-forth perspective but of constant evolution (spiral). In other words, we understand that advocacy in regional settings turns into central moments of exchange with authorities, but is part of a broader process seeking in the mid-term both the individual and collective development of children and adolescents, their interests and needs.

Finally, much of the experience Save the Children has had in the region (Latin America and the Caribbean) regarding children’s participation has happened within the framework of advocacy spaces raising different issues of the agendas of the very child-led organisations, including the issue of juvenile justice.

Thus, for example, in March of 2014 the 150th Extraordinary Session of the Inter-American Commission on Human Rights (IACHR) was carried out, where a regional thematic hearing was held on juvenile justice as proposed by REDLAMYC, along with 11 national coalitions on children’s issues and the REDNNYAS accompanied by Save the Children.<sup>17</sup>

It is worth noting that for the first time adolescents actively participated in inter-governmental settings such as the OAS. Doubtlessly, this was an important achievement of the REDNNYAS, insofar as they had the possibility of providing their perceptions and knowledge on the issue, regarding the practices in their countries and in the region in general, setting a precedent to be replicated

<sup>14</sup> Centre for Children’s Rights. (2015). *Towards Better Investment in the rights of the child: The views of the children*.

<sup>15</sup> Statement on behalf of Save the Children, CIVICUS and other organisations in the 32<sup>nd</sup> session OHCHR.

<sup>16</sup> *La participación de niños, niñas y adolescentes en espacios de incidencia regional*. Documento de Trabajo. June of 2013. Reflexiones y aprendizajes sobre la participación de niños, niñas y adolescentes en espacios de incidencia regional. Save the Children. REDLAMYC. IIN. pp. 23 onwards.

<sup>17</sup> To listen to the Regional Thematic Hearing, please visit the following link: <http://www.oas.org/es/cidh/audiencias/Hearings.aspx?Lang=es&Session=134&page=2>.

in coming hearings before the IACHR. The main subjects they addressed were: a regressive trend at the legislative level, lack of data and information, lack of access to justice, police violence and the use of force, low age for legal responsibility, the application of restorative justice, among others.

The specific requests the adolescents asked the IACHR Commissioners were: (i) Revising and updating the justice systems in order to adjust them to the principles of the Convention on the Rights of the Child, specifically the tendency to lowering the age of criminal culpability for children and adolescents, contravening the Convention; (ii) Ensuring the technical, sensitive, and humanised training of officials working with children and youths in order to guarantee the effective fulfilment of each of our demands within the framework of children's rights; (iii) Generating decentralised spaces of ombudsman offices to give counsel and guidance to adolescents and their families. (iv) Real combat against drug trafficking and drug abuse in communities and schools with preventive, non-repressive policies focusing on children and adolescents; and (v) Creating comprehensive public policies with a rights-based approach to improve the quality of life of children and adolescents on issues like food, health, education, job generation, recreation and leisure (centres of popular education, schools, clubs, and sports and cultural centres).

Likewise, in 2014 several regional advocacy meetings followed, where adolescents participated actively. For instance, in May, the 44th Regular Session of the OAS General Assembly was held in Asunción, Paraguay, and for the first time a delegation of adolescents—through the RENNYS—attended a high political level talk with the OAS Secretary General in the framework of a meeting with civil society. In August, adolescents also participated in the II Civil Society Forum in the framework of the XXI Pan American Child and Adolescent Congress, where the core theme was juvenile justice, which was also discussed in December in Brazil.

We can then conclude that the role of civil society, where child-led organisations are included through an exercise of full citizenship and real protagonist participation, is crucial to achieve fundamental contributions for the promotion and protection of the rights of the child and adolescent.

Finally, this exercise of citizenship and participation could be held through civil society—including children and adolescents—demanding that States implement the recommendations that the Committee on the Rights of the Child and the Human Rights Council regularly issue through the Universal Periodic Review (UPR).

We next list these recommendations in the specific issues of juvenile justice, torture and cruel and inhuman treatment.

### **III. Recommendations of the Committee on the Rights of the Child and the Universal Periodic Review (UPR) on issues of Juvenile Justice and Torture, Cruel and Inhuman Treatment**

In 2013, Save the Children, along with REDLAMYC,<sup>18</sup> developed a regional human rights monitoring tool. The main motivation of this instrument was to have integrated and updated information of both protection systems of human rights, specifically on issues of children's and adolescents' rights. This tool systematises the recommendations, resolutions, and sanctions issued both by the organs of the Inter-American Human Rights System and the Universal System of Human Rights on issues of children for 20 countries in Latin America.

<sup>18</sup> See [www.redlamyc.info](http://www.redlamyc.info).

Next we present a systematisation of the main concluding observations of the Committee on the Rights of the Child (2003-2015) and the Universal Periodic Review (UPR) (second cycle)<sup>19</sup> for 20 countries in the region, particularly on the issue of juvenile justice regarding torture, abuse, inhuman or degrading treatment. The recommendations have been grouped according to three stages: (i) Prevention, (ii) Protection, and (iii) Prosecution-indictment and participation as a cross-cutting approach.

In the first stage (Prevention) we find the following recommendations:

1. **COMPREHENSIVE TRAININGS:** The Committee recommends adopting urgent prevention measures to combat torture, cruel, inhuman and degrading treatment or punishment, and arbitrary detention including measures of comprehensive training for all professionals working with children and law enforcement personnel, including the police (at national and local levels) on issues of children's rights. *This recommendation has been general among Committee experts to the States; however, not all of them included training at the local level and also most of them highlighted training for law enforcement personnel but not for other professionals working with children.*

2. **AWARENESS-RAISING CAMPAIGNS:** The Committee recommends awareness-raising and education campaigns against physical punishment and to promote means of non-violent, participative education and teaching. *This recommendation has been reaffirmed by the Committee to the States (80%). However, it focuses too much on public education campaigns through the media on the negative consequences of imposing physical punishment on children and promoting forms of positive, non-violent discipline.*

In addition, within the UPR, Canada recommended carrying out awareness-raising campaigns regarding violence against women.

3. **VALUES:** The Committee recommends prioritising and promoting non-violent values and awareness-raising. *This recommendation was mentioned twice (10%), and is included in the report of the independent expert for the UN study on violence against children. It was worth mentioning this for it is key to work with values and raise awareness at all levels of action.*

4. **RESOURCE ALLOCATION:** The Committee urges States to prioritise prevention addressing the underlying causes and allocating sufficient resources to face the risk factors and prevent violence before it emerges. *This recommendation has only been mentioned in 20% of the recommendations, and has also been gathered from the report of the independent expert for the UN study on violence against children. Promoting resource allocation for this particular issue is key to the institutions and to manage the approach against torture and abuse.*

5. **GENDER AND LGBTI PERSONS.** The Committee urges States to strengthen their efforts to prevent violence, in particular femicides against mothers and caregivers. *In spite of being cross-cutting, only 15% of the recommendations mentioned the issue of violence and gender.*

In the scope of the UPR, States Parties addressed the gender issue with much passion recommending, for instance, addressing the excessively long detentions and promoting the use of alternative measures to preventive detention, in particular of pregnant women and small children. Moreover, the Committee recommended improving detention conditions in general, particularly

<sup>19</sup> By the end of 2013, a regional human rights monitoring tool was developed, where the latest concluding observations were gathered through the recommendations issued by the Committee on the Rights of the Child to 20 countries in Latin America and the Caribbean. In addition, the recommendations of the States made to their peers in the framework of the second Universal Periodic Review before the Human Rights Council were also gathered.

of women and children. Likewise, the States recommended strengthening their efforts to improve the situation regarding violence against women and girls, including the recovery process, and strengthening activities and adopting broad measures to combat violence against women, children, youths, and lesbian, gay, bisexual, and transgender persons.

In the second stage (Protection), the following issues were mentioned:

6. LEGAL FRAMEWORK: The Committee recommends the explicit banning by law of corporal punishment and all forms of violence against children in every setting: family, school, institutions, and detention facilities for underage offenders. *This recommendation has been the most reiterative (100%) by the experts of the Committee to the countries; however, it did not always include the detention facilities.*

On the other hand, the Committee encourages the States Parties to consider General Comment No. 8 (2006) regarding the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment. *This recommendation has also been reiterative (70%) by the Committee to the States.*

Likewise, the Committee recommends the development of a complete national strategy to prevent and combat all forms of violence. *This has been part of the recommendations (15%) of the Study stipulated by the Special Representative of the Secretary General study on violence against children.*

In the framework of the UPR, the States Parties recommend adopting a criminal system conforming to the recommendations of the Committee on the Rights of the Child, the Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), and the UN Guidelines for the prevention of Juvenile Delinquency (The Riyadh Guidelines). Likewise, they recommend the prohibiting of life imprisonment for persons below 18 years of age, in accordance with Article 37 of the Convention on the Rights of the Child.

7. CONDITIONS OF DEPRIVATION OF LIBERTY: The Committee urges the investigation of fires, deaths, and injuries in juvenile detention centres; it recommends that States prohibit the use of tear gas in detention centres, to supervise its fulfilment and to impose disciplinary measures in case of unfulfilment; it recommends the States to renew the rehabilitation and recreational facilities and ensure that detained children receive medical assistance and education; it urges States to establish an independent commission to examine all of the facilities regularly, informing the competent authorities and formulate recommendations. The Committee also recommends that States carry out independent investigations on the presumed irregularities in the administration of medicine for detained children, and to provide the victims with assistance and the necessary and appropriate means to recover, compensate and rehabilitate. *These recommendations have been isolated according the specific conditions of each country. For example, the issue of medicine was only recommended to Uruguay.*

In the framework of the UPR, States Parties have recommended adopting effective measures to improve the general situation in detention facilities, especially the detention conditions for women and children. They also recommended improving the juvenile justice system both in legislation and in practice, ensuring particularly that professionals are sufficiently trained, that there is appropriate infrastructure, and that the deprivation of liberty may only be used as a last resort in cases of children.

8. FURTHER VICTIMISATION: The Committee recommends taking steps to avoid further victimisation for adolescents in custody. It recommends States to investigate and prosecute all cases of child torture and abuse in order to prevent impunity and to guarantee that abused children are not further victimised in judicial proceedings, and their intimacy is protected. *This recommendation is*

*fundamental for the rights of victims of torture and inhuman treatment. However it has only been mentioned in 10% of the cases.*

9. REPARATION AND REINTEGRATION OF VICTIMS: The Committee recommends that States guarantee that all children victims of cruel, inhuman, and degrading treatment have access to comprehensive reparation measures, including measures for physical and psychological recovery and social reintegration.

*The recommendations to the States on the issue of victim reparation and reintegration have been reiterated (70%); however, only two recommendations included compensations in the reparation.*

In the framework of the UPR, the States Parties have recommended adopting all of the necessary measures for adolescents between the ages of 14 and 18 to be tried by a specialised justice system for children, where the best interests of the juvenile delinquents prevail, looking towards their satisfactory reintegration into society, and having the deprivation of liberty as a last resort in the case of children.

In the third stage (Prosecution) the following themes were detected:

10. RECORD AND FOLLOW-UP MECHANISMS FOR COMPLAINTS: The Committee urges States to establish a registration mechanism that includes a national record of complaints of inhuman or degrading treatment. *It was emphasised that the complaints should be accessible for children and adolescents.*

11. INVESTIGATION OF REPORTS AND IMPUNITY: The Committee recommends that States investigate (exhaustively and impartially) reports of torture and ill-treatment of children, including harassment of adolescents due to their physical appearance, ethnicity, or their situation of poverty, and to adopt all of the necessary measures to prosecute the perpetrators. *This recommendation, as well as the previous ones, has been reiterated by the experts of the Committee to the States (75%).*

The Committee further insists on the need to investigate and penalise all reported cases of agents or people acting in an official capacity in order to end the impunity regarding serious violations of human rights.

12. DATA: The Committee urges States to establish a national system to gather, examine and disseminate data, and a research programme on violence against children. *35% of the recommendations have agreed on emphasising the issue of data treatment, which after being demanded has followed up on the recommendations formulated in the UN study on violence against children (A/61/299). Likewise, Costa Rica emphasised the need for special attention on gender issues.*

Finally, PARTICIPATION, as a cross-cutting approach, has also been mentioned in the recommendations both of the Committee on the Rights of the Child and the Universal Periodic Review. The Committee urges States to use all of the recommendations in the report of the independent expert for the UN study on violence against children (A/61/299) as a tool for action, along with civil society and particularly with the participation of children in order to guarantee that each child is protected from all forms of physical, sexual, and psychological violence, and also to gain momentum for concrete actions.

This important recommendation of involving children and adolescents in the implementation of measures such as prevention actions, creating values, raising awareness, generating data, guaranteeing access to justice and no impunity, has been mentioned 40% of the time.

Finally, in the framework of the UPR, the States Parties recommend the special participation of women in spaces and decision-making processes both in the public and the private sector.

In conclusion, the States of Latin America and the Caribbean, and probably the States of all regions in general, have a great responsibility in the implementation of these recommendations because they are duty bearers and we are within the framework of the Convention on the Rights of the Child. Advanced recommendations addressing, for example, gender, investment in children, promotion of non-violent values, and minorities like LGBTI, on issues of deprivation of liberty and torture, should pose significant challenges to the States in order to achieve implementation. Undoubtedly, civil society, including child-led organisations, will play an important role in this implementation.

Thus, below we present the voices of the very boys and girls regarding their reactions to the recommendations mentioned above.

#### **IV. Adolescents' reactions regarding the recommendations human rights bodies have given to their States**

In June of 2016, after a virtual meeting, the children and adolescents of the REDNNYAS voiced their reactions and viewpoints not only regarding the recommendations their States received on the specific issue of deprivation of liberty (previously addressed), but also raised their own life experiences on issues of advocacy regarding protagonist participation.

A total of eight adolescents from four different countries—El Salvador, Honduras, Ecuador and Uruguay—attended. Each country represented their organisation (REDNAES, COPRODENI, Children and Adolescents Movement of Ecuador, and Gurises Unidos / Committee on the Rights of the Child Uruguay, respectively), and at the same time represented a single voice, the Children and Adolescent Network of the REDNNYAS—the Executive Secretary now in charge of the REDNAES in El Salvador. The ages of these adolescents were between 15 and 17.

For a more focused communication with the adolescents, four motivating questions were prepared, based on a systematisation they received on the recommendations of the human rights organisms on the issue of deprivation of liberty.

**The first question focused on learning what they thought about the recommendations, both of the Committee and of the UPR and, from there, the reactions these might arouse.** In that regard, there was an agreement to categorise the recommendations as “good”, since they said the recommendations had “touched different issues and viewpoints, while addressing the stages of prevention, protection, and impunity.” However, they emphasised—especially the adolescents representing the Executive Secretary of the REDNNYAS—that it was also necessary to address the issue of participation with greater clarity within the recommendations.

“We need to establish concrete actions, because if this is put into practice, it will be different. The comprehensive outlook is lost.” Particularly, the REDNAES (a collective of boys and girls from El Salvador) had two workshops in order to have their own reading of the recommendations made by human rights organisms. In this regard, they said the implementation of recommendations had three levels: “the main problem we see is how to bring this recommendations into practice, because they are not integrated. The second problem we see is that there is no coordination in the national protection systems. The operators do not have a rights-based approach. Finally, we asked who was monitoring the implementation of these recommendations. Currently in El Salvador and in most countries in the region there is no specialised organism.”

**The second question focused on asking the adolescents whether they thought their countries would be able to implement these recommendations, and whether they would prioritise a specific recommendation.** The adolescent from Honduras pointed out that, sadly, the policies and laws are not implemented in her country: “they are only signed and there they remain. They are not implemented, they want to give all the money to the military police.”

On the other hand, the adolescents from El Salvador concluded that the States Parties were able to implement the recommendations, but provided that they produced certain conditions. The first condition they pointed out was that the States and decision-makers should have political will. The second condition was to regard children as a priority in order to implement public policies to be duly fulfilled. The third condition they stated was to allocate resources to the areas of reintegration, health, education, and security. Finally, the fourth condition was having an effective monitoring of the recommendations to the States, because these recommendations also include what civil society, international organisms, the international cooperation and the voices of the very children and adolescents pointed out.

Regarding prioritising, the boys and girls from El Salvador said it was difficult to prioritise, because the comprehensive approach could be lost. They further said that “it is urgent to tackle the issue of prevention and the causes of poverty, such as violence, social exclusion, allocating resources for social reintegration programmes, and the participation of all sectors, including children and adolescents.”

An adolescent from Honduras said that civil society is really doing the Government’s job: “the Government does not make efficient laws, nor implements them.”

In contrast with the adolescents from El Salvador, an adolescent from Ecuador said that if he had to prioritise, he would focus more on the phase of prevention with key actors, such as families and educators: “prevention campaigns need to be prioritised.”

**The third question focused more on the participation of organised children and adolescents in the sense of knowing how they would get directly involved in following up on the recommendations.**

The adolescents from El Salvador said that the best way to get involved was to create spaces for participation: “being informed of the recommendations and disseminating them to the community. Great efforts are needed, like advocacy plans to see what capacities need follow-up.” In addition they highlighted “identifying training actions, awareness-raising campaigns on non-violent values, positive discipline, rearing models, gun control, more educational and cultural media, investment in children campaigns, as well as promoting impunity campaigns through reports submitted along with the Universal Periodic Review.” Finally, they proposed a greater visibility of the testimonials from the very children and adolescents who participate in this process.

The adolescent from Ecuador also proposed to strengthen the processes of participation as a means to get involved. In particular, she posed the need to have children participating actively in the processes of consultations: “doing advocacy, monitoring the governments so we can be consulted in the construction of public policies. Let us assemble one force, a team with the organisations of the civil society.”

**Finally, the last guiding question was based on listening to the adolescents regarding their needs and requirements for achieving better and greater participation, and on advocating for better implementation and fulfilment of the recommendations by their States.**



In that regard, there was agreement among participants: there is a need for sustainable support for the adult networks in order to set spaces for participation—“true spaces for participation.” The secretary of the REDNNYAS emphasised that “few civil society organisations know the recommendations. We need resources for the implementation of an advocacy plan.” The adolescent from Honduras said true participation is required: “Children know what is going on. We know our reality. Adults have already lived this stage.” The adolescent from El Salvador also pointed out that there is a need for greater support from international to the national organisations. “International organisations have greater weight to make participation visible. We need to work closely together. We need improved monitoring.”

The adolescents from Uruguay highlighted how they are seen by adults. The adult companion of the boys from Uruguay said that “kids die in the streets, and nobody cares—this is news of little importance because they are poor or because they are adolescents. This is the place adolescents have, and that’s how they are presented in the news, usually as something negative, like dangerous people.”

An adolescent from Uruguay added that in his country violence is experienced before, during and after all the things surrounding juvenile justice. “It has happened to me with the prejudice here—me and my haircut, me and the way I dress, me and the way I am, me and the colour of my skin—I am certain things like a thief or a drug-addict. I was once stopped by officers, policemen, and they checked me aggressively because I was supposedly going astray. I have friends who tell me they’ve been to detention centres for minors where they are treated badly, they are degraded, and I have also learned of children in shelters who are later sent to similar places, deprived of liberty. This happens a lot in Uruguay. What’s next? Discriminated by society, their social insertion is tough, their daily lives, getting a job, studies and so on, because supposedly in the detention centres for minors the children should study, they are there to change their attitudes and not to repeat whatever happened before. But if you are put in such a place and you receive no information, and you only live badly, and then you come out you and have no opportunities whatsoever, unfortunately, to make a living (it’s not the best solution). Most choose to steal again. If they catch you again, they lock you up again, and it is a vicious circle. Because of this we should have information beforehand, and good treatment during and after rehab.”

The adolescent from Uruguay also said that while they are deprived of liberty, it is very important that adolescents work with their families. In other words, preparing to come out, how is the adolescent going to return to the community.

Finally, the adolescent from Honduras talked about a personal experience in an atmosphere of violence which is worth mentioning: “One of my brothers sadly fell into this trap. He is a gangster. He fell. My mother and father separated because of problems they had. These things happen. When the family unit is destroyed, the children would take anything. And my brother found that on the street. He told me his experience, and he says that when the police caught him, they beat him so badly he was nearly disabled. He told me that if my mom and dad had not separated, he would have been happy, well, with his son, and he would have seen his son grow up because he is a parent. And now that he is in prison, I only went to visit him once and saw how they treated them. The Government does not give them any food. The same money he makes for the *maras* (gangs) or the tax they charge him is meant for food, and to provide for their families, and when they come out of prison, the other *maras* come, or the police comes, and they kill would him. That is the problem here in Honduras.”

## V. Conclusions and Recommendations

Children and adolescents from Latin America and the Caribbean, through their organisations, especially the Network of Children and Adolescents from Latin America and the Caribbean—REDNNYAS—have in both their technical and political agendas the goal of exercising their meaningful participation in different settings, mainly in advocacy. In order to do this, we strongly recommend strengthening these organisations and supporting them in their processes of change.

Throughout this article we have seen significant progress in the participation of organised children and adolescents, specifically on issues of juvenile justice, where their demand and accountability to eradicate torture and cruel and inhuman treatment have not been indifferent to their advocacy actions. In other words, there have been achievements on the issue in the last years such as: (i) Organised children increased capacity reflection, exchanged different experiences in LAC and gained knowledge in the juvenile justice system. (ii) National coalitions of children have incorporated in their agendas an advocacy strategy to further pose the issue in key spaces. (iii) Incorporated new actors in national, regional and global settings to work with more synergy on the juvenile justice system. (iv) Better knowledge and more usage of technical tools and mechanisms of the Inter-American Commission on Human Rights (IACHR).

Even more, one of the recommendations civil society demanded in the framework of the 21 Pan American Child and Adolescent Congress to their States was to “Institutionalise the spaces to increase children[‘s] participation in the fight against violence. Their voices have to be heard in the implementation and evaluation of children[‘s] policies in government institutions to guarantee the protection and promotion of their rights.”<sup>20</sup>

Lastly, through the reactions of the very adolescents we have seen that the recommendations to the States—through their peers (in the framework of the Universal Periodic Review) and the human rights organisms (particularly those of the Committee on the Rights of the Child)—on specific areas like deprivation of liberty and torture, are a significant tool to advocate for the improvement of public policies in favour of children. They have raised the relevance of a comprehensive reading of the recommendations, since they address not only themes on prevention, protection and prosecution, but also cross-cutting issues like, precisely, participation and gender.

Finally, they made clear that if their States do not have the political will to perform changes in their policies in favour of promoting and guaranteeing their rights, then the implementation and realisation of these recommendations will remain on paper.

<sup>20</sup> Visit: Recommendations of the Civil Society Forum within the framework of the XXI Pan American Child and Adolescent Congress. (2014), <http://xxicongresopanamericano.org/>.

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# Protecting the Rights of Children Deprived of their Liberty

DR. HIRANTHI WIJEMANNE\*

## Abstract

*Children get into conflict with the law for reasons very different from adults, but are very often subjected to enforcement and justice systems that deal with both adults and children. Children are most often accused of juvenile delinquency related offences, for which adults are neither detained nor prosecuted. The root causes of juvenile delinquency among children lie in their family environments and in poverty. Children may also be affected by domestic violence and experience poor parenting practices, which result in weak parent-child relationships. Such children may also experience neglect, violence, or even sexual abuse. Adolescent children are at particular risk because of the rapid physical, physiological and psychological changes that they experience. Many children lacking sufficient parental support and understanding find such changes difficult to deal with, as their emotional needs are unfulfilled. In schools, teachers lacking the requisite knowledge of how such children should be dealt with may not respond to their needs. Overcrowded classrooms in many developing countries aggravate the situation. These circumstances also contribute to children dropping out of school, running away from home, or getting into conflict with the law. All state parties to the United Nations Convention on the Rights of the Child are accountable for ensuring that law enforcement and justice procedures protect every child in conflict with the law. However, not all countries have translated the relevant international legal instruments into national laws, nor have they developed the necessary administration system to enable effective implementation. Addressing the root causes of why children get into conflict with the law, and undertaking preventive measures at the family and community level, are essential.*

*There are other children who are also at risk of detention, including children with disabilities, migrant children, and forcibly-recruited child soldiers. They too are in need of special protection measures. The death penalty should be abolished for all children; the child for these purposes is defined as any person under 18 years of age. It is also essential to increase the age of criminal responsibility to a minimum of 14 years, and preferably to 16 years. The development of an inte-*

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*grated mechanism is required, which incorporates the judicial and law enforcement systems, as well as the administrative processes essential to protect all children deprived of their liberty, whatever the causative factor. A multi-sectoral and coordinated support system of protective law enforcement, which is child-focused and includes the sectors of health, education and social services, is necessary. Preventive interventions are essential and should focus both on addressing risk factors in families and communities, as well as in all forms of alternatives to detention. Such alternatives may include diversion, mediation and rehabilitation. State practices from Sri Lanka, which are relevant to the topic at hand, have been included herein. Awareness-raising, training of all responsible authorities and service providers, data collection, monitoring, evaluation and research, are of particular importance.*

## Introduction

Almost every child who gets into conflict with the law is deprived of his or her liberty in one way or another. This includes both those who are suspected and accused of crimes and of breaking the law. Most children, in contrast to adults, are convicted of minor offences. These are described as “status offences,” which include, amongst others, vagrancy, loitering on streets and public premises, truancy, petty thefts, involvement in street fights. Such offenses may even include begging and alcohol abuse.

Children suspected or convicted of such crimes are mostly adolescents between the ages of 10 and 18 years, who constitute children in accordance with the definition enshrined in the CRC. Adolescence is a bridge through early childhood, middle childhood, the teenage years, and adulthood. It is one of the most challenging periods of childhood, when the susceptibility of a child to peer pressure is high, and when the child has increased vulnerability to use alcohol, drugs, and enter into casual sexual encounters, as well as to engage in acts of aggression. Adolescents who suffer deprivation, drop out of school, and live in poverty are more vulnerable to the forces of coercion to engage in robberies, and even to engage in drug distribution. Minor girls lacking proper family support are vulnerable to commercial sexual exploitation.

Such children mostly live on overcrowded streets in big cities, in congested slums and shanty towns. Some such children may be those who have run away from home as a result of conflicts within their family. Others may have suffered physical abuse, sexual abuse, or neglect. Nearly all such children are deprived of adequate parental care. These children are also vulnerable to the influences of older youths, who encourage them to join adult street gangs, which often form part of criminal and drug syndicates.

It is these particular children who are most often discriminated against by law enforcement officials. It is common for such officials to raise suspicions of criminal activities against minors of a certain profile, even without the requisite burden of proof being met. Discrimination against children can also occur due to their ethnicity, religion, illiteracy, or on the basis of their deprived socio-economic situation. Language competency can also constitute an obstacle for children if they are from certain ethnic minorities. When minors speak a different language to that of the authorities, the resulting communication barriers add an additional layer of discrimination. Discrimination can also occur when children have undetected disabilities, such as intellectual or psychosocial disabilities. Children, and in particular girls, who live away from their family units or in deprived socio-economic environments are lured into commercial sexual networks and can even become victims of traffickers. Once lured, such girls become vulnerable to sexual violence, sexually trans-

mitted infections, and pregnancy. They are also at high risk of discrimination by law enforcement authorities and can be detained, although they are the victims.

Another group that is at risk of getting into conflict with the law is that of migrant children. The numbers of such at-risk migrant children are rapidly increasing. Destination countries for migrants are finding it increasingly difficult to cope with the growing demand for more and better child protective facilities for incoming migrants, many of whom also lack basic documentation for entry into a foreign country. Being unaccompanied by parents adds to further vulnerability.

Placement in substandard detention facilities, separation from parents, language problems and lack of birth certification and other essential documentation aggravate the already vulnerable situation of migrant children. Once deprived of their liberty, migrant children are at high risk of neglect and cruel and degrading treatment.

Another category of children at a high risk of violence, ill-treatment, and even torture in detention, is that of child soldiers. The number of child soldiers is growing with the escalation of internal conflicts in many countries. Child soldiers are usually forcibly recruited by non-State armed groups in States experiencing situations of internal armed conflict. Child soldiers, once recruited, are most often detained in overcrowded detention facilities located in remote locations, such as forested areas, and can therefore become "invisible." They mostly lack even essential amenities such as food, proper shelter, and safe water. They are at risk of experiencing abuse and violence, including sexual abuse. Child soldiers are forced to engage in battle against security forces, often adults, risking death and injury of a permanent nature. Child soldiers who may "surrender" face the possibility of detention by the State party to the conflict, and consequently face a risk of being subjected to discrimination, cruel and degrading treatment, violence, and abuse. This creates a double jeopardy for them, aggravating their situation even further.

Child soldiers are most often forcibly recruited. They may be abducted from locations within a conflict zone, which can include their homes, public places, and even schools. They are detained by non-State armed groups who forcibly recruit them, and place them in makeshift training camps, often in jungle areas. They are often subjected to cruel treatment in the name of discipline. Such children are forced to undergo weapons training, and ultimately to engage in battle against adult security forces. The consequences for such children are inevitably tragic, and may include loss of life, serious war injuries, and permanent disabilities.

The severe trauma and injuries suffered by child soldiers often remain hidden, and may come to light only if these children manage to escape the relevant non-State armed group, or if they are "captured" by security forces. Further tragedy may await such children to the extent that they are subjected to additional cruelty and degrading treatment or punishment, including torture, by their captors. Child soldiers are often treated as adult offenders, rather than children, and it is therefore imperative that state authorities in the relevant countries are responsive to the protection and rehabilitation needs of such child victims, and that they further endeavor to reunify them with their families. Legislative measures absolving children of responsibility for crimes committed under threat of force by non-State parties may also be considered. This has been undertaken in Sri Lanka, which introduced special legislature to protect child soldiers and afford them rehabilitation services and reintegration with families, and has provided for amnesty for any crimes committed by them as children.

## The Legal Framework

There are well established international legal norms embodied in treaty law which are applicable to all countries, and which should govern all children in conflict with the law. Foremost among these treaties is the United Nations (UN) Convention on the Rights of the Child (CRC). Other pertinent treaties include the International Covenant on Civil and Political Rights (ICCPR) and the International Convention against Torture (CAT). There are also well-established legal standards that elaborate minimum rules for the administration of juvenile justice (the Beijing Rules), the UN Guidelines to prevent juvenile delinquency (the Riyadh Guidelines), and rules for the protection of juveniles deprived of their liberty (the Havana Rules).

Notwithstanding the existence of such international standards, millions of children around the world continue to suffer varying degrees of injustice and victimization while being held in detention, because they have come into conflict with the law. This includes violence, ill-treatment, and even torture. The numbers of such child victims are increasing rather than decreasing. Actual numbers are not adequately known, as comprehensive data collection and reporting systems have yet to be established in many countries.

Children are sometimes placed in prison facilities for adults, which should never occur. This is often due to overcrowded jails and lack of separate facilities for juveniles, or of a dedicated and alternative care system for children in a given country. Nevertheless, all States that are signatories to the CRC are obligated to establish the necessary infrastructure for separate juvenile justice systems separate, where children are concerned. This is in the child's best interest, the attainment of which is a primary obligation of all States as signatories to the CRC. Separate facilities for children are also necessary at the decentralized level of provinces and districts. Children are also often detained in overcrowded facilities, without proper access to ventilation, safe water, sanitation, healthcare, or nutrition, and are thus deprived of the most basic conditions essential for their welfare.

The perpetuation of violence against juveniles in conflict with the law remains a serious and growing concern. Violence and abuse experienced by children in their communities can be aggravated and perpetrated by the very law enforcement and judicial authorities responsible for their protection. Corporal punishment, which is a form of violence against children, remains justified in many detention situations in the name of discipline. This practice must be replaced by non-violent forms of discipline. Another important right of every child in detention is the opportunity to report such incidents to an independent authority. The relevant authority should be empowered and have the necessary support to enable it to respond rapidly and undertake prompt remedial action, pursuant to an independent investigation. Once reported, all those involved in violations of the rights of children must be held accountable without impunity.

## Addressing Root Causes

While the root causes which contribute to children getting into conflict with the law are well known, prior identification of and efforts to address such root causes, in a manner adapted to country-specific contexts, allow for more preventive and cost-effective interventions, as compared with responding to the situation once children have come into conflict with the law.

Preventive intervention should aim at providing the means for a positive family life for children, and for universal access to regular schooling. This should include early childhood development through pre-schools and parent education. Enabling families to access to basic healthcare,

nutrition, safe water, and sanitation are essential, as is access to housing. Preventive intervention includes a special focus on services for adolescents in schools and hospitals, as well as communities. Adolescent-friendly healthcare services that provide support and are responsive to the particular problems faced by adolescents, particularly with regards to reproductive health, are essential. Peer educators in schools are useful. Services should include life skills development, including in relation to tobacco-use prevention, alcohol and drug addiction, and sexually transmitted infections. Trainings with regards to skills in conflict resolution are also advantageous to adolescents.

### **The Greater Vulnerability of Adolescents**

The quality of a child's adolescence can be a key determinant of his or her future, being as important as early childhood and the middle years. Adolescence is a critical phase of childhood, during which the child experiences very rapid growth and development of a physical, mental, and sexual nature. It is a critical phase of evolving capacities, when children are in a process of rapid changes leading to adulthood. During this phase children categorically need strong and caring support from parents and, most of all, an understanding of the changes they are experiencing and the challenges they face, including the risks involved. They need support to enable them to continue their regular schooling and to complete their education. They need parental support in the form of good communication, so as to assist them in acquiring knowledge on responsible living and in refraining from engaging in unprotected sex and experimenting with alcohol, tobacco, and drugs. Children need to develop requisite life skills to overcome the influence and pressure of peers to engage in such activities, which can cause them to enter into conflict with law enforcement authorities. Media and digital technologies are rapidly growing forces that wield increasing influence on children, which can be of both a positive and negative nature. Considering their influence, the principles of child protection and attendant responsibilities must be heeded in the domains of both media and digital technology.

Children, when detained by law enforcement authorities, are sometimes isolated, whereas at other times they might be confined in conjunction either with other juveniles or adults. All such detention scenarios entail risks to the welfare of detained children, unless there is a close monitoring system. Detention of children together with adults carries a very high risk of sexual abuse for the children. Additionally, children who are detained in adult prisons, if they are non-compliant with the prison authorities, may be vulnerable to corporal punishment, cruel and degrading treatment, and even torture.

Who is accountable for such children? In the context of the CRC, the State bears the primary responsibility to uphold the best interest of the child, and is obliged to meet its additional legal obligations with regards to law enforcement and legal processes related to children, which are different from those pertaining to adult offenders. Nearly all countries of the world have ratified the CRC and other covenants on standards pertaining to juvenile justice, but not all such countries have actually adopted child friendly justice and law enforcement systems within their domestic laws. The allocation of the necessary resources for such domestic implementation, including the training of separate personnel for children's facilities and services—training pertaining to children's rights, and their unique needs—is essential to ensure access to true justice for all children.

An important issue not yet fully examined herein is the lack of power, capacity, and opportunities for children to independently report offenses committed against them without fear of reprisals. Such reporting is often impossible in the face of the type of intimidation against children that is



common in many countries. This situation must be remedied. Children need access to confidential reporting systems, which must be accompanied with prompt action against perpetrators.

Some countries continue to lack separate, dedicated and children's rights oriented juvenile justice and law enforcement systems that include a specialized juvenile justice judiciary. When children are dealt with within the framework of adult systems of justice and law enforcement, they are conceptualized merely as subjects that give rise to additional responsibilities on authorities. Thus, children are most often not treated with dignity, and are denied the protections and respect due to them as a matter of right. Law enforcement and staff in detention centres often lack training on how they should handle children, which leads to a negative impact on the children concerned. Ultimately, the victimization of children in prisons and detention centres and the justice system is tantamount to their double victimization, adding further harm to already harmed child.

Many research studies have provided insights into biological factors that cause adolescents to be more susceptible to entering into conflict with the law. Such factors include the individualized manner in which each child responds to the rapid physical and sexual changes occurring in his or her body. The development of secondary sexual characteristics can be difficult for some children to deal with. In addition, there are related emotional fluctuations which the child experiences, all of which can also be confusing and difficult to control. Risk-taking behavior may set in. These changes cause unique difficulties for the adolescent child who undergoes changes that are distinguishable from those experienced in early and middle childhood. Parenting of adolescents may also prove particularly difficult by contrast to the early years of childhood. One way of easing the difficult transition to adulthood is by accessing positive parental practices, encompassing the necessary skills required for positive parental interaction with adolescents. All parents should be provided with such requisite knowledge, which will both ease children's transition to adulthood and contribute their realizing themselves into responsible adults. Such parenting holds the potential to positively navigate this critical period in children's, and to allow children to move from total dependency in early childhood to greater independence, while maintaining parental bonds and support. Adolescence poses many challenges to children in the area of education, particularly in terms of pressure to achieve academic targets, including examination challenges. Peer pressure and the external influence of media and technology play a key role in the fashioning of adolescent behavior patterns. As noted previously, such external influences can have positive effects where they support the acquisition of knowledge and education. Violence in the media can however lead to negative effects if behavior is fashioned around role models who achieve their goals through violence, including as a means of conflict resolution.

Most adolescents search for greater independence and freedom as they seek to realize the natural urge for establishing an identity of their own. Thus, they can be lured into joining groups of other adolescents who may not be leading responsible lives. Some may be experimenting with drugs, alcohol, sex, or may even be engaged in petty crime networks. Reckless driving is common and involves a lack of sound and responsible discretion, which can cause road traffic accidents resulting in harm to children or others. Adolescents tend to be secretive in their search for independence, and all the more so when they are engaged in criminal or illicit rebellious activities, or in the questioning of traditional norms.

It is important to recognize that adolescents are driven by strong biological forces, which they may not fully understand or be able to control. The resulting emotional distancing that can occur between adolescents and their immediate families needs to be bridged by empathy and understanding, rather than by stricter controls. Lack of access to adolescent healthcare services, to infor-

mation on life skills development or with regards to the development of coping mechanisms, must be addressed. Cessation of school studies by a child can constitute an important risk factor that can lead him or her into conflict with the law. The promotion of regular universal schooling for all children should be compulsory.

Well researched scientific evidence indicates that the brain of an adolescent is in a process of rapid development. Such development generally commences when a child reaches between ten and twelve years of age, and continues until its completion when a child reaches the age of eighteen, or in some instances, the early twenties. Studies also indicate that the frontal lobe of the human brain undergoes more changes during adolescence than at any other time in the life of a human. Despite these significant and rapid changes, the development of proper reasoning skills takes time to occur, and such skills are most often not well developed in children. The underdevelopment of reasoning skills can be a contributing factor that offers an explanation of why more adolescents get into trouble with law enforcement authorities and the legal system.

### **Children with Disabilities**

Although not well recognized, children with undetected disabilities are at greater risk of entering into conflict with the law. These include varying intellectual disabilities and behavioral disorders, including attention span disorders and hyperactivity. These issues can contribute to children failing to do well in school, dropping out of school, and having difficulties in their relationships with parents and their families. These factors can contribute children running away from home and joining street gangs and engaging in petty crime, which can cause conflict with law enforcement. Most children in conflict with the law are unlikely to be screened for such disabilities, which should be a basic requirement. Once in detention, children need access to healthcare, including such screenings, rehabilitation services, and other support. Placement in detention will aggravate such conditions and deny any further development.

Disadvantaged families, especially if educational levels are low, are likely to be unaware of how they can access the necessary services. In less developed countries, such services may not even be available. In order to avoid such families being deterred by potential costs, the State should provide the necessary services free of charge or for a minimal fee. Children in such adverse situations need special care, rather than detention. Children's being lured into criminal activities by means of the exploitation of their disabilities must be prevented. Such children are also at higher risk of being subjected to violence and abuse, including sexual abuse. Detection and preventive action to protect such children is an imperative in their best interest, the attainment of which is a State obligation. It must also be recognized that the detention of children with disabilities has the potential to worsen their disability, and measures must be taken to prevent this from occurring.

### **Migrant Children**

Children can run away from homes both in rural areas to crowded cities. Such children, who are often lured by drug and criminal groups, can easily enter into conflict with the law. Furthermore, international migration is a growing problem, with the worldwide proliferation of conflicts, natural disasters, and poverty. Migrant children may accompany their parents, while in other instances they may travel unaccompanied, via hazardous transport systems. When such children reach their destination, they may be held in detention facilities with their families or, alternatively, with other children or adults. Many of these centers are not child friendly, nor do they offer even the most

basic provisions of proper shelter, access to food and safe drinking water, sanitation, and basic healthcare. Migrant children require legal safeguards that are protective of their rights, and that prohibit discrimination, neglect, ill-treatment, abuses in detention, and family reunification. Legal standards are needed and must be adhered to. The separation of families should be prevented. Additionally, such children should never be placed with adult detainees, which would place them at risk of sexual abuse and other forms of violence.

### **Children Affected by Armed Conflicts**

Children most affected by armed conflict are those who are forcibly recruited as child soldiers. Such children are kept in detention, separated from their families, and at a risk violence and death. Children detained by non-state armed groups are kept in illegal training camps in substandard conditions, and sometimes in forested environments lacking basic services. They are trained and radicalized to fight for a cause. Girl children can also be forcibly recruited and are at risk of sexual abuse. Such children are at a constant risk of death, physical injury, psychological distress, and are often deprived of contact with their families. Some such children are detained without possibility of escape. United Nations Security Council Resolution 1612 stipulates protection for such children, to which some countries have agreed. It is incumbent on States and UN agencies in relevant countries to set-up a database with a view to tracking and addressing the extent of the problem. Any children who escape need to access rehabilitation services and should be reunited with their families. Penal code amendments must also be made to absolve children of the crimes they may have committed as forcible recruits under the compulsion of non-State armed groups. Sri Lanka was among the countries that suffered a prolonged internal conflict, for over 26 years, in which over 60 percent of the fighting forces were children—boys and girls—under 18 years of age, who were forcibly recruited from schools, homes and public places. UNICEF provided assistance for the establishment of a database to track the number of child combatants. All children who managed to escape were provided with protective rehabilitation services and reunited with their families. None were prosecuted as the necessary penal code amendments were made to absolve them of crimes they committed as forced recruits.

### **Other Forms of Detention**

Other forms of detention of children, wherein they may require protection, include police custody, administrative detention, involuntary hospitalization, and institutional custody. Children with disabilities, including those with psychosocial, intellectual, and developmental disabilities, cerebral palsy, and behavioral disorders, are sometimes placed in detention by families who are unable to care for them. Such disabilities may also include severe physical disabilities, and visual and hearing impairments. Children with such disabilities, who are placed in poorly resourced detention facilities lacking trained staff, are at a high risk of cruel and degrading treatment, and even sexual abuse and violence. Such children may lack capacity to report ill-treatment, aggravating their plight. This situation requires urgent redress. A State obligation exists under the CRC to serve the best interest of every child. Thus, instead of poorly managed detention centers, community-based alternatives, including day-care centers, which are accessible to parents and families, are needed. Where children with disabilities are detained, adequate registration and regular, independent monitoring of conditions of detention are essential. All situations in which children are deprived of their liberty, including the other forms of detention listed here, give rise to the need for

well-formulated and rights-based protective safeguards for the prevention of ill-treatment and violence. This need extends both to children deprived of their liberty in state institutions and to those detained by private entities, including orphanages. In essence, all institutions where children are detained, for whatever reason, must be legally regulated and regularly and independently monitored with a view to preventing violence and cruel or degrading treatment of all children. Prompt action against all perpetrators, as legally specified, is essential.

There are many private entities that maintain institutions for children in difficult circumstances, such as children who have been abandoned by their families as a result of abandonment or illegitimacy of birth. Some children who have left their families because of factors such as abuse or violence end up in institutions. A lack of uniformity persists in many countries regarding how such institutions operate and how they are or ought to be regulated. All such institutions where children are detained, for whatever reason, must be legally regulated and subjected to an independent monitoring and oversight system. All institutions where children are detained, whether managed by the state authorities or private entities, must be mandated by law to observe the CRC and other UN standards that pertain to the detention of children. Ultimate responsibility and accountability must remain with State authorities for the ensuring of the extension of rights-based protection to all children who have been detained.

## **The Protection of Children's Rights in the United Nations Convention on the Rights of the Child**

Article 37 of the CRC emphasizes the vulnerabilities of children in detention to degrading treatment and other forms of violence and abuse, including the indiscriminate use of corporal punishment as a form of discipline. It is this particular article of the CRC that clearly stipulates the obligation and accountability of all State parties to ensure that no child is subjected to torture or any other form of cruel or degrading treatment, including capital punishment. Neither capital punishment nor life imprisonment, without the possibility of release, should be imposed by authorities on any person under 18 years of age, who consequently meets the definition of a child under the CRC. Article 37 of the CRC also stipulates that no child may be unlawfully deprived of his or her liberty. In addition, mention is made in the aforementioned Article as to the permissibility of the use of detention only in conformity with conditions established by law, as a measure of last resort, and for the shortest possible time.

Article 37 also provides that every child who is deprived of liberty be treated in a manner that is humane and respectful, in accordance with the child's inherent dignity as a human being, and in a manner which takes into account the age and status of the child. This Article of the CRC also refers to the importance of separating children from adult prisoners. The importance of the child maintaining contact with his or her family, by correspondence and/or visits, except under exceptional circumstances, is emphasized. Reference is made to the importance of the right of the child to promptly access legal aid and other appropriate assistance, and to the right to challenge the legality of deprivation of liberty before a court of law, or any other competent impartial and independent authority. This right incorporates prompt judicial review without undue delays.

Although nearly every State in the world has ratified the CRC, the incorporation of Article 37 of the CRC into the domestic legal systems of State parties, as well as its substantive translation into administrative policies and legal rulings, has yet to be fully realized. Juvenile justice systems that do not provide differential treatment for minors persist, and should be abandoned by States.

The absence in many domestic legal systems of explicit and clearly defined legislation that stipulates enforcement procedures for perpetrators of ill-treatment and torture against children is another cause for concern. Specialized legislative provisions are also required to account for the unique predicament of children who are affected by disabilities or armed conflict who have been detained, or to girl children who have been detained and who are at a higher risk of sexual abuse and exploitation.

The UN Committee on the Rights of the Child (the “CRC Committee”) has regularly raised concerns about the importance of formally criminalizing torture in a country’s penal code and national legislation. The CRC Committee has also drawn attention to the importance of legislative provisions that protect children from torture and violence, not only when in detention, but also in homes, schools, and teaching institutions, and all other public and private establishments for children. It has emphasized that torture should be criminalized in all settings by law. The protection of the child’s right to privacy in all such contexts must be upheld. Mention is made of the necessity to provide children with appropriate care services, including those that will enable recovery, rehabilitation, and reintegration in their communities and families.

The CRC Committee has regularly urged member States of the UN to amend the relevant portions of their penal code dealing with children in conflict with the law, for the purposes of guiding the judiciary and law enforcement. Further, the CRC Committee also has recalled that any statements made by a child resulting from torture or other cruel and degrading treatment, must be inadmissible in court.

Another important aspect of the CRC as a treaty is the fact that it emphasizes the indivisibility of children’s rights. Consequently, all articles of the CRC pertaining to the rights of children are interdependent, and Article 37 is not to be considered in isolation.

Accordingly, the core principles and rules stipulated for under CRC Article 37 must be contextualized by a series of other CRC Articles, including: Article 2, which stipulates that no child should suffer discrimination, on any grounds; Article 3, which stipulates that the best interest of the child should be a primary consideration in all actions concerning children; Article 6, which refers to the right to life of the child and the concomitant obligation to ensure the survival and development of the child to the maximum possible extent; and Article 12, which provides that a child’s views must be respected in all matters that affect the child, and that children must be afforded an opportunity to be heard in any judicial or administrative proceedings affecting them.

Other relevant provisions arising from articles of the CRC pertain to the right to protection from all forms of violence; standards for alternative care; protection of refugee and migrant children; restrictions to liberty and access to essential health care; protection from sexual exploitation; and child soldiers.

## **Article 40 of the United Nations Convention on the Rights of the Child**

This Article defines State party obligations to give due recognition to the right of every child accused of, or recognized as, having infringed penal laws, to be treated in a manner consistent with his or her right to dignity and self-respect. It is only when a child is accorded his or her rights that the child learns to respect the human rights and the fundamental freedoms of others. Recognizing and understanding the different age-related stages of a child’s evolving capacities is also essential.

Several protective measures for children are highlighted in Article 40 of the CRC. Article 40 stipulates that no child should be accused of or recognized as having infringed the penal code by acts or omissions that were not prohibited by national or international law at the time they were committed. Article 40 further stipulates that children must be entitled to the judicial guarantee of the presumption of innocence until proven guilty according to law. The Article further requires that prompt information be given to children about the charges against them, and that, where appropriate, such information is to be conveyed by means of parents or legal guardians. Article 40 also stipulates for the entitlement of children to legal and other types of support in the preparation and presentation of their defense.

Most cases before the judiciary are characterized by the lengthy time periods taken to conclude them. It is important to highlight the need to avoid delays where children are concerned. Hearings with regards to children should as a rule be decided before a competent, independent, and impartial authority or judicial body pursuant to a fair hearing. Unless considered contrary to the best interest of the child, it is essential to take into consideration parameters such as the child's age, his or her particular circumstances or relevant issues, and to consider and consult with parents, family or legal guardians, as applicable.

Children should not be compelled to give testimony or to confess guilt. Children should have the right to examine adverse witnesses or to have them examined, and they should be afforded the opportunity to bring witnesses on their own behalf under equal conditions. Article 40 also stipulates that if a child is determined to have infringed penal laws, he or she is entitled to have such a decision and consequent measures reviewed by higher authorities, who should be impartial, independent, and competent to conduct such a review.

Where a child cannot understand or speak the language used, he or she should be provided with the free assistance of an interpreter. The child's privacy should be maintained at all stages of proceedings. Article 40 also outlines the obligations of State parties to the CRC to establish laws and legal processes, and set up institutions that are dedicated only to children accused of or recognized as having infringed penal law. Mention is made of the use of alternatives to judicial measures, including diversion and mediation for petty offences, which need to be community-based and easily accessible to children and their families at a local level. Many countries, including Sri Lanka, are now using such measure, which are immensely beneficial to children and can be formulated in accordance with child protection and human rights parameters.

Article 40 also refers to guidance and supervision orders; access to counseling and probation services; foster care; and access to education and vocational training. It refers to alternatives to institutional detention, which should be determined in accordance with the nature of the offence committed.

### **Issues Highlighted in General Comment No. 10 of the United Nations Committee on the Rights of the Child, Pertaining to the Rights of Children in the Justice System**

There are certain key principles of relevance and significance to juvenile justice that must be upheld by State authorities, and that relate to the fulfillment of State obligations for the implementation of the rights of children. These include children's rights-based norms and practices that should be incorporated into a State's judiciary and law enforcement system. General Comment No.10 of the CRC Committee draws attention to the responsibilities of States towards children,

and to the extent that States must answer such responsibilities and enforce the rights of children in conflict with the law. Within the framework of these obligations, States must take corrective action and address all reported grievances and, following investigations, undertake sanctions without delay in relation to wrongdoing by individuals and institutions. Delays must be avoided, as time is of essence where children are concerned.

The importance of prevention efforts with regards to children in conflict with the law has already been mentioned herein within the context of accountability for violations of the children's rights. The identification, and consequent remedy, of weaknesses in the judiciary and law enforcement systems with regards to juvenile justice has also been explored herein. Sufficient resources must be allocated for the requisite changes to be implemented.

A key principle highlighted in the General Comment includes an emphasis on the effective implementation of other relevant provisions, including Articles 2, 3, 6, 12, 37 and 40 of the CRC, which relate to juvenile justice.

The adoption of more preventive approaches at the community level deserves greater priority, and is both cost effective and beneficial by comparison to other remedial approaches. Interventions which are outside judicial proceedings need to be more actively promoted. But, if interventions involving judicial proceedings are inevitable, it is essential that a fair trial be conducted in all instances, and restriction of liberty undertaken only as a measure of last resort.

There is special mention in General Comment No.10 of the importance of raising the age of criminal responsibility to a minimum of no less than 12 years of age, whereas the comment indicates that a minimum age of 14 years is preferable. Sri Lanka has recently made a policy decision to raise the minimum age of criminal responsibility to 12 years.

The rights of children to a fair and just trial, including special judicial guarantees, are particularly emphasized. While General Comment No.10 lists such guarantees to ensure a fair and just trial, emphasis is placed on the importance of protecting the child's privacy throughout the process. Greater efforts are necessary to prevent the publishing of any information related to the judicial process, including any information that enables identification. The need for a ban on the use of the child's records in subsequent adult proceedings is also referred to. Mention is made of the need to reduce the duration of pre-trial detention. The necessity for regular fortnightly reviews of the detention of children is further mentioned. Although adults in detention are often not the subjects of regular reviews of this nature, they are particularly essential where children are concerned.

When deprived of their liberty, under no circumstances should children be detained with adults. This point is emphasized by nearly all international treaties pertaining to child protection, for the obvious reason that children are particularly vulnerable to sexual abuse.

The necessity to promote greater awareness of the essential aspects of juvenile justice is another area of concern, and legal literacy in this regard requires greater promotion at the community level. Such information should in particular be made available in areas where there is a greater incidence of juveniles coming into conflict with the law. Some countries have instituted legal aid programs at the local level, which are very useful, particularly with regards to the commission of petty crimes by juvenile offenders.

There is further a need for greater and stronger action by media and civil society organizations to counteract entrenched negative perceptions of children in conflict with the law in society. This is essential to enable their reintegration into society, and is also necessary to increase their capacity to lead law-abiding and independent lives when they become adults.

## Recommendations

1. It is essential that all States adopt domestic legislation on juvenile justice, based on the relevant articles of the CRC and its optional protocols, and also upon other international standards related to juvenile justice. This is of particular importance in countries with a dualist international legal system, where international treaties are not automatically incorporated and applied by local courts of law. Such domestic legislation should include relevant legislative and administrative procedures, as well as adequate financial and human resource allocations. Both basic training and subsequent refresher trainings will be needed for all law enforcement and judicial officials. A regular system of monitoring is essential to ensure adherence to all policies, rules, and regulations that are enacted, and to determine the extent of implementation of established procedures. Special measures, such as the giving of evidence by audio-visual transmission, may need to be undertaken by courts. This should be made permissible for children who are testifying, particularly in instances involving sexual abuse. Special expertise required to collect such evidence will be necessary, and should be taken into account in legislation. The use of audio-visual media for the transmission of evidence by children remotely can prevent their repeated traumatization, by ensuring that they will not be compelled to testify several times, which could constitute a form of cruelty against child victims. Direct examination may be appropriate for children who are accused as perpetrators, rather than victims. Children should have access to an interpreter whenever necessary. Expert opinions by child psychologists and pediatricians are usually beneficial, and assist in upholding the best interest of the child.
2. Legislative changes to increase the minimum age of criminal responsibility to at least 12 years, and preferably to 14 years, remain a priority in many countries. Facilities should be available for age determination of all children lacking a birth certificate. This is particularly relevant to children in detention for reasons of migration, children in armed conflict situations, and children with disabilities.
3. Responses designed to ensure the protection of children in detention, in view of their unique vulnerabilities, should draw support from other sectors relevant to children's wellbeing, such as the healthcare, educational, and social service sectors. Such responses should also include the media for the purpose of promoting awareness on key related issues. Establishing a multi-sectoral coordinating mechanism can wield advantages at the national, provincial, and district levels, including for municipal authorities. Civil society organizations that provide basic services should also be included in such multi-sectoral activity, to the extent that they also provide relevant services to children.
4. Greater efforts are needed to explore and determine alternatives to detention, including diversion and rehabilitation. Mediation at the local level, linked to the justice system, can be useful when juveniles are involved in petty crimes. Such efforts are ongoing in Sri Lanka, and the Sri Lankan experience has been positive in this regard. Appropriate alternatives to detention prevent the unnecessary detention of children, which is of great advantage to the young persons involved.
5. Every effort is necessary to eliminate the accommodation of children in adult prisons, which are serviced by staff working with adult prisoners. This also includes the separation of boys from adult males, and ensuring separate facilities for girls.



6. Children in detention are most often estranged from their parents and this is detrimental to their well-being. Locating parents is therefore essential, and children should additionally be encouraged to be accompanied by their parents or a relative of their choice during court proceedings. Financial allocations may be necessary in order to facilitate regular visits by parents and families to children in detention. This is important for children's well-being and useful in preventing recidivism. If a child in detention has no family, a suitable guardian should be appointed to watch over his or her best interests.
7. Children in detention should have opportunities to maintain contact with the outside social environment. Prolonged detention in the same environment deprives children of mental stimulation, which in turn can have very negative emotional and psychological consequences. Support that allows such children to maintain social contact with immediate or extended family is greatly advantageous.
8. Access to primary and secondary education is a right that all children should enjoy. If the enjoyment of this right is not possible for children in detention, authorities should consider facilitating access to informal education, at the very least. This is also necessary when such children have dropped out of school. It is essential to enable such children to gain literacy and numeracy skills, and to afford them access to vocational training, which can pave the way for future gainful occupation, and thus prevent recidivism.
9. Access to basic healthcare is essential for all children, particularly adolescents. Adolescent healthcare should include a regular assessment of both physical health and psychological well-being. Relevant services should be made available through the state healthcare system, as appropriate. Special services are needed to screen for disabilities and to identify the relevant services or assistance needed, where applicable. This could include, by way of an example, appliances for hearing and visual impairments.
10. A system of data collection and research is necessary, as is an effective monitoring system.
11. A confidential reporting system for all children in detention to report abuse, ill-treatment, and violence in all its forms must be established. This could be done in collaboration with the National Human Rights Institution or an independent children's rights commission. A prompt and impartial investigation of all allegations, and punishment of perpetrators, is essential. Regular visits by the National Human Rights Institution to monitor the status of children in detention must be encouraged.
12. Children in detention have a right to leisure, play and recreation, including sports activities. These have a healing effect on children and should be included in their daily schedule. Thus, necessary provisions need to be made for these purposes.
13. Undertaking a mapping exercise at the national level to determine the most vulnerable areas and communities where children have the highest risk of coming into conflict with the law could benefit the planning and development of preventive strategies. Such an exercise should include an emphasis on preventing school truancy, particularly at the primary education level, but also at the secondary education level, considering that attaining a secondary level education is also advantageous for employment. Children who drop out of school or have family problems need, at a minimum, to be provided with informal education and vocational training, so as to enable employment. Access for all children to comprehensive early childhood development programs enables success-

ful school entry and contributes to continuation of schooling and higher educational achievements.

14. Migrant children, when detained, need child-friendly facilities. Services provided at such centers should include access to healthcare, safe water, and sanitation. It is preferable that such children remain with their parents and families. Language barriers need to be addressed and probable age certification should be provided in the absence of a birth certificate.
15. In countries experiencing armed conflict, every effort is needed to eliminate the forcible recruitment of children by non-State parties in conflict with the State. Legal safeguards are necessary to ensure the protection of such children, including penal code amendments to relieve them of potential responsibility for crimes they committed whilst being subject to duress and threats made by non-State armed groups. Such children should be granted access to rehabilitation services, protection from discrimination and ill-treatment while in detention, and access to healthcare services, particularly for war injuries, and including psychological therapy for post-traumatic stress disorders. Psychological support for girls who may have undergone sexual violence is essential. Locating the parents and families of children recruited is a primary need, as is the establishment of a database for reporting.
16. Personal Country Experiences (Sri Lanka)
  - a. Sri Lanka has had experience with children in conflict with the law, and in particular child soldiers. Internal armed conflict in certain parts of the island prevailed for over 26 years, ending in May 2009. A significant feature was the forcible recruitment of child soldiers, including underage girls and boys. The penal code was amended so that no child could be prosecuted for his or her actions as a child soldier, and consequently no children were so prosecuted. The children included many who ‘surrendered’ or escaped, and were provided with rehabilitation facilities, rather than being detained in prisons. They were provided with healthcare and informal education, which maintained their literacy and numeracy and vocational training. The children in question had access to healthcare, psychosocial support, and vocational training to ensure gainful occupation upon return to their families. Locating the families of these children was sometimes difficult, but was regarded as an important part of the rehabilitation process. Opportunities were provided for the families to visit their children at rehabilitation facilities. This was supported by the organizations *Medicins Sans Frontieres* (Doctors without Borders) Organization. Following the ratification of UN Security Council Resolution 1612, a comprehensive database was set up in 2006 by UNICEF, on the basis of information provided by parents and families in local communities. Information was received about 6000 to 7000 children who had been forcibly recruited by non-State parties to the conflict between 2006 and 2009. The estimated numbers between 1987 and 2005 pointed over 14,000 children who had been recruited, of whom one third were girl children. All the children returned to their families when the conflict ended in May 2009. No indictments were filled against any underage child who had been forcibly recruited.
  - b. Sri Lanka continues to make efforts to plan and develop non-custodial methods of discipline for children who have committed petty crimes, such as minor thefts. Mediation has been found to be a useful option, and one that is working well and of value

- to children involved in petty thefts.
- c. Sri Lanka has thus substituted diversion and rehabilitation for detention. Efforts are ongoing to prevent the harsh punishment often experienced by juvenile offenders. Thus, three types of institutional and community-based correctional processes have been implemented, which include the establishment of separate remand homes and approved schools for juveniles. These have been established under the Children and Young Persons Ordinance for purposes of rehabilitation, and function under the auspices of the Department of Probation and Childcare. However, vigilance with regards to monitoring the quality of care and protection of children under such frameworks remains significant, as decentralization of the administration to provincial and district authorities has proven challenging. Community-based correctional methods are also available to rehabilitate offending juveniles. There is still a need, however, to strengthen these systems by ensuring trained staff, improved quality of care and protection, improved healthcare, and better access to education and vocational training. More opportunities are necessary for income generation and community contact, so as to enable independent living for those leaving such institutions.
  - d. In 2009, the Sri Lanka Human Rights Commission undertook an inspection of one of the largest facilities for the detention of juveniles in Sri Lanka. On the basis of its findings, the commission ordered the relocation of the inmates of the juvenile detention facility to a significantly more child-friendly facility, previously established for child soldiers. This provided a better and more child-friendly environment for the children.
  - e. There are legal aid programs with reach extending to rural areas, which include legal aid clinics and other programs that seek to promote information regarding laws and law enforcement. These initiatives are beneficial considering that in Sri Lanka, as in other developing countries, over 70% of the population lives in rural areas. Information related to the country's legal system, its laws and regulations, including the substance of international human rights treaties, must be made accessible to the people, as a way to ensure that the law thereby extends its reach to those who need such protections and safeguards the most.
  - f. There are also legal aid programs that reach out to communities, particularly in more rural areas. These have been beneficial in educating the public on human rights, including children's rights, and with regards to relevant legal issues. Further promotion is needed given that legal literacy is essential for persons in conflict with the law, particularly where children are concerned.

## Conclusions

The multi-faceted issue of children in conflict with the law is best addressed within the framework of a dedicated child-friendly juvenile justice system, rather than as part of longstanding systems planned and developed for adult offenders. Treatment of children, both during and after judicial proceedings, needs to conform to children's rights principles as articulated in the CRC, and other standards on juvenile justice. This is an obligation of States that are parties to the CRC, and of the international community as a whole. A multidisciplinary approach is needed to address the root causes, in both families and communities, which cause children to come into conflict with the law. Such causes include the special vulnerabilities of adolescents and the pressure they experience to engage in activities that can cause them to come into conflict with the law. Additionally, the

law enforcement system and judicial authorities need to reorient their strategies and processes to respond to children in a manner that is different to that applicable to adults, and which takes into account their best interest in all the legal processes. The special situations of children in migration, children affected by armed conflicts, and children with disabilities need further consideration.

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## II.

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# Normative Developments and Legal Framework: The United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice

MARTA SANTOS PAIS AND ANN-KRISTIN VERVIK\*

## Abstract

*Despite the strong normative foundation provided by international human rights instruments, the governance gap between standards and practice continues to be a strong barrier to ensuring children's right to liberty and freedom from violence, including inhuman sentencing, torture, physical and sexual abuse and humiliating treatment and punishment in the criminal justice system. The article by Marta Santos Pais and Ann-Kristin Vervik builds upon the recently adopted UN Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice (Model Strategies), which seek to fill such governance gap through a child-centred, comprehensive, integrated and multidisciplinary approach.*

*In many countries, the criminal justice system is used as a substitute to weak health care services and child protection systems, generating stigmatization, criminalization and deprivation of liberty of children who are already at risk and vulnerable. The article emphasizes the cumulative impact of physical, mental and sexual violence endured by children in the home, at school, in the community and at the hands of those responsible for their protection while in situations of deprivation of liberty. Furthermore, the article examines the Model Strategies' aim to improve the effectiveness of the criminal justice system in preventing and responding to violence against children, and to protect children against any violence while in contact with the justice system and when at risk of deprivation of liberty.*

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\* Marta Santos Pais is the United Nations Special Representative of the Secretary General on Violence against Children. Ann-Kristin Vervik is an international consultant on child protection. The views expressed in the article are those of the authors and do not necessarily represent the policy of the United Nations.



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### I. Introduction—Addressing the continuum of violence against children

In 2006, the United Nations Study on Violence against Children (UNVAC Study) revealed that millions of children, particularly boys, spent substantial periods of their lives under the control and supervision of care authorities or justice systems, and in institutions such as orphanages, children's homes, care homes, police lock-ups, prisons, juvenile detention facilities and reform schools. While deprived of liberty, children were at risk of violence from staff responsible for their well-being.

The UNVAC Study showed that the risk of violence heightened in situations of overcrowding and squalid conditions, societal stigmatization and discrimination, and poorly trained staff.<sup>1</sup> It found that effective complaints, monitoring and inspection mechanisms, and adequate government regulation and oversight were frequently absent and that lack of accountability of perpetrators created a culture of impunity and tolerance of violence against children. Moreover, it described how the impact of institutionalization went beyond children's experience of violence and how long-term effects could include severe developmental delays, disability, irreversible psychological damage, and increased rates of suicide and recidivism.<sup>2</sup>

The Global Survey on Violence against Children, conducted in 2013 by the Special Representative of the Secretary General on Violence against Children to assess the progress in preventing and eliminating violence against children since the ground-breaking UNVAC Study, found that every year, between 500 million and 1.5 billion children worldwide endure some form of violence. Violence knows no boundaries and takes place in all settings, including the places where children

<sup>1</sup> See also U.N. Human Rights Council, Human Rights Implications of Overincarceration and Overcrowding, Report of the U.N. High Comm'r for Human Rights, ¶ 66, U.N. Doc. A/HRC/30/19 (Aug. 10, 2015) (observing that one of the major underlying causes of overcrowding is the use of over incarceration, which results in conditions that can amount to ill-treatment and torture).

<sup>2</sup> U.N. General Assembly, Report of the Independent Expert for the United Nations Study on Violence against Children, Paulo Sérgio Pinheiro, ¶¶ 53, 54, U.N. Doc. A/61/299 (Aug. 29, 2006).

are expected to be safe, such as in the home, in schools and in justice and care institutions.<sup>3</sup> In spite of progress within areas such as legal reform, awareness-raising and policy development, insufficient attention is given to the situation of particularly vulnerable children who remain hidden, overlooked and ignored.<sup>4</sup>

Incidents of violence in the home and community, and violence associated with criminal activities are often deeply interconnected. Children are hard hit, both as victims and as witnesses.<sup>5</sup> Hence, it is often these same groups of children who, due to previous victimization, end up being deprived of their liberty. Still in 2016, the year during which the international community commemorates the tenth anniversary of the UNVAC Study, countless numbers of children in vulnerable situations are at special risk of being detained, including children who have run away from domestic violence, who live on the street and who are victims of trafficking, prostitution, organized crime or conflict situations.

Children from poor communities and from areas known for gang activity are particularly stigmatized and perceived as delinquents, which increases the risk of criminalization and detention. Migration can add to these risks. And in communities where deprivation is pervasive, with high rates of child poverty and limited access to social and protective services, children can be attractive targets for organized criminal networks. Through coercion, social pressure or the promise of financial reward, they are at risk of recruitment and manipulation to hold or deliver drugs or weapons, carry out petty crimes, beg on the streets, or become involved in other exploitative activities. Public fear of gang violence and youth crime fuels the perception of these children as a danger, rather than as being at risk of violence and exploitation and in need of care and protection. As a result of stigmatization in mass media, the tolerance of institutionalized violence against children increases and generates societal pressure to criminalize children and adolescents, lower minimum ages of criminal responsibility and impose longer prison sentences.<sup>6</sup>

Girls deprived of liberty continue to be at high risk of violence and abuse. In most countries, criminal justice systems are originally designed to address male offending. The numbers of girls in detention are relatively low compared to boys, and as a result special arrangements are not made to ensure their safety and specific needs. They are very often held with adult women and face high risk of gender-based discrimination and violence from staff in detention centres, the police and other professionals in the justice system.<sup>7</sup>

A disturbing trend in many countries is the significantly disproportionate rate of increase of women being deprived of liberty, compared to their male counterparts.<sup>8</sup> This is also true for girls, who face significant barriers to accessing justice whether they are victims of crime or alleged offenders. Due to persisting discriminatory attitudes and perceptions in society and amongst

<sup>3</sup> Office of the Special Representative of the Secretary General on Violence against Children, *Toward a World Free from Violence: Global Survey on Violence against Children*, New York 2013, p. 21.

<sup>4</sup> Office of the Special Representative of the Secretary General on Violence against Children, *Toward a World Free from Violence: Global Survey on Violence against Children*, New York 2013, p. 17.

<sup>5</sup> U.N. General Assembly, Annual Report of the Special Representative of the Secretary-General on Violence against Children, ¶ 54, U.N. Doc. A/70/289 (Aug. 5, 2015) [hereinafter SRSG Annual Report].

<sup>6</sup> *Id.* ¶¶ 57-60.

<sup>7</sup> See Office of the Special Representative on Violence against Children, *Safeguarding the rights of girls in the criminal justice system—Preventing violence, stigmatization and deprivation of liberty*, New York, 2015; Penal Reform International/Inter-agency Panel for Juvenile Justice, *Neglected needs: girls in the criminal justice system*, 2014.

<sup>8</sup> U.N. General Assembly, Pathways to, Conditions and Consequences of Incarceration for Women, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo, ¶ 1, U.N. Doc. A/68/340 (Aug. 21, 2013).

police, criminal justice officials and prison staff, the justice system becomes a setting with even more violence, rather than affording them support and protection.<sup>9</sup>

Girls and boys may also be deprived of liberty due to mental health and drug abuse, and because of their status as migrants or asylum seekers. Held in closed institutions, psychiatric centres or adult prisons, where they await trial for long periods of time and may live in inhuman conditions, children often lack opportunities to access justice and challenge the legality of their detention.

Access to justice is a right in itself, and in addition an essential prerequisite for protecting all other human rights, including the right to liberty and freedom from all forms of violence. Access to justice requires children to have effective remedies to claim their rights. But the reality is that counselling, reporting and complaints mechanisms are often non-existent. And in places where they are available children may not be informed of their existence or of the ways of benefitting from them, they frequently fear that they will not be believed or even face stigmatization, harassment or reprisals from staff or other inmates.<sup>10</sup>

Children's right to education and vocational training, necessary health services and long-lasting social reintegration are often compromised in situations of children's deprivation of liberty. Children are at heightened risk of serious forms of violence, including harassment, sexual abuse and acts of torture. They may also be subjected to violence as a form of discipline, punishment or sentencing.<sup>11</sup>

The international community has developed a sound international legally binding human rights framework and an important set of standards to address this alarming situation and secure the protection of the rights of children deprived of liberty. Notwithstanding, the Global Survey on Violence against Children found that, around the world, the standards are insufficiently known, overlooked or poorly implemented.<sup>12</sup> Similar observations have been made in several other reports. The Special Rapporteur on torture and other cruel and inhuman treatment or punishment, Juan E. Méndez, examines numerous shortcomings in the practical implementation of legal standards in his report on children deprived of liberty from the perspective of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.<sup>13</sup>

As a response to the persistent and serious concerns related to children deprived of liberty, the General Assembly decided, on 18 December 2014, to invite the Secretary-General to commission an in-depth global study on children deprived of liberty. The development of the Study will rely on close cooperation with relevant United Nations agencies and offices, Member States, civil society, academia and children.<sup>14</sup> The study will include good practices and recommendations for action to effectively realize all relevant rights of the child, including supporting the implementation of the

<sup>9</sup> See Office of the Special Representative on Violence against Children, *Safeguarding the rights of girls in the criminal justice system: Preventing violence, stigmatization and deprivation of liberty*, New York, 2015, pp. 1-5.

<sup>10</sup> Special Representative of the Secretary-General on Violence against Children and Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, *Child-sensitive counselling, reporting and complaints mechanisms to address violence against children*, New York, 2012, p. 3.

<sup>11</sup> Presentation by the Special Representative of the Secretary General on Violence against Children, held in the Side-Event 'Working together towards a global study on Children deprived of liberty' during the Human Rights Council's 31st Session, 10 March 2016.

<sup>12</sup> Office of the Special Representative of the Secretary General on Violence against Children, *Toward a World Free from Violence: Global Survey on Violence against Children*, New York, 2013, p.74.

<sup>13</sup> U.N. General Assembly, Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, U.N Doc. A/HRC/28/68 (Mar. 20, 2015).

<sup>14</sup> G.A. Res. 69/157, ¶ 52(d) (Feb. 3, 2015).

United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice and to submit the conclusions to the Assembly at its seventy-second session.<sup>15</sup>

## **2. Development of the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice (Model Strategies on VAC)**

The Model Strategies on VAC, adopted by the General Assembly on 18 December 2014,<sup>16</sup> seek to fill the current governance gap between commitments and practice through a child-centred, comprehensive, integrated and multidisciplinary approach. They articulate, for the first time in an international instrument, the responsibility of the criminal justice system, in cooperation with child protection and other agencies, to prevent and respond to violence against children.<sup>17</sup>

The Model Strategies on VAC were developed by an inter-governmental group which gathered in February 2014, in Bangkok, in a meeting hosted by the Government of Thailand. This process benefited from the support of the United Nations Office for Drugs and Crime, the Office of the High Commissioner for Human Rights, United Nations Children's Fund, the Office of the Special Representative of the Secretary-General on Violence against Children and experts from civil society organizations and academia. Subsequently, the draft was reviewed by the 2014 session of the Commission on Crime Prevention and Criminal Justice and later unanimously adopted by the General Assembly.

### *a. The normative framework—international human rights law and relevant UN justice norms and standards*

The Model Strategies on VAC are framed by the rights of the child, as recognized by the international community in a number of treaties, including the Universal Declaration of Human Rights,<sup>18</sup> the International Covenant on Economic, Social and Cultural Rights,<sup>19</sup> the International Covenant on Civil and Political Rights,<sup>20</sup> and the Convention on the Rights of the Child (CRC)<sup>21</sup> and its' Optional Protocols.<sup>22</sup>

Furthermore, they build upon numerous international standards and norms in the field of crime prevention and criminal justice, in particular on juvenile justice. Some of them are legally binding

<sup>15</sup> *Id.*

<sup>16</sup> G.A. Res. 69/194, United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, (Jan. 26, 2015) [hereinafter Model Strategies], [http://srsg.violenceagainstchildren.org/sites/default/files/documents/docs/A\\_RES\\_69\\_194\\_EN.pdf](http://srsg.violenceagainstchildren.org/sites/default/files/documents/docs/A_RES_69_194_EN.pdf).

<sup>17</sup> U.N. Office on Drugs and Crime [UNODC], *Introducing the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, A New Tool for Policymakers, Criminal Justice Officials and Practitioners*, United Nations, New York 2015, p. 3.

<sup>18</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948).

<sup>19</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

<sup>20</sup> International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 19, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

<sup>21</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

<sup>22</sup> G.A. Res. 54/263, Optional Protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography (May 25, 2000).

because of their incorporation in the CRC, while others provide valuable detail on the interpretation and implementation of fundamental rights.

These include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);<sup>23</sup> the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines);<sup>24</sup> the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules);<sup>25</sup> the Guidelines for Action on Children in the Criminal Justice System;<sup>26</sup> the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime;<sup>27</sup> the Guidelines for the Prevention of Crime;<sup>28</sup> the United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems and others.<sup>29</sup>

Additionally, the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)<sup>30</sup> and the updated Model Strategies and Practical Measures on the Elimination of Violence against Women in the Field of Crime Prevention and Criminal Justice (Model Strategies on VAW)<sup>31</sup> provided a sound basis to build upon during the drafting of the Model Strategies on VAC.

Guided by the CRC preamble, the preamble of the Model Strategies reiterates that children “by reason of their physical and mental development, face particular vulnerabilities and need special safeguards and care, including appropriate legal protection.”<sup>32</sup> Indeed, girls, as well as boys, need more, not less protection than adults, and as a result, during the drafting process of the Model Strategies it became important to ensure that the UN Model Strategies on VAC did not compromise or lower the threshold agreed upon in other international standards, including the Model Strategies on violence against women and the Bangkok Rules.

With its special focus on children’s protection from violence, the Model Strategies on VAC bring together, in an integrated, multi-disciplinary and child-sensitive approach,<sup>33</sup> the richness of relevant UN standards previously adopted. Thus, the Model Strategies add significant value for practical implementation, rather than being a repetition of previously agreed commitments.

The Model Strategies provide action-oriented guidance for implementation of international human rights standards, including the review of national legislation, and the promotion of its enforcement and implementation.

Depending on the national context of each country, some of the strategies and measures may be ready to be applied immediately, while others may involve a longer term process. This should not, however, compromise the essential purpose, which is to work toward the prevention and elim-

<sup>23</sup> G.A. Res. A/Res/40/33, annex, United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Nov. 25, 1985) [hereinafter Beijing Rules].

<sup>24</sup> G.A. Res. A/Res/45/112, annex, United Nations Guidelines for the Prevention of Juvenile Delinquency (Dec. 14, 1990).

<sup>25</sup> G.A. Res. A/Res/45/113, annex, United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Dec. 14, 1990) [hereinafter Havana Rules].

<sup>26</sup> Economic and Social Council Res. 1997/30, annex (July 21, 1997).

<sup>27</sup> Economic and Social Council Res. 2005/20, annex (July 22, 2005).

<sup>28</sup> Economic and Social Council Res. 2002/13, annex (July 24, 2002).

<sup>29</sup> G.A. Res. 67/187, annex (Mar. 28, 2013).

<sup>30</sup> G.A. Res. 65/229, U.N. Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules), annex (Mar. 16, 2011).

<sup>31</sup> G.A. Res. 67/187, annex (Mar. 28, 2013).

<sup>32</sup> Model Strategies, *supra* note 16, at preamble.

<sup>33</sup> “Child-sensitive” denotes an approach that takes into consideration the child’s right to protection and individual needs and views in accordance with the age and maturity of the child; *see* Model Strategies, *supra* note 16, at annex, ¶ 6(d).

ination of violence against children, protect the rights of child victims, witnesses and alleged or recognised offenders, and eliminate impunity. Pursuant to CRC article 4, efforts should be sought to the maximum extent of available resources, and where needed, within the framework of international cooperation.<sup>34</sup>

### *b. Definition of violence against children*

The CRC addresses violence against children in many of its provisions<sup>35</sup> and includes a broad definition of violence against children in article 19. The Model Strategies capture this important provision and refer to ‘all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse’.<sup>36</sup> CRC Article 19 is complemented by other provisions addressing additional and serious forms of violence, most importantly article 37, which includes the prohibition of torture or other cruel, inhuman or degrading treatment or punishment, as well as of death penalty and life imprisonment without possibility of release.

By referring to the CRC, the Model Strategies make a crucial clarification of the scope of strategies and measures required in violence prevention and response, both in the public and private spheres. With its broad approach they recognize the duty of the criminal justice system to not only respond to crimes, but also to invest in changing norms that culturally accept or tolerate violence, as well as in comprehensive prevention programmes, and capacity building within the system.

## **3. Key dimensions of the Model Strategies on VAC**

The Model Strategies on VAC are grouped into three broad categories, which are complimentary and reinforcing in preventing and responding to violence against children, including when deprived of their liberty. Altogether, there are 17 strategies with practical measures, which seek to address common gaps and challenges through best evidence-based crime prevention and child protection practices.<sup>37</sup>

In implementing the Model Strategies at the national level, the following principles should guide Member States’ actions:<sup>38</sup>

- (a) The inherent rights of the child to life, survival and development are protected. States should take into account that children’s meeting with actors in the criminal justice system can be very frightening and intimidating. The harmful effects of deprivation of liberty are well-documented, hampering children’s development and social reintegration and can sometimes be fatal.
- (b) The right of the child to have his or her best interests as a primary consideration in all matters involving or affecting him or her is respected, whether the child is a victim or a perpetrator of violence, as well as in all measures of prevention and protection.

This principle is fundamental in any child-sensitive approach. Regrettably, in many countries it is seldom applied in decisions on depriving a child of his or her liberty. Deprivation of liberty is

<sup>34</sup> Model Strategies, *supra* note 16, at annex, ¶ 5.

<sup>35</sup> Convention on the Rights of the Child, arts. 19, 28.2, 32–36, 37, 39, Nov. 20, 1989, 1577 U.N.T.S. 3 [hereinafter CRC].

<sup>36</sup> Model Strategies, *supra* note 16, at annex, ¶ 6.

<sup>37</sup> UNODC, *Planning the implementation of the United Nations Model Strategies and Practical Measures on the elimination of violence against children in the field of crime prevention and criminal justice: A Checklist*, New York, 2015 p. vi.

<sup>38</sup> Based on the general principles in articles 2, 3, 6, and 12 in the CRC.

not a measure in the best interests of the child and should give way to non-custodial alternative measures, including restorative justice approaches.<sup>39</sup>

- (c) Every child is protected from all forms of violence without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

The preamble of the resolution adopting the Model Strategies urge Member States to "remove any barrier, including any kind of discrimination that children may face in accessing justice and in effectively participating in criminal proceedings (...)"<sup>40</sup>

A recent report by the Report of the United Nations High Commissioner for Human Rights on access to justice for children identifies a number of particularly vulnerable groups who are at particular risk of multiple forms of stigmatization, discrimination and violence. These include girls, children in alternative care, children deprived of their liberty, asylum-seeking and migrant children, children with disabilities, children living in poverty, children in street situations, children belonging to minorities or who are indigenous children, and children in conflict situations. They face significant barriers in accessing justice on grounds of gender, disability, race, ethnicity, colour, language, religion, national or social origin, property, birth, or other status, such as sexual orientation or gender identity (...)<sup>41</sup>

- (d) The child is informed of his or her rights in an age-appropriate manner and the right of the child to be consulted and to express his or her views freely in all matters affecting him or her is fully respected.

The child's right to participation is often challenging due to children's lack of agency and autonomy, and their dependency on parents, legal representatives and justice professionals to support them. But based on their age, maturity and evolving capacity they have a right to be heard and be taken seriously.

Children in contact with the justice system or who are deprived of liberty may face stigmatization for breaking norms in society, being beyond social control or committing an offence. Overcoming ill-perceptions, paternalistic or needs-centred attitudes towards children by listening to them and taking their views into account remains a great challenge, especially in situations of deprivation of liberty. Safeguarding the child's right to be heard in these situations requires strong commitment and action by all relevant actors.<sup>42</sup>

### *a. Prohibiting violence against children, implementing broad prevention measures and promoting research and data collection*

Still today, violence against children remains accepted as a form of discipline in all settings, including care institutions, detention centers and as a punishment in judicial sentencing.<sup>43</sup> A first

<sup>39</sup> Comm. on the Rights of the Child, General Comment No. 10, at 5, U.N. Doc. CRC/C/GC/10 (2007) [hereinafter General Comment No. 10].

<sup>40</sup> Model Strategies, *supra* note 16, ¶ 6.

<sup>41</sup> U.N. General Assembly, Human Rights Council, Annual report of the Special Representative of the Secretary-General on Violence against Children, ¶ 17, U.N. Doc. A/HRC/25/35 (Dec. 16, 2013).

<sup>42</sup> W. Schabas and H. Sax, "Article 37. Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty", in: A. Alen, J. Vande Lanotte, E. Verhellen, F. Ang, E. Berghmans and M. Verheyde (Eds.) *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden 2006), pp. 72, 73.

<sup>43</sup> SRSG Annual Report, *supra* note 5.

critical step in proactive prevention of violence is to ensure that all forms of violence against children are prohibited by law.<sup>44</sup> A clear message through legislation is crucial for empowering and legitimizing action by the authorities, and for mobilizing social support for changes in perceptions, attitudes and behavior in society.

The Model Strategies call for laws that are comprehensive and effective in prohibiting and eliminating all forms of violence against children. Provisions that justify, allow for or condone violence against children or may increase the risk of violence against children should be removed.<sup>45</sup> A comprehensive and multi-disciplinary approach entails moving beyond a limited “criminalization” approach and making use of the full range of relevant legislation, including civil, criminal, administrative and constitutional law.<sup>46</sup>

Particular challenges have been experienced in legal reform processes related to harmful practices, which may not always be perceived as violence or crimes, or be justified as part of tradition. For instance, in some countries, children with disabilities and children with albinism, specially gifted children and prematurely born children are frequently the target of witchcraft accusations. Due to fear and superstition these serious incidents are rarely reported and remain unaddressed by the criminal justice system.<sup>47</sup> Harmful social norms and practices may also lead to deprivation of liberty of child victims as punishment or allegedly for their own protection, such as girls in danger of crimes in the name of honour. In such cases there may be no legal basis for the detention, procedural guarantees will not be observed, and the detention will constitute discrimination.<sup>48</sup> Since release may be conditional upon the consent of a male relative,<sup>49</sup> girls may risk spending a lengthy period of time in detention.

The responsibility to prevent and respond to harmful practices is explicitly clarified through the call in the Model Strategies for Member States to “establish by law a clear and comprehensive prohibition of all harmful practices against children, supported by detailed provisions in relevant legislation to secure the effective protection of girls and boys from those practices, and to provide means of redress and to fight impunity.”<sup>50</sup> Furthermore, the Model Strategies seek to strengthen children’s access to justice by urging Member States to “ensure that resorting to informal justice systems does not jeopardize children’s rights or preclude child victims from accessing the formal justice system, and to establish the supremacy of international human rights law.”<sup>51</sup>

Based on international human rights law, the Model Strategies call on Member States to criminalize certain forms of violence, including sexual violence, sale of, or trafficking in children, sexual exploitation, child prostitution, sexual abuse images of children (often referred to as child pornography), transfer of organs of the child for profit, engagement of the child in forced labour, slavery

<sup>44</sup> Model Strategies, *supra* note 16, at annex, ¶¶ 8, 9.

<sup>45</sup> *Id.* ¶ 9(a).

<sup>46</sup> See U.N. Women, *Handbook for legislation on violence against women*, New York, 2012; U.N. General Assembly, Human Rights Council, Annual report of the Special Representative of the Secretary-General on Violence against Children, ¶¶ 21-26, U.N. Doc A/HRC/19/64 (Jan. 13, 2012).

<sup>47</sup> Office of the Special Representative of the Secretary on Violence against Children and Plan International, *Protecting children from harmful practices in plural legal systems, with a special emphasis on Africa*, New York 2012, p. 35.

<sup>48</sup> See, e.g., U.N. General Assembly, Human Rights Council, Report of the Working Group in Arbitrary Detention, ¶¶ 78-79, U.N. Doc. A/HRC/27/48 (June 30, 2014).

<sup>49</sup> U.N. General Assembly, Human Rights Council, Report of the Special Rapporteur on violence against women, its causes and consequences, Rashida Manjoo, Addendum, Mission to Jordan, ¶ 28, U.N. Doc. A/HRC/20/16/Add.1 (May, 12, 2012).

<sup>50</sup> Model Strategies, *supra* note 16, at annex ¶ 10(a).

<sup>51</sup> *Id.* ¶ 10(c).



and gender-related violence, in particular gender-related killings of girls.<sup>52</sup> However, it is arguable that this list is far from exhaustive and that there are several other forms of violence against children that should be addressed in national penal codes. Prohibitions of violence specifically related to children deprived of liberty are further integrated into the third part of the Model Strategies, on preventing and responding to violence within the justice system.

The Model strategies promote the development of comprehensive and effective prevention programmes that address the risks of violence and build a protective environment for children. Comprehensive plans for the prevention of violence against children in all its forms, based on in-depth analysis of the problem, should be developed and implemented, at every level of government.<sup>53</sup> For interventions to be effective, criminal justice agencies are required to work together with child protection, social welfare, health and education agencies and civil society organizations, as part of broader crime prevention programmes.<sup>54</sup>

Throughout the world, criminal justice systems are frequently used as a substitute to health care and child protection. To overcome this challenge, Member States are urged to strengthen existing child protection systems.<sup>55</sup>

Moreover, a wide range of measures are introduced to prevent violence against children and address cultural acceptance or tolerance of violence against children through evidence-based policies and programmes, parental capacity and family support, education and awareness-raising with the involvement of relevant agencies, the media, communities, local leaders, religious leaders, families and children themselves.<sup>56</sup> Specific focus is given to address the risk of violence against children committed by children<sup>57</sup> and the risk of violence associated with trafficking and various forms of exploitation by criminal groups.<sup>58</sup>

To overcome the specific risks faced by unaccompanied children, migrant children and children who are refugees or asylum seekers, the Model Strategies stress that these children should have access to independent assistance, advocacy and advice, and be always placed in appropriate accommodation and treated in a manner that is fully compatible with their best interests (...)<sup>59</sup> In this regard, it is important to recall that the Committee on the Rights of the Child has taken a firm stance, stressing that “detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child.” The Committee recommends that States “expeditiously and completely cease the detention of children on the basis of their immigration status.”<sup>60</sup>

<sup>52</sup> *Id.* ¶ 11.

<sup>53</sup> *Id.* ¶ 13(c).

<sup>54</sup> *Id.* ¶ 12.

<sup>55</sup> *Id.* ¶ 13(a). *See also id.* ¶ 6(b). “A “child protection system” refers to the national legal framework, formal and informal structures, functions and capacities to prevent and respond to violence against and abuse, exploitation and neglect of children”.

<sup>56</sup> *Id.* ¶¶ 3,16.

<sup>57</sup> *Id.* ¶ 14.

<sup>58</sup> *Id.* ¶ 15.

<sup>59</sup> *Id.* ¶ 17. *See also id.* ¶¶ 17(a), (b). “While accommodated, children should be separated from adults when necessary to protect them and, when applicable, States should ensure to sever relationships with smugglers and traffickers, and ensure that a legally appointed representative is available from the moment an unaccompanied child is detected by the authorities. Moreover, States should conduct regular analyses of the nature of the threats faced by these children and to assess their needs for assistance and protection.”

<sup>60</sup> Comm. on the Rights of the Child, *Report of the 2012 Day of General Discussion: The rights of all children in the context of international migration*, ¶ 78.

This is an area that is generating increasing international concern. In Europe more than one million non-European migrants have arrived in the past one and a half year, leading to increasingly restrictive responses. On 7 June 2016, the European Court of Justice issued a landmark ruling<sup>61</sup> that precludes legislation of EU Member States from imprisoning a third national, who has not been subject to a completed return procedure, merely on account of illegal entry across an internal border within the Schengen zone, resulting in an illegal stay. In the light of international and regional standards related to children's rights, it would be expected that children are granted more rather than less protection than adults.

Another persisting challenge for the protection of children from violence, including when deprived of liberty, is the scarce and fragmented information and limited data on the extent and impact, and the risk factors that perpetuate such violence in different settings.<sup>62</sup> It is vital that systematic, multilevel and coordinated collection of data and research make use of a variety of sources, such as population surveys, performance indicators and evaluations of the efficiency and effectiveness of the justice system and complaints and monitoring mechanisms.<sup>63</sup> Periodic reports on cases of violence against children reported to the police and other criminal justice agencies should be published and monitored. The reports should include the number of cases, apprehension or arrest and clearance rates, prosecution and case disposition with regard to the alleged offenders and the prevalence of violence against children. The reports should also disaggregate data by type of violence, information on the age and sex of the alleged offender and his or her relationship to the victim.<sup>64</sup>

***b. Enhancing the ability and capacity of the criminal justice system to respond to violence against children and protect child victims***

A fair, effective and efficient criminal justice system is a system that respects the fundamental rights of victims, witnesses and alleged or recognized offenders. It focuses on the need to prevent victimization, to protect and assist victims, to treat them with compassion, and to respect their dignity.<sup>65</sup> To secure these standards, justice professionals need to be qualified, well trained and have the necessary knowledge on children's rights and on relevant legislation, and possess the needed skills to work directly with children.<sup>66</sup> When authorities responsible for the protection of children lack technical and human resources and capacities to identify, prevent and react to violence against children, they may cause harm to those they are expected to protect. It is therefore crucial to have in place internal and external accountability mechanisms to prevent violence and avoid children's re-victimization.

To address questions such as these, the Model Strategies contain key strategies and measures to enhance the ability and capacity of the criminal justice system. These include effective detection

<sup>61</sup> Case C-47/15, *Sélina Affum v Préfet du Pas-de-Calais*, Court of Justice of the European Union, 7 June 2016.

<sup>62</sup> Office of the Special Representative of the Secretary General on Violence against Children, *Toward a World Free from Violence: Global Survey on Violence against Children*, New York 2013, p. 131.

<sup>63</sup> Model Strategies, *supra* note 16, at annex, ¶18.

<sup>64</sup> *Id.* ¶ 18(b).

<sup>65</sup> <https://www.unodc.org/unodc/en/justice-and-prison-reform/childrensvictimswomensissues.html#children>, retrieved 20 May 2016.

<sup>66</sup> U.N. General Assembly, Human Rights Council, Joint report of the Office of the High Commissioner for Human Rights, the United Nations Office on Drugs and Crime and the Special Representative of the Secretary-General on Violence against Children on prevention of and responses to violence against children within the juvenile justice system, ¶ 51, U.N. Doc. A/HRC/21/25 (June 27, 2012) [hereinafter Joint Report]; Office of the Special Representative on Violence against Children, *Promoting restorative justice for children*, New York 2013, p. 37.

and reporting mechanisms;<sup>67</sup> protection of child victims and prevention of secondary victimization;<sup>68</sup> effective investigation and prosecution of incidents of violence, as well as sentencing that reflects the serious nature of violence against children.<sup>69</sup> At the same time, the Model Strategies promote cooperation among various sectors and acknowledge the complementary roles of the criminal justice system, child protection agencies, health and education and social service sectors, as well as the informal justice system.<sup>70</sup> Stronger operational links between both public and private agencies and actors will not only strengthen reporting, recording, investigating and prosecuting acts of violence, but also better ensure that child victims are protected and receive child-sensitive support and services.<sup>71</sup>

The Model Strategies promote continuous training of staff, the adoption of codes of conduct and the establishment of specialized units specifically trained to deal with the complexities and sensitivities relating to child victims of violence, from which victims can receive comprehensive assistance, protection and intervention services, including health and social services, legal aid and police assistance and protection.<sup>72</sup>

*c. Preventing and responding to violence against children within the justice system and limiting deprivation of liberty to a measure of last resort*

The CRC calls on States to establish a specialized and separate juvenile justice system.<sup>73</sup> Every child who is alleged as, accused of or recognized as having infringed the penal law has the right to be treated in a manner that promotes the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others, and which takes into account the child's age, and the child's possibility of social reintegration and assuming a constructive role in society.<sup>74</sup>

The juvenile justice system is based on a restorative justice approach focusing on the reintegration of children into society.<sup>75</sup> In a number of countries, however, a comprehensive juvenile justice system is either not in place, or not in accordance with the relevant provisions of the CRC, and in some cases the system in place lacks effectiveness. While some States have failed to comply with the obligation to establish juvenile courts, others may lack judges with the adequate specialization in juvenile justice. As a consequence, children are tried by the ordinary criminal justice system, at times treated as adults, and unable to benefit from the special measures of protection to which they are entitled.<sup>76</sup>

The third part of the Model Strategies concerns children who are in the justice system, including those deprived of liberty. Acknowledging that some states still lack a separate juvenile justice system, the expression "justice system" encompasses both the juvenile- and criminal justice systems.

<sup>67</sup> Model Strategies, *supra* note 16, at annex, ¶ 19.

<sup>68</sup> *Id.* ¶¶ 20-21, 24-26.

<sup>69</sup> *Id.* ¶¶ 22, 27.

<sup>70</sup> *Id.* ¶ 23.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> See CRC, *supra* note 35, at art. 40(3); General Comment No. 10, *supra* note 39, ¶ 10; Beijing Rules, *supra* note 23, at art. 4(1).

<sup>74</sup> CRC, *supra* note 35, at art. 40(1).

<sup>75</sup> U.N. General Assembly, Human Rights Council, Report of the High Commissioner for Human Rights on the Protection of Human Rights of Juveniles Deprived of their Liberty, ¶ 97, U.N. Doc A/HRC/21/26 (Aug. 13, 2012).

<sup>76</sup> *Id.* ¶¶ 99, 100.

The Model Strategies base the definition of “deprivation of liberty” on the Havana Rules, adopted in 1990 by the UN General Assembly.<sup>77</sup> “Deprivation of liberty” means any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which that person is not permitted to leave at will, by order of any judicial, administrative or other public authority.<sup>78</sup> In its General Comment no. 35 the Human Rights Committee provides a broad range of examples of deprivation of liberty, including police custody, remand detention, imprisonment after conviction, administrative detention, involuntary hospitalization, institutional custody of children, which may affect children with disabilities and children with child protection needs, confinement to a restricted area of an airport, affecting child migrants in particular, and involuntary transportation; further restrictions on a child who is already detained, such as solitary confinement or physical restraining devices are also forms of deprivation of liberty.<sup>79</sup>

The Model Strategies are designed to be applied within the field of crime prevention and criminal justice, and their main focus is on children who are alleged or recognized offenders. Nevertheless, they are applicable in all situations where children are deprived of liberty. This includes children who are administratively detained by the justice system, for example in police custody and children living in custody with a parent or legal guardian on any ground, including when immigration laws have been contravened.<sup>80</sup>

During the drafting process of the Model Strategies, the expression “children conflict with the law” was deliberately avoided. The main reasons were the recognition that a large number of children in contact with the criminal justice system have in fact not committed an offence, and may be unlawfully or arbitrarily arrested and deprived of liberty; moreover, the term was considered to be stigmatizing towards children and not in line with the values of the CRC.

As noted by the CRC, no child should be deprived of his or her liberty unlawfully or arbitrarily. “The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”<sup>81</sup>

In many cases, however, detention is used as a first resort.<sup>82</sup> The over-reliance on deprivation of liberty is partly due to lack of non-custodial community-based alternatives focusing on social reintegration. Countering this immense challenge requires policies and programmes that ensure access to fair, effective and child-sensitive justice systems that promote the development of such alternatives. There is also an ongoing concern that children are brought into the justice system for status offences, such as truancy, vagrancy, begging.<sup>83</sup> Available research indicates that the majority of girls in the criminal justice system are in fact charged with property, drug or status offences, such as begging and sleeping on the street.<sup>84</sup>

The last part of the Model Strategies aims to address these concerns and reduce the number of children deprived of liberty, including pre-trial detention. A critical step is to prevent stigmatization, victimization and criminalization of children. With this in mind, Member States are urged to “ensure that any conduct not considered a criminal offence or not penalized if committed by an

<sup>77</sup> Havana Rules, *supra* note 25.

<sup>78</sup> Model Strategies, *supra* note 16, at annex, ¶ 6(h).

<sup>79</sup> Human Rights Comm., General Comment No. 35, ¶ 5, U.N.Doc. CCPR/C/GC/35 (Dec. 16, 2014).

<sup>80</sup> Model Strategies, *supra* note 16, at annex, ¶¶ 37(d),(g).

<sup>81</sup> CRC *supra* note 35, at art. 37(b).

<sup>82</sup> UNODC, *Addressing the Global Prison Crisis: Strategy 2015-2017*.

<sup>83</sup> Joint Report, *supra* note 68, ¶ 15.

<sup>84</sup> Office of the Special Representative on Violence against Children, *Safeguarding the rights of girls in the criminal justice system—Preventing violence, stigmatization and deprivation of liberty*, New York, 2015, p 7.

adult is also not considered a criminal offence and not penalized if committed by a child.<sup>85 86</sup> The Model Strategies recognize that limiting the use of detention as a sentence and encouraging the use of alternatives can help to reduce the risk of violence against children within the justice system.<sup>87</sup> An important and highly effective way of doing so is to provide support to families and use diversion, restorative justice programmes and non-coercive treatment and education programmes as alternative measures to judicial proceedings.<sup>88</sup>

Conventional forms of criminal justice that focus on punishment rather than restoring the harm caused have had little success in reforming children's attitudes toward offending. Practice in a number of countries shows that holistic, multidisciplinary restorative justice programmes give promising results in reducing adverse effects of anti-social behaviour among children. Children involved in such programmes show fewer tendencies towards violence, both in the community and the home. Children who have benefitted from such programmes also demonstrate significantly lower rates of recidivism and are more likely to stay away from gang life and also less likely to become victims of armed or gang-related violence. Children are also less likely to become victims of domestic violence, as parents who have assisted their child through a restorative justice conference show less inclination to resort to violence as a form of discipline.<sup>89</sup>

In addition to ensuring that all arrests are conducted in conformity with the law, the apprehension, arrest and detention of children should be limited to situations in which these measures are necessary as a last resort. Alternatives to arrest and detention, such as summonses and notices to appear should be used. Moreover, the use of all forms of violence, torture and other cruel, inhuman or degrading treatment or punishment to obtain information, extract confessions, coerce a child into acting as an informant or agent for the police, or engage a child in activities against his or her will should be prohibited. As should the use of firearms, electric shock weapons and violent methods to apprehend and arrest children, and procedures that limit the use of force and restraints are essential in preventing violence by the police during apprehensions and arrests of children. Similar prohibitions are presented for other places of detention.

The Model Strategies recognize that the majority of children deprived of liberty are in police custody or pre-trial or preventive detention. Disturbingly, many of these children are subsequently found not guilty of any offence. Important safeguards are promoted to reduce the risks of violence and reduce the use of pre-trial detention. Member States should ensure that children in police custody or pre-trial or preventive detention can promptly appear before a court or tribunal to challenge that detention; reduce delays in the justice process, to expedite trials and other proceedings; ensure access to justice and legal aid; and adopt legislative and administrative measures and policies on its preconditions, limitations, duration and alternatives to pre-trial detention.

While deprived of liberty, the best interest of the child and respect of the child's dignity and the rights to protection, well-being and development must continue to be ensured in accordance with the CRC, including articles 19 and 37. When arriving in a place of detention, a first step to safeguard the child's rights and protection is to ensure that he or she, parents and legal guardians receive clear information, both verbally and in writing, about his/her rights, including how to

<sup>85</sup> Model Strategies, *supra* note 16, at annex, ¶ 29.

<sup>86</sup> Similar formulation can be found in Human Rights Council Res. A/HRC/24/L.28, ¶ 23 (Sept. 23, 2013) ("Human rights in the administration of justice, including juvenile justice.").

<sup>87</sup> Model Strategies, *supra* note 16, at annex, ¶ 35.

<sup>88</sup> *Id.* ¶ 31(a).

<sup>89</sup> Office of the Special Representative on Violence against Children, *Promoting restorative justice for children*, New York 2013, p. 27.

exercise the right to be heard; about effective remedies and available services for assistance and support; as well as information on seeking compensation for damages.<sup>90</sup>

The Model Strategies acknowledge the fact that police and other security forces can sometimes be responsible for acts of violence against children. For this reason, they urge Member States to prevent abuse of power, arbitrary detention, corruption and extortion by police officers who target children and their families.<sup>91</sup>

Children face significant risks of ill-treatment and violence in pre-trial detention as well as in other places where they are deprived of liberty. Violence may be legally sanctioned, or committed unlawfully by staff, adult detainees or by other children. Available studies across different regions reveal very disturbing levels of all forms of violence, including corporal punishment, inhuman sentencing, caning and flogging, psychological violence, sexual abuse, bullying, and self-harm by cutting or hanging themselves.<sup>92</sup> While in police custody and detention, girls are particularly vulnerable to incidents of sexual violence, including rape, harassment, invasive body searches and being stripped naked.<sup>93</sup>

It is of crucial importance that children who are victims of re-victimization and violence within the justice system have easy access to complaint mechanisms that are safe from retaliation, confidential and effective. Moreover, protection, support and counselling should be provided immediately.<sup>94</sup>

Once children enter detention facilities, their needs for necessary care, treatment and protection are often unaddressed, leading to exacerbated trauma. An individual assessment and classification is therefore critical to identify special needs for appropriate protection, treatment and support. A sufficient array of facilities is necessary to accommodate and protect children of different ages and different needs. The specific needs of girls, treatment for mental illness, disabilities, HIV/AIDS and other communicable and non-communicable diseases and drug addiction must be offered, and the needs of children at risk of committing suicide or other forms of self-harm addressed.<sup>95</sup>

The use of solitary confinement is a serious form of deprivation of liberty which can have serious detrimental effects on children. As highlighted by the Havana Rules: "All disciplinary measures constituting cruel, inhuman or degrading treatment shall be strictly prohibited, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile concerned."<sup>96</sup> In the inter-governmental negotiations of the Model Strategies, the language concerning "placement in a dark cell, closed or solitary confinement (...)" was undisputed. The prohibition of corporal punishment as a

<sup>90</sup> Model Strategies, *supra* note 16, at annex, ¶ 43(b).

<sup>91</sup> *Id.* ¶ 32.

<sup>92</sup> See Joint Report, *supra* note 68, ¶¶ 35-44.

<sup>93</sup> Manfred Nowak (Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment), *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, U.N. Doc. A/HRC/7/3, para 34 (Jan. 15, 2008).

<sup>94</sup> Model Strategies, *supra* note 16, at annex, ¶¶ 43(a), (c).

<sup>95</sup> *Id.* ¶¶ 38(e), (f).

<sup>96</sup> Havana Rules, *supra* note 25, ¶ 67.

disciplinary measure was included in a separate paragraph that also calls for effective prevention of corporal punishment and monitoring.<sup>97 98</sup>

Despite the universal prohibition of torture and other cruel, inhuman or degrading treatment or punishment in international human rights law, and reaffirmed by the Model Strategies,<sup>99</sup> some serious forms of violence and inhuman sentencing including death penalty, life imprisonment without parole, as well as indeterminate- and mandatory minimum sentences, are still used in different parts of the world.

Significant initiatives have been promoted to advocate for change. In 2010, the Special Representative together with other human rights experts and CRIN launched a major global campaign at the UN in New York to end inhuman sentencing of children. As of today, children can be sentenced to death in 15 countries by lethal injection, hanging, shooting or stoning; and in some countries children as young as seven are sentenced to life imprisonment.<sup>100</sup> In 35 states, corporal punishment such as whipping, flogging and caning is still lawful under state, traditional and/or religious law as a sentence for crimes committed by children.<sup>101</sup>

The gender-dimension remains largely unaddressed in both juvenile justice and criminal justice systems. In this regard, girls require special protection due to their particular vulnerabilities and also because the infrastructure of most detention facilities around the world has been designed for the needs of young males, failing to take into account the needs of females. The effects of imprisonment on them are therefore much harsher.<sup>102</sup> Gender-stereotypes and expected gender-norms in society influence how girls and boys are fuelled into the criminal justice system and how the system responds to it. Harsh sentences for drug offences and breaching curfews often affect girls disproportionately. In some countries, girls are more often arrested for running away from home and immoral conduct than boys and may be detained for longer periods of time than boys. Girls exploited through prostitution and trafficking are also frequently arrested and deprived of their liberty.<sup>103</sup>

Inspired by the Bangkok Rules, the Model Strategies urge Member States to take into account the distinctive needs of girls and their vulnerability to gender-based violence. The risk of all forms of

<sup>97</sup> See Model Strategies, *supra* note 16, at annex, ¶ 39(e) (“To prohibit and effectively prevent the use of corporal punishment as a disciplinary measure, to adopt clear and transparent disciplinary policies and procedures that encourage the use of positive and educational forms of discipline and to establish in law the duty of managers and personnel of detention facilities to record, review and monitor every instance in which disciplinary measures or punishment are used.”).

<sup>98</sup> According to a recent research report on solitary confinement in the UK, staff and children agree that sometimes the use of short-term isolation can be in the child’s best interest. The report argues that some children may just need ‘time away’ from others or need time to address a health or a mental health problem, which could lead them to pose a risk to themselves. This type of isolation has another purpose than punishment, and should only last for an hour or less (or in case of elected isolation it should have an agreed maximum duration), until a constructive solution is found to address the deep-rooted issue. See Children’s Commissioner and Associate Development Solutions, *Isolation and Solitary Confinement of Children in the English Youth Justice Secure Estate*, September 2015.

<sup>99</sup> Children’s Commissioner and Associate Development Solutions, *Isolation and Solitary Confinement of Children in the English Youth Justice Secure Estate*, para 36, September 2015.

<sup>100</sup> Child Rights International Network (CRIN), “The Problem.” <https://www.crin.org/en/home/campaigns/inhuman-sentencing/problem> (accessed May, 19, 2016).

<sup>101</sup> Global Initiative to End All Corporal Punishment of Children, “Countdown to Universal Prohibition.” <http://www.endcorporalpunishment.org/progress/countdown.html> (accessed May 18, 2016).

<sup>102</sup> U.N. General Assembly, Human Rights Council, Panel Discussion on the Protection of the Human Rights of Persons Deprived of their Liberty, ¶ 43, U.N. Doc A/HRC/28/29 (Apr. 9, 2015).

<sup>103</sup> Office of the Special Representative on Violence against Children, *Safeguarding the rights of girls in the criminal justice system: Preventing violence, stigmatization and deprivation of liberty*, New York, 2015, p. 5.

harassment, violence and discrimination against girls should be eliminated and the special needs and vulnerabilities of girls should be taken into account in decision-making processes. The dignity of girls should be respected and protected during personal searches, carried out by female staff only, and alternative screening methods, such as scans, should replace strip searches and invasive body searches. Lastly, clear policies and regulations on the conduct of staff aimed at providing maximum protection for girls deprived of their liberty from any physical or verbal violence, abuse or sexual harassment should be adopted implemented.<sup>104</sup>

Finally, the Model Strategies seek to end impunity and strengthen accountability by calling on the establishment of oversight mechanisms, as well as independent national monitoring and complaint mechanisms for agencies dealing with children. The Model Strategies call for the independent, prompt and effective investigation and prosecution of offences involving violence against children within the justice system. To ensure that all public officials who are found responsible for violence against children are held accountable, the Model Strategies foresee significant measures such as workplace disciplinary measures, termination of employment and criminal justice investigations.<sup>105</sup>

#### 4. Conclusions and way forward

The elimination of violence against children in the field of crime prevention and criminal justice requires an urgent paradigm shift from punitive and retributive responses to child- and gender-sensitive approaches. Within the justice system and in society as a whole, ill-perceptions, stereotypes and stigmatization towards excluded and vulnerable groups of children must be transformed, and criminalisation of child victims of violence, exploitation and neglect must be brought to an end. Capacity and accountability must be enhanced among all relevant professionals and the national child protection system needs to be strengthened so that the criminal justice system is no longer used as a substitute to provide care and protection for children. There is enough evidence to conclude that addressing the underlying causes of offending by children and using non-custodial alternatives will significantly reduce the number of children deprived of liberty and better ensure the realization of their human rights.

But such a paradigm shift needs strong political will and investment. The short-term and long-term benefits of keeping children out of institutions and detention centres will be considerably higher for children concerned, their families and society as a whole.

The Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice seek to provide a tool to assist legislators, policy makers and practitioners to steadily narrow the gap between international human rights and justice standards and norms and implementation on the ground.<sup>106</sup> But, as with all other UN standards, their effective use and enforcement will depend on their wide dissemination and awareness-raising, capacity building to promote their effective application at the national level.

<sup>104</sup> Model Strategies, *supra* note 16, at annex, ¶ 41.

<sup>105</sup> *Id.* at annex, ¶¶ 47(c)-(e).

<sup>106</sup> As a supplement, UNODC with partners have developed further practical guidance and a checklist. See UNODC, *Introducing the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children: A New Tool for Policymakers, Criminal Justice Officials and Practitioners*, [http://www.unodc.org/documents/justice-and-prison-reform/14-08451\\_Strategy\\_eBook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/14-08451_Strategy_eBook.pdf) (accessed June 1, 2016); UNODC, *Planning the Implementation of the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children: A Checklist*, [http://www.unodc.org/documents/justice-and-prison-reform/14-08452\\_Ebook.pdf](http://www.unodc.org/documents/justice-and-prison-reform/14-08452_Ebook.pdf) (accessed June 1, 2016).



The forthcoming Global Study on Children Deprived of Liberty provides a unique opportunity to support the realization of children's rights and the implementation of the Model Strategies. The Global Study aims to consolidate data and sound evidence to inform policy and law, to develop capacity-building initiatives for professionals, and promote change to overcome stigmatizing attitudes and behaviour towards children in detention. It will examine the legality, grounds and root causes for deprivation of liberty and will provide information and statistics on the form, length and conditions of detention and the institutions where children are deprived of liberty.

To secure children's right to protection from discrimination and ensure that no child is left behind it will be important to identify and provide special protection to children who may be at special risk. These include girls; asylum-seeking, refugee and migrant children; children belonging to minorities or who are indigenous; children in conflict situations, children with disabilities, children in street situations; and children who are victims of violence, neglect and exploitation.<sup>107</sup>

The success of the Global Study on Children Deprived of Liberty will depend on the mobilization of broad support for its development and implementation by Member States, UN actors, professionals and practitioners, civil society, academia, and not least, children themselves.

In addition, the Global Study can help advance implementation of the new global sustainable development agenda. Agenda 2030, as it is commonly known, brings an ambitious and inspiring vision of a world free from fear and from violence. It recognizes the dignity and right of every child to grow up in a violence-free environment, as well as to access justice and accountable and transparent institutions. The Agenda is global and universal and concerns all children, and its implementation should reach those furthest behind first—the most invisible and forgotten children, those who are also the most at risk of violence, abuse and exploitation.

The value and success of Agenda 2030 will be measured by strategic action and tangible progress achieved through its implementation on the ground. Children deprived of liberty can become a crucial indicator of how effective the international community will be in moving this agenda forward.

Our commitment to the realization of children's rights and children's protection from violence in the justice system is as ambitious as the vision of Agenda 2030 and it cannot run the risk of becoming diluted in the face of other competing priorities.

The countdown to 2030 has started. Urgent action is truly of essence and children deserve no less!

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<sup>107</sup> Data and research is very scarce in cases where these groups of children are administratively detained, either in prisons together with children who are recognized offenders, or in closed educational or welfare institutions. See Carloyn Hamilton et al., *Administrative detention of children: a global report*, UNICEF and the Children's Leal Centre, 2011, which concluded that surprisingly little attention is paid in State treaty reports on this form of administrative detention, p. 137.

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# Stop Solitary for Kids: The Path Forward to End Solitary Confinement of Children

JENNIFER LUTZ, JASON SZANYI, AND MARK SOLER\*

## Abstract

*This article supports the Special Rapporteur's report and recommendations to eliminate solitary confinement by describing movement toward that goal in the United States. There have been developments in all three branches of government. In Congress, bipartisan legislation is pending that would virtually eliminate the use of solitary for juveniles held in federal custody and would serve as a model for state legislation. The legislation is based on juvenile detention facility standards developed by the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI). Legislation that would reduce the use of solitary is also pending in several states, including California and Ohio. In the executive branch, following a report by the Department of Justice, President Obama has banned the use of solitary on juveniles in federal custody. Attorney General Lynch has made reduction of solitary across the country a focus of Department of Justice efforts. In executive agencies in the states, some juvenile justice agencies have eliminated solitary as discipline (Massachusetts, Ohio), and many others are working toward significant reductions (e.g., Oregon, Indiana, New York, New Jersey). In the judicial branch, Supreme Court Justice Anthony Kennedy has directly criticized the use of solitary, and invited a challenge to the practice. There have been editorials and op-eds in many newspapers from both conservative and liberal commentators. On April 19, 2016, the Center for Children's Law and Policy, the Justice Policy Institute, the Center for Juvenile Justice Reform, and the Council of Juvenile Correctional Administrators launched a multi-strategy national campaign to eliminate solitary confinement in the United States in three years. The article will describe these developments and draw lessons for future reform.*

*Solitary confinement is what destroyed my son. He was a child locked up for 23 hours a day for nearly two years. That's enough to destroy a man's mind, let alone a child's.*

*-Venida Browder\*\**

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\*\* Carrie Johnson, *Solitary Confinement Is What Destroyed My Son, Grieving Mom Says*, NATIONAL PUBLIC RADIO (Apr. 18, 2016), <http://www.npr.org/2016/04/18/474397998/solitary-confinement-is-what-destroyed-my-son-grieving-mom-says>.

## I. Introduction

When New York City police officers arrested 16-year-old Kalief Browder on May 15, 2010 for allegedly stealing a backpack, they set events in motion that would change the national conversation about solitary confinement.<sup>1</sup>

Following his arrest, Kalief became another victim of a broken justice system. He spent the next three years at the notorious Rikers Island jail,<sup>2</sup> maintaining his innocence and awaiting his day in court. Prosecutors ultimately dismissed the charges against Kalief, but not before he spent nearly two years in solitary confinement. Those two years, along with the other abuses Kalief experienced at Rikers, led him to take his own life at his family's home in the Bronx on June 13, 2015. Venida Browder, Kalief's mother, had no doubt the experience at Riker's had permanently harmed her son. She said, "They damaged him so much that he felt this was his only way to escape."<sup>3</sup>

Kalief's death touched people deeply. Spike TV and Sean "JAY-Z" Carter co-produced a six episode documentary series on Kalief's life and death entitled *TIME: The Kalief Browder Story*. The series, which shows the horrific impact of Kalief's time in solitary confinement, will air in March, 2017. Less than a year after his death, President Barack Obama—citing Kalief's tragedy<sup>4</sup>—issued a directive banning the use of solitary confinement for youth in federal custody. At the same time, in the U.S. Senate, legislation with bipartisan support was pending in the Judiciary Committee to incorporate the President's recommendations into federal law.<sup>5</sup> And a growing coalition of child advocates, corrections administrators, and human rights organizations launched a national campaign to stop the solitary confinement of children in juvenile and adult facilities.<sup>6</sup>

There is momentum in the United States to end one of the most dangerous and inhumane practices affecting youth in custody: solitary confinement. However, as Special Rapporteur Juan E. Méndez noted in his March 2015 report on children deprived of liberty, solitary confinement continues to affect youth in many countries' juvenile justice and criminal justice systems, psychiatric institutions, and immigrant detention centers.<sup>7</sup>

In this article, we describe the harmful impact of solitary confinement on children, and why the practice has been so prevalent in spite of those harms. Next, we outline recent developments in the United States that have raised the profile of the issue of solitary confinement of youth. Finally, we outline a path forward for a coordinated national campaign to achieve the recommendation outlined by the Special Rapporteur: a prohibition on solitary confinement of children.<sup>8</sup>

<sup>1</sup> Various news outlets have carried coverage of Kalief's story, including *The New Yorker*, ABC News, and CNN. The summary in this article is adapted from these sources. See Jennifer Gonnerman, *Before the Law*, *THE NEW YORKER*, Oct. 6, 2014; Byron Pitts et al., *Who Kalief Browder Might Have Been If He Hadn't Spent Over 1,000 Days in Jail Without a Conviction*, ABC NEWS, June 17, 2015; Dana Ford, *Man Jailed as Teen without Conviction Commits Suicide*, CNN, June 15, 2015.

<sup>2</sup> U.S. Dep't of Justice, U.S. Attorney, SDNY, CRIPA Investigation Letter (Aug. 4, 2014), <https://www.justice.gov/sites/default/files/usao-sdny/legacy/2015/03/25/SDNY%20Rikers%20Report.pdf>.

<sup>3</sup> Pitts et al, *supra* note 1.

<sup>4</sup> Barack Obama, Presidential Memorandum—Limiting the Use of Restrictive Housing by the Federal Government (Mar. 1, 2016).

<sup>5</sup> Sentencing and Corrections Reform Act of 2015, S. 2123, 114th Cong. § 212 (2015).

<sup>6</sup> The Stop Solitary for Kids campaign is described in greater detail below.

<sup>7</sup> Juan E. Méndez, *Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, at 9, 12-13, U.N. Doc. A/HRC/28/68 (Mar. 5, 2015) [hereinafter Special Rapporteur].

<sup>8</sup> *Id.* at 21.

## II. The Harms of Solitary Confinement for Youth

The harmful effects of solitary confinement—also known as seclusion, isolation, segregation, and room confinement—are well-recognized. Young people are especially vulnerable to the mental and emotional effects of solitary confinement,<sup>9</sup> including depression, anxiety, nervousness, lack of impulse control, and psychosis.<sup>10</sup> Solitary poses serious safety risks for children, including increased opportunities to engage in self-harm and suicide, and re-traumatizing youth who were previously victimized. In a 2009 report, the U.S. Department of Justice’s Office of Juvenile Justice and Delinquency Prevention described a “strong relationship between juvenile suicide and room confinement.”<sup>11</sup> The study, which reviewed 110 suicides of children in juvenile facilities, found that approximately half of the victims were locked up in solitary at the time of their deaths.<sup>12</sup> The Justice Department echoed these concerns in its comments on federal regulations to implement the federal Prison Rape Elimination Act,<sup>13</sup> stating that “long periods of isolation have negative and, at times, dangerous consequences for confined youth.”<sup>14</sup>

Solitary confinement has particularly serious consequences for youth with mental health disorders, who are a large proportion of youth in the juvenile justice system. One multi-state study found that 70% of youth entering juvenile detention met the criteria for a mental health disorder, with 27% of detained youth having a disorder severe enough to require immediate treatment.<sup>15</sup> Solitary confinement exacerbates the problems. For this reason, many mental health associations strongly oppose its use. For example, the American Academy of Child and Adolescent Psychiatry opposes the use of solitary confinement in correctional facilities for youth, noting that children are “at a particular risk of . . . adverse reactions” including depression, anxiety, psychosis, and suicide.<sup>16</sup> Similarly, the American Psychiatric Association states that “[c]hildren should not be subjected to isolation, which is a form of punishment that is likely to produce lasting psychiatric symptoms.”<sup>17</sup>

Many youth in solitary do not receive appropriate education, mental health services, or drug treatment. Because of limited resources in their institutions, facility administrators and staff often use solitary to confine youth with mental health, behavioral, or developmental needs. Research and experience show that simply responding to youth with a show of force creates a cycle that exacerbates violence, acting-out behavior of youth, staff injury, and poor staff morale.<sup>18</sup> Researchers who studied the effect of isolation and restraint on youth concluded that the practices were “detri-

<sup>9</sup> Juvenile Justice Reform Comm., *Policy Statement: Solitary Confinement of Juvenile Offenders*, AM. ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY (Apr. 2012), [http://www.aacap.org/aacap/policy\\_statements/2012/solitary\\_confinement\\_of\\_juvenile\\_offenders.aspx](http://www.aacap.org/aacap/policy_statements/2012/solitary_confinement_of_juvenile_offenders.aspx).

<sup>10</sup> ACLU, *Alone and Afraid: Children Held in Solitary Confinement and Isolation in Juvenile Detention and Correctional Facilities* (June 2014), <https://www.aclu.org/files/assets/Alone%20and%20Afraid%20COMPLETE%20FINAL.pdf>.

<sup>11</sup> Lindsay M. Hayes, *Juvenile Suicide in Confinement: A National Survey*, OJJDP (Feb. 2009), at 27, <https://www.ncjrs.gov/pdffiles1/ojjdp/213691.pdf>.

<sup>12</sup> *Id.*

<sup>13</sup> Prison Rape Elimination Act of 2003 (PREA), 42 U.S.C. §§ 15601-15609.

<sup>14</sup> U.S. Dep’t of Justice, National Standards to Prevent, Detect, and Respond to Prison Rape, 28 CFR § 115 at 96 (May 16, 2012), [http://www.ojp.usdoj.gov/programs/pdfs/prea\\_final\\_rule.pdf](http://www.ojp.usdoj.gov/programs/pdfs/prea_final_rule.pdf).

<sup>15</sup> Jennie L. Shufelt & Joseph J. Coccozza, *Youth with Mental Health Disorders in the Juvenile Justice System: Results from a Multi-State Prevalence Study*, Nat’l Ctr. for Mental Health & Juvenile Justice (June 2006), at 2, [http://www.unicef.org/tdad/usmentalhealthprevalence06\(3\).pdf](http://www.unicef.org/tdad/usmentalhealthprevalence06(3).pdf).

<sup>16</sup> Am. Academy of Child & Adolescent Psychiatry, *supra* note 9.

<sup>17</sup> Press Release, Am. Psychiatric Ass’n, Incarcerated Juveniles Belong in Juvenile Facilities (Feb. 27, 2009), [http://www.njjn.org/uploads/digital-library/resource\\_1050.pdf](http://www.njjn.org/uploads/digital-library/resource_1050.pdf)

<sup>18</sup> Harvey J. Reed, *Ohio Implements Path to Safer Facilities*, CORRECTIONS TODAY, Sept.-Oct. 2015, <http://www.scstatehouse.gov/CommitteeInfo/SenateSpecialStudyCommitteeOnDJJ/August312016Meeting/083116%20Corrections%20Today%20Ohio.pdf> [hereinafter Path to Safer Facilities].



mental and anxiety-producing to children, and can actually have the paradoxical effect of being a negative reinforcer that increases misbehavior."<sup>19</sup>

There are over 54,000 youth in juvenile facilities in the United States each day,<sup>20</sup> and another 5,200 are in adult prisons and jails.<sup>21</sup> While most states and the federal government do not regularly publish data on the number of youth subjected to solitary confinement in juvenile facilities, the most recent available research shows that more than one-third of youth in facilities report being isolated, or locked up alone, or confined to their room with no contact with other residents.<sup>22</sup> More than half of those youth report being in solitary confinement for more than 24 hours.<sup>23</sup> Federal data released in August, 2016 shows that 47% of detention facilities and 46% of training schools isolate youth for more than four hours to control unruly behavior.<sup>24</sup> At least 29 states have statutes, regulations, or policies permitting the use of solitary confinement as punishment for violating facility rules, most commonly for periods of 3 to 5 days at a time.<sup>25</sup> Many of these states permit indefinite extensions of time in isolation.<sup>26</sup> Moreover, many states that have a ban on solitary confinement in policy do not follow it in practice.<sup>27</sup>

Based on the number of youth incarcerated in adult and juvenile facilities and the overrepresentation of particularly vulnerable populations—LGBTQ youth,<sup>28</sup> youth with disabilities,<sup>29</sup> youth with mental health disorders, and youth of color<sup>30</sup>—it is clear that tens of thousands of young people every year are held in solitary confinement. There is no shortage of depressing examples:

<sup>19</sup> Wanda K. Mohr et al., *A Restraint on Restraints: The Need to Reconsider the Use of Restrictive Interventions*, 12 ARCHIVES OF PSYCHIATRIC NURSING 95, 103 (1998).

<sup>20</sup> M. Sickmund et al, *Easy Access to the Census of Juveniles in Residential Placement: 1997-2013*, OJJDP (2015), <http://www.ojjdp.gov/ojstatbb/ezacjrp/>.

<sup>21</sup> On a typical day in 2014, about 4,200 persons younger than 18 were inmates in jails in the U.S. *OJJDP Statistical Briefing Book*, OJJDP (Dec. 13, 2015), <http://www.ojjdp.gov/ojstatbb/corrections/qa08700.asp?qaDate=2014>. Just over 1,000 inmates age 17 or younger were under the custody of state prisons at the end of 2014. *Id.*

<sup>22</sup> Andrea J. Sedlak & Karla S. McPherson, *Conditions of Confinement: Findings from the Study of Youth Residential Placement*, OJJDP JUVENILE JUSTICE BULLETIN, May 2010, at 9, <https://www.ncjrs.gov/pdffiles1/ojjdp/227729.pdf>.

<sup>23</sup> *Id.*

<sup>24</sup> *Data Reflect Changing Nature of Facility Populations, Characteristics, and Practices*, OJJDP (Aug. 2016), [https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot\\_JRFC2014.pdf?ed2f26df2d9c416fbddddd2330a778c6=jac csqpwcv-jdvpjwkc](https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_JRFC2014.pdf?ed2f26df2d9c416fbddddd2330a778c6=jac csqpwcv-jdvpjwkc).

<sup>25</sup> Natalie J. Kraner et al, 51- *Jurisdiction Survey of Juvenile Solitary Confinement Rules in Juvenile Justice Systems*, Lowenstein Ctr. for the Public Interest (July 2016), at 2, <https://www.lowenstein.com/files/upload/51-Jurisdiction%20Survey%20of%20Juvenile%20Solitary%20Confinement%20Rules.PDF>.

<sup>26</sup> *Id.*

<sup>27</sup> See Cassandra Basler, *Conn. Child Advocate Releases DCF Surveillance Videos Showing Illegal Restraint, Isolation*, WSHU Public Radio Group, Sept. 16, 2015, <http://wshu.org/post/conn-child-advocate-releases-dcf-surveillance-videos-showing-illegal-restraint-isolation>; Victoria Middleton, *End Unjust S.C. Practice of Putting Juveniles in Solitary*, The Post & Courier, Feb. 7, 2016, <http://www.postandcourier.com/article/20160207/PC1002/160209528/1023&source=RSS>; Megan Schrader, *Bill to Limit Use of Solitary Confinement in State-Run Juvenile Facilities Passes House Judiciary Committee*, THE GAZETTE, Apr. 26, 2016, <http://gazette.com/bill-to-limit-use-of-solitary-confinement-in-state-run-juvenile-facilities-passed-by-slim-margin/article/1574618>.

<sup>28</sup> Sue Burrell, *Trauma and the Environment of Care in Juvenile Institutions*, NAT'L CTR. FOR CHILD TRAUMATIC STRESS (Aug. 2013), [http://www.njjn.org/uploads/digital-library/NCTSN\\_trauma-and-environment-of-juvenile-care-institutions\\_Sue-Burrell\\_September-2013.pdf](http://www.njjn.org/uploads/digital-library/NCTSN_trauma-and-environment-of-juvenile-care-institutions_Sue-Burrell_September-2013.pdf).

<sup>29</sup> Some studies have suggested that youth with disabilities account for 70% of residents of youth correctional facilities. Peter E. Leone et al, *Understanding the Overrepresentation of Youths with Disabilities in Juvenile Detention*, 3 D.C. L. REV. 389, 389-401 (1995). Youth with special education needs are also overrepresented in juvenile facilities. Jacob R. Herendeen, *Overrepresentation of Special Education in the Juvenile Justice System*, 4 FISHER DIGITAL PUBLICATIONS 1 (2010), [http://fisherpub.sjfc.edu/education\\_ETD\\_masters/59/](http://fisherpub.sjfc.edu/education_ETD_masters/59/).

<sup>30</sup> Recent data show that over two-thirds of all youth in juvenile placements are youth of color. Sarah Hockenberry, *Juveniles in Residential Placement, 2011*, JUVENILE OFFENDERS AND VICTIMS: NATIONAL REPORT SERIES

- At the Contra Costa County Juvenile Hall, a 17-year-old diagnosed with psychosis and schizophrenia was placed in isolation due to hearing voices and talking to himself. He remained there for 60 days because of hallucinations, inappropriate laughter, and facial twitching. After 90 days, he decompensated and suffered a psychotic break, requiring hospitalization for three weeks.<sup>31</sup>
- Three teenage girls were held in extended solitary confinement at the Iowa Juvenile Home, a state-operated facility that houses children in need of supervision and adjudicated youth. An investigation by Disabilities Rights Iowa revealed that in November, 2012, the girls were held in rooms consisting of walls and floors of concrete, with only a raised platform for a bed and a thin mattress to sleep on at night. Two of the girls remained in isolation for approximately two months. The facility held the third girl in isolation for almost a year, allowing her out only one hour per day for hygiene and exercise. Two of the three girls received no education during their stays in isolation.<sup>32</sup>
- In December 2013, the U.S. District Court in New Jersey approved a settlement of a lawsuit by juvenile plaintiffs Troy D. and O'Neill S. against the New Jersey Juvenile Justice Commission and its health care providers.<sup>33</sup> During their solitary confinement for 178 days and 55 days, respectively, the boys often had no access to education, treatment or other therapeutic support. Despite being diagnosed with serious mental health problems at intake, Troy received almost no individual therapy, never received group therapy, and was denied the opportunity to speak with the psychiatrist about his medications. The youth were frequently denied personal possessions and proper clothing, nutrition and medical care, and were allowed no physical recreation or exercise or other interaction with their peers. Staff told them that if they continued their requests for mental health care or other services, their stays in room confinement would be extended.<sup>34</sup>

### III. The Growing Consensus Against Solitary Confinement

The United States has a long and troubled history of solitary confinement for children involved with the justice system. As the Special Rapporteur noted in his report on children deprived of liberty, though, the United States is not alone. The Special Rapporteur found that “[i]n many States, solitary confinement is still imposed on children as a ‘disciplinary’ or ‘protective’ measure” and that “[n]ational legislation often contains provisions to permit children to be placed in solitary confinement...[for] days, weeks and even months.”<sup>35</sup>

Fortunately, recent international developments and developments within the United States have contributed to a growing consensus around the need to eliminate solitary confinement for children.

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BULLETIN (Aug. 2014), at 12, <http://www.ojjdp.gov/pubs/246826.pdf>.

<sup>31</sup> Statement of Interest of the United States, G.F. et al v. Contra Costa County et al, Case No. 3:13-cv-03667-MEJ (N.D. Cal. Feb. 2014), [https://www.justice.gov/sites/default/files/crt/legacy/2014/02/14/contracosta\\_soi\\_2-13-14.pdf](https://www.justice.gov/sites/default/files/crt/legacy/2014/02/14/contracosta_soi_2-13-14.pdf).

<sup>32</sup> *Id.*

<sup>33</sup> *Juvenile Law Center Negotiates Final Settlement of Civil Rights Lawsuit Challenging Solitary Confinement of 2 Boys in Custody of NJ Juvenile Justice Commission*, JUVENILE LAW CENTER: PURSUING JUSTICE (Jan. 21, 2014), <http://www.jlc.org/blog/juvenile-law-center-negotiates-final-settlement-civil-rights-lawsuit-challenging-solitary-confi>.

<sup>34</sup> *Id.*; *T.D. and O.S. v. Mickens et al.*, (D.N.J., Civil Ac. No.1:10-cv-02902-JEI-AMD), Second Amended Complaint (filed Dec. 14, 2011) 1-3.

<sup>35</sup> Special Rapporteur, *supra* note 7, at 9.

### A. International Developments

For decades, the United Nations has been a leading international voice on the harms of solitary confinement for children.<sup>36</sup> In 1990, the U.N. General Assembly adopted Rules for the Protection of Juveniles Deprived of Their Liberty.<sup>37</sup> The rules prohibited “disciplinary measures constituting cruel, inhuman or degrading treatment . . . , including . . . solitary confinement or any other punishment that may compromise the physical or mental health of the juvenile.”<sup>38</sup> In 2007, the U.N. Committee on the Rights of the Child clearly stated that solitary confinement of children was “strictly forbidden” by article 37 of the Convention on the Rights of the Child (CRC).<sup>39</sup> Article 37 prohibits “torture or other cruel, inhuman or degrading treatment or punishment” of children.<sup>40</sup> The United States is the only U.N. Member State that has not ratified the CRC.<sup>41</sup> And in March, 2015, Special Rapporteur Méndez issued the most recent of several of his reports describing solitary confinement of children as a form of torture.<sup>42</sup>

International human rights organizations have also weighed in on the issue of solitary confinement of youth. In 2012, Human Rights Watch and the American Civil Liberties Union issued a major report on solitary confinement of youth in jails and prisons in the United States.<sup>43</sup> In 2005, a joint report by Amnesty International and Human Rights Watch documented how youth in adult prisons and jails often ended up in solitary confinement “for their own protection” from adult inmates.<sup>44</sup>

By describing the solitary confinement of children as torture and publicizing the extent of its use, the United Nations and the international human rights community have contributed to a sense of urgency for reforms in this area.

### B. Developments within the United States

Many children in the United States have been victims of abuse related to the use of solitary confinement, and new abuses continue to emerge.<sup>45</sup> However, several recent national developments

<sup>36</sup> Human Rights First has prepared a comprehensive listing of international treaties, reports, and instruments referencing the use of solitary confinement. See Human Rights First, *International Human Rights Law on Solitary Confinement*, 2015, <https://www.prisonlegalnews.org/media/publications/International%20Human%20Rights%20Law%20on%20Solitary%20Confinement,%20HRF,%202015.pdf>. See also Youth Solitary Confinement: *International Law and Practice*, ACLU, <https://www.aclu.org/files/assets/4%203%20International%20Law%20and%20Practice.pdf>.

<sup>37</sup> G.A. Res. 45/113, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (Dec. 14, 1990), <http://www.un.org/documents/ga/res/45/a45r113.htm>.

<sup>38</sup> *Id.* ¶ 67.

<sup>39</sup> Comm. on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, ¶ 89, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007), <http://www.refworld.org/docid/4670fca12.html>.

<sup>40</sup> *Id.*

<sup>41</sup> Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990).

<sup>42</sup> Special Rapporteur, *supra* note 7, at 9. See also Juan E. Méndez, *Interim Rep. of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 77, U.N. Doc. A/66/268 (Aug. 5, 2011), <http://solitaryconfinement.org/uploads/SpecRapTortureAug2011.pdf>.

<sup>43</sup> Ian Kysel, *Growing Up Locked Down: Youth in Solitary Confinement*, ACLU (Oct. 10, 2012), <https://www.aclu.org/blog/growing-locked-down-youth-solitary-confinement>.

<sup>44</sup> Amnesty International & Human Rights Watch, *The Rest of Their Lives: Life Without Parole for Child Offenders in the United States* (2005), <http://www.pendulumfoundation.com/TheRestofTheirLives.pdf>.

<sup>45</sup> Jen French & Kaylin Searles, *Lawsuit Filed After Special Needs Teen Allegedly Put in Solitary Confinement for Five Days*, FOX 17 NEWS NASHVILLE, Apr. 26, 2016, <http://fox17.com/news/local/nashville-law-firm-claims-child-held-in-solitary-confinement-days-straight-files-suit>; Carimah Townes, *Why Four Boys In South Carolina Have Been Shackled In Solitary Confinement For Six Weeks*, THINK PROGRESS, Oct. 29, 2015, <http://thinkprogress.org/justice/2015/10/29/3717311/solitary-confinement-spring-valley/>; Keegan Kyle,

show the potential to eliminate the use of solitary for children. These include the evolution of juvenile justice standards, growing consensus about the harms of solitary confinement among national professional organizations, and federal leadership on reforms related to solitary confinement.

### 1. Evolution of Juvenile Justice Standards

Officials who run juvenile justice agencies and facilities look to professional standards when determining which policies and practices to adopt or avoid. Over the past several years, the leading juvenile justice standards have evolved to include prohibitions on the use of solitary confinement for children and youth.

#### *a. The Annie E. Casey Foundation's Juvenile Detention Facility Assessment Standards*

One of the leading sets of professional standards is the Juvenile Detention Facility Assessment Standards, used as part of the Annie E. Casey Foundation's Juvenile Detention Alternatives Initiative (JDAI). JDAI is a long-standing initiative focused on safely reducing unnecessary and inappropriate incarceration of youth in pre-adjudication detention facilities.<sup>46</sup> More than 250 counties in 39 states and the District of Columbia participate in JDAI. The initiative relies on a set of eight "core strategies" to help jurisdictions reduce unnecessary incarceration.<sup>47</sup>

One of the JDAI core strategies is ensuring safe and humane policies, practices, and conditions for youth who are incarcerated. As part of JDAI, the Center for Children's Law and Policy and the Youth Law Center developed standards for juvenile detention facilities, in consultation with numerous experts in the field.<sup>48</sup> The JDAI Standards are the most comprehensive and demanding professional standards for juvenile facilities, with the highest level of protection for incarcerated youth. JDAI trains teams of local stakeholders to evaluate their facilities using the standards and to report on identified deficiencies. The JDAI standards have been widely used outside of JDAI. They have served as the basis for federal and state legislation, as well as many agencies' regulations and policies.<sup>49</sup>

The JDAI Standards were revised in 2014.<sup>50</sup> The standards refer to solitary confinement as "room confinement," defined as the involuntary restriction of a youth alone in a cell, room, or other area.<sup>51</sup> Under the revised JDAI standards, room confinement can only be used as a temporary response to behavior that threatens immediate harm to the youth or others.<sup>52</sup> It may only be used after exhausting less restrictive alternatives and only as long as necessary for the youth to calm down

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*Explained: Wisconsin's Youth Prison Scandal*, POST-CRESCENT, <http://www.postcrescent.com/story/news/investigations/2016/05/13/explained-wisconsins-youth-prison-scandal/83714726/>.

<sup>46</sup> See Richard A Mendel, *Two Decades of JDAI: From Demonstration Project to National Standard*, THE ANNIE E. CASEY FOUNDATION (Dec. 2, 2009), <http://www.aecf.org/resources/two-decades-of-jdai/>.

<sup>47</sup> See *JDAI Core Strategies*, JDAI HELPDESK, <http://jdaihelpdesk.org/SitePages/corestrategies.aspx>.

<sup>48</sup> *Juvenile Detention Facility Assessment: Guidelines for Conducting a Facility Assessment (2014 Update)*, JUVENILE DETENTION ALTERNATIVES INITIATIVE: A PROJECT OF THE ANNIE E. CASEY FOUNDATION (2014), at 2, <http://www.cclp.org/wp-content/uploads/2016/06/JDAI-Detention-Facility-Assessment-Guidelines.pdf>.

<sup>49</sup> CCLP staff worked with state and local officials in Louisiana and Mississippi to develop comprehensive standards for juvenile detention facilities using the JDAI standards as the framework for revisions following numerous lawsuits and concerns about conditions in those states. See also *Embedding Detention Reform in State Statutes, Rules and Regulations*, JUVENILE DETENTION ALTERNATIVES INITIATIVE: A PROJECT OF THE ANNIE E. CASEY FOUNDATION (2014), at 70-72, <http://jdaihelpdesk.org/JDAI%20Practice%20Guides/Practice%20Guide%208-%20Embedding%20Detention%20Reform%20in%20State%20Statutes%20Rules%20and%20Regulations.pdf>.

<sup>50</sup> *Juvenile Detention Facility Assessment: Standards Instrument (2014 Update)*, JUVENILE DETENTION ALTERNATIVES INITIATIVE, A PROJECT OF THE ANNIE E. CASEY FOUNDATION (2014), <http://www.cclp.org/wp-content/uploads/2016/06/JDAI-Detention-Facility-Assessment-Standards.pdf>.

<sup>51</sup> *Id.* at 92.

<sup>52</sup> *Id.* at 97.

and no longer present a risk of imminent harm to himself or others (but no longer than 4 hours).<sup>53</sup> Notably, room confinement may never be used as a punishment or disciplinary sanction, or for any other purpose than when a youth engages in behavior that threatens immediate harm to the youth or others.<sup>54</sup> The prior version of the JDAI standards had allowed (but discouraged) the use of disciplinary room confinement. The update represents a major change in policy for JDAI and the standards.

*b. The Council of Juvenile Correctional Administrators' Performance-based Standards*

The juvenile correctional community has developed a comparable springboard for reform through professional standards. The Council of Juvenile Correctional Administrators (CJCA) is a national professional organization of state juvenile justice agency directors and administrators of large urban juvenile facilities. CJCA has developed Performance-based Standards (PbS), a national program for agencies and facilities to identify, monitor, and improve conditions and treatment services provided to incarcerated youth.<sup>55</sup> PbS is a voluntary program, with more than 100 participating facilities across 29 states. A major focus of PbS is gathering and comparing data to promote best practices.

PbS standards are clear about the use of solitary confinement: isolation should only be used to protect a youth from harming himself or others. If isolation is used, it should be brief and supervised. Any time a youth is alone for 15 minutes or more is a reportable PbS event and must be documented. As in the JDAI standards, isolation is never allowed as a form of punishment. These principles are outlined CJCA's Toolkit on Reducing the Use of Isolation, which was released in the spring of 2015.<sup>56</sup> The report stated CJCA's goal to have juvenile facilities reduce their reliance on solitary confinement for any reason. Because CJCA is a professional association of administrators of juvenile facilities, the organization's standards and position on the use of solitary confinement holds particular weight in the juvenile justice field.

*c. The National Commission on Correctional Healthcare*

In April, 2016, the National Commission on Correctional Health Care (NCCHC) released a new position statement on solitary confinement.<sup>57</sup> NCCHC publishes standards on health care in the nation's jails, prisons and juvenile justice facilities, and accredits facilities that are in compliance with its standards. The NCCHC position statement calls for an absolute prohibition on solitary confinement for certain groups, including youth.<sup>58</sup> NCCHC's position statement notes that "the participation of health care staff in actions that may be injurious to an individual's health is in conflict with their role as caregivers."<sup>59</sup>

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *About Us*, PERFORMANCE-BASED STANDARDS, <http://pbstandards.org/about-us>.

<sup>56</sup> See also *Council of Juvenile Correctional Administrators Toolkit: Reducing the Use of Isolation*, COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS (Mar. 2015), <http://cja.net/attachments/article/751/CJCA%20Toolkit%20Reducing%20the%20Use%20of%20Isolation.pdf>.

<sup>57</sup> *Position Statement: Solitary Confinement (Isolation)*, NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE (Apr. 10, 2016), <http://www.ncchc.org/solitary-confinement> [hereinafter NCCHC Position Statement].

<sup>58</sup> *Id.* Other groups for which NCCHC has called for a ban on solitary include mentally ill individuals and pregnant women. *Id.*

<sup>59</sup> NCCHC Position Statement, *supra* note 55.

## 2. Support from National Professional Organizations

In the past several years, many prominent national organizations have taken strong positions against solitary confinement of young people. As mentioned above, a 2012 AACAP position statement noted that children are especially vulnerable to solitary confinement and “specifically prohibits the use of seclusion as a means of coercion, discipline, convenience or staff retaliation.”<sup>60</sup> Other professional organizations that have recently taken positions against solitary confinement include the American Correctional Association (2016)<sup>61</sup>, the American Psychological Association (2015),<sup>62</sup> the American Public Health Association (2014),<sup>63</sup> the American Bar Association (2014),<sup>64</sup> the National Council of Juvenile and Family Court Judges (2016)<sup>65</sup>, the National Lawyers Guild (2014),<sup>66</sup> and the Substance Abuse and Mental Health Services Administration (2015).<sup>67</sup> The growing consensus among professional organizations has added momentum to efforts to reduce and eliminate solitary confinement of youth.

## 3. State Legislative Action

Just this year, several states have proposed or passed legislation limiting solitary confinement for youth. In April, 2016, Nebraska passed legislation that requires all facilities that house youth to gather and report detailed data on all instances of room confinement that exceed one hour.<sup>68</sup> The legislation followed the ACLU of Nebraska’s report, *Growing Up Locked Down*, released in January 2016, which found that juveniles are kept in isolation for up to 90 days in some facilities, while other facilities don’t even record how often or how long juveniles are deprived of contact with other people.<sup>69</sup>

Colorado passed legislation in June 2016, to curb the use of solitary confinement for young people.<sup>70</sup> House Bill 1328 restricts the use of solitary to four hours except in emergency situations where a licensed physician in consultation with a mental health professional approves the continued use of solitary confinement. A court order is required to keep a youth in solitary confinement

<sup>60</sup> Juvenile Justice Reform Comm., *supra* note 9.

<sup>61</sup> AM. CORRECTIONAL ASS’N, *Letter from President Mary L. Livers and Executive Director James A. Gondles, Jr. to Staff Attorney at the Center for Children’s Law and Policy Jennifer Lutz* (Mar. 24, 2016), <http://www.stopsolitaryforkids.org/wp-content/uploads/2016/04/ACA-Support-Letter.pdf>.

<sup>62</sup> *Solitary Confinement of Juvenile Offenders*, AM. PSYCHOLOGICAL ASS’N, <https://www.apa.org/about/gr/issues/cyf/solitary.pdf>.

<sup>63</sup> *Solitary Confinement as a Public Health Issue*, APHA, <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/14/13/30/solitary-confinement-as-a-public-health-issue>

<sup>64</sup> *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2014) (statement of the Am. Bar Ass’n), [http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014feb25\\_solitaryconfinements\\_t.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014feb25_solitaryconfinements_t.authcheckdam.pdf)

<sup>65</sup> *Resolution regarding Reducing the Use of Solitary Confinement for Youth*, NCJFCJ (Aug. 8, 2016), [http://www.ncjfcj.org/sites/default/files/Final\\_SolitaryConfinementResolution\\_8\\_6-2016.pdf](http://www.ncjfcj.org/sites/default/files/Final_SolitaryConfinementResolution_8_6-2016.pdf)

<sup>66</sup> *Reassessing Solitary Confinement II: The Human Rights, Fiscal, and Public Safety Consequences: Hearing Before the Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights*, 113th Cong. (2014) (statement of the National Lawyers Guild), [https://www.nlg.org/sites/default/files/Reassessing%20Solitary%20Confinement%20II%20FINAL\\_0.pdf](https://www.nlg.org/sites/default/files/Reassessing%20Solitary%20Confinement%20II%20FINAL_0.pdf).

<sup>67</sup> *Alternatives to Seclusion and Restraint*, SAMHSA, Sept. 16, 2015, <http://www.samhsa.gov/trauma-violence/seclusion>.

<sup>68</sup> L.B. 894, 104th Legislature, 2nd Sess. (Neb. 2016), <http://www.nebraskalegislature.gov/FloorDocs/Current/PDF/Slip/LB894.pdf>. Facilities must submit quarterly reports to the Legislature and the Inspector General of Child Welfare must review this data and prepare annual reports to the Legislature. *Id.*

<sup>69</sup> *Growing Up Locked Down: Juvenile Solitary Confinement in Nebraska*, ACLU OF NEBRASKA (Jan. 2016), [http://www.stopsolitaryforkids.org/wp-content/uploads/2016/05/Nebraska-juvenile\\_solitary\\_report\\_final.pdf](http://www.stopsolitaryforkids.org/wp-content/uploads/2016/05/Nebraska-juvenile_solitary_report_final.pdf).

<sup>70</sup> H.B. 1328, 70th General Assembly, 2nd Regular Sess. (Colo. 2016), [http://www.leg.state.co.us/clics/clics2016a/csl.nsf/fsbillcont3/4BEB10D6836F19E287257F2400644E19?open&file=1328sapp\\_01.pdf](http://www.leg.state.co.us/clics/clics2016a/csl.nsf/fsbillcont3/4BEB10D6836F19E287257F2400644E19?open&file=1328sapp_01.pdf).

for eight hours. The bill requires the Colorado Division of Youth Corrections to document the use of solitary confinement and report it to a board created by the law to oversee the practices and make recommendations to the directors.<sup>71</sup>

In September 2016, California passed legislation<sup>72</sup> to ban the use of room confinement for the purposes of punishment, coercion, convenience, or retaliation. The law also limits the use of solitary to situations where less restrictive options have been tried. Co-sponsored by the Chief Probation Officers of California, human rights advocates, experts on youth rehabilitation, and faith leaders, this bill represents a multi-year effort in California<sup>73</sup> and has the support of the California Attorney General.<sup>74</sup>

The District of Columbia has now joined other jurisdictions that significantly limit solitary confinement for youth.<sup>75</sup> In December, 2017, D.C. Mayor Muriel Bowser signed the Comprehensive Youth Justice Amendment Act of 2016, or D.C. Act A21-0568. The law bans solitary confinement as punishment, requires staff to try less restrictive options, requires facilities to collect and report detailed data about how they are using solitary, and limits solitary confinement to a maximum of six hours.

#### 4. Efforts at the Federal Level

There have been multiple efforts at the federal level to end solitary for young people. One month after Kalief Browder's death, in his keynote address at the NAACP's annual conference, President Obama announced that he had directed Attorney General Loretta Lynch to conduct a review of the overuse of solitary confinement in American prisons, stating that solitary confinement was "more likely to make inmates more alienated, more hostile, potentially more violent."<sup>76</sup>

Six months after that speech, the Department of Justice issued a landmark report and guiding principles for the use of solitary confinement.<sup>77</sup> The report recommended a ban on the use of solitary confinement for youth.<sup>78</sup> Shortly thereafter, President Obama issued a directive ordering the Bureau of Prisons to implement the report's recommendations for youth in federal custody.<sup>79</sup> At the same time, President Obama published an opinion piece in the Washington Post explaining why the ban on solitary confinement of youth was necessary.<sup>80</sup>

Although the Bureau of Prisons houses a small number of youth in its custody,<sup>81</sup> the President's leadership helped elevate the issue of solitary confinement—and solitary confinement of youth—

<sup>71</sup> Megan Schrader, *Bill to Limit Use of Solitary Confinement in State-Run Juvenile Facilities Passes House Judiciary Committee*, COLORADO SPRINGS GAZETTE, Apr. 22, 2016, <http://gazette.com/bill-to-limit-use-of-solitary-confinement-in-state-run-juvenile-facilities-passed-by-slim-margin/article/1574618>.

<sup>72</sup> S.B. 1143, 2015-2016 Leg., Regular Sess. (Cal. 2016), [http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill\\_id=201520160SB1143](http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201520160SB1143).

<sup>73</sup> Mark Bonini and Sue Burrell, *A Rare Consensus on Juvenile Detention*, SACRAMENTO BEE, June 1, 2016, <http://www.sacbee.com/opinion/op-ed/soapbox/article81182057.html>.

<sup>74</sup> Press Release, SVCNews.com, AG Harris Supports Bill to End Juvenile Confinement (June 21, 2016), <http://scvnews.com/2016/06/21/attorney-general-harris-supports-legislation-to-end-juvenile-confinement/>.

<sup>75</sup> Act A21-0568 (D.C. Dec. 7, 2016), <http://lims.dccouncil.us/Download/35539/B21-0683-SignedAct.pdf>.

<sup>76</sup> Press Release, The White House, Remarks by the President at the NAACP Conference (July 14, 2015), <https://www.whitehouse.gov/the-press-office/2015/07/14/remarks-president-naacp-conference>.

<sup>77</sup> U.S. DEP'T OF JUSTICE, REPORT AND RECOMMENDATIONS CONCERNING THE USE OF RESTRICTIVE HOUSING (Jan. 2016).

<sup>78</sup> *Id.* at 101.

<sup>79</sup> Obama, *supra* note 4.

<sup>80</sup> Barack Obama, *Why We Must Rethink Solitary Confinement*, WASHINGTON POST (Jan. 25, 2015).

<sup>81</sup> *Population Statistics: Inmate Age*, FEDERAL BUREAU OF PRISONS (Apr. 23, 2016), [https://www.bop.gov/about/statistics/statistics\\_inmate\\_age.jsp](https://www.bop.gov/about/statistics/statistics_inmate_age.jsp).

to national prominence. A few months later, Robert Listenbee, Administrator of the federal Office of Juvenile Justice and Delinquency Prevention (OJJDP), released an official statement that OJJDP saw the issue of solitary confinement of youth as a “priority” and was “committed to working with states to develop effective policies to limit the practice and adopt alternatives.”<sup>82</sup>

Efforts at the Federal Level”: The Department of Justice has taken a strong position against the use of solitary confinement for juveniles in several cases. In June, 2016, the Department reached a settlement agreement with the Hinds County Jail in Mississippi. Under the agreement, solitary is only permissible for youth when there is a threat of harm, and staff cannot use solitary as punishment.<sup>83</sup> On January 3, 2017, the Department of Justice submitted a statement of interest in support of a lawsuit filed by the New York Civil Liberties Union and Legal Services of Central New York to stop the jail in Syracuse, New York from putting 16- and 17-year-olds in solitary confinement. The statement definitively supports the position that youth should never be subjected to solitary confinement.<sup>84</sup>

In the U.S. Senate, bipartisan criminal justice reform legislation was introduced to incorporate President Obama’s executive action into federal law. The Sentencing Reform and Corrections Act of 2015 proposed to limit the use of solitary confinement of youth in federal custody to situations in which the young person poses a serious and immediate threat of physical harm, and then only for brief periods of no more than three hours.<sup>85</sup>

Kalief Browder’s death even reached the Supreme Court. Twelve days after Kalief died, Justice Anthony Kennedy wrote a concurring opinion about the dangers of solitary confinement in *Davis v. Ayala*.<sup>86</sup> The case did not focus on issues of conditions of confinement, but Justice Kennedy took time to dedicate his concurrence to the conditions in which the respondent, Hector Ayala, had been held.

Justice Kennedy noted that Ayala had spent the majority of 25 years in custody in solitary confinement. In his concurrence, Justice Kennedy cited concerns raised by the Supreme Court as far back as 1890 regarding the use of solitary confinement.<sup>87</sup> Justice Kennedy cited Kalief’s suicide and invited a case for the Court to “determine whether workable alternative systems for long-term confinement exist, and, if so, whether a correctional system should be required to adopt them.”<sup>88</sup>

<sup>82</sup> Statement of Robert L. Listenbee, *OJJDP Supports Eliminating Solitary Confinement for Youth*, U.S. DEP’T OF JUSTICE (Apr. 19, 2016), <https://www.justice.gov/opa/blog/ojjdp-supports-eliminating-solitary-confinement-youth>.

<sup>83</sup> Settlement Agreement Between the United States of America and Hinds County, Mississippi Regarding the Hinds County Jail, United States. v. Hinds Cnty., No. 16-489 (S.D. Miss. July 19, 2016), ECF No. 8-1 at 37-38, <https://www.justice.gov/crt/file/883861/download>.)

<sup>84</sup> *Justice Department Files Brief to Address Solitary Confinement of Juvenile Offenders in New York*, U.S. DEP’T OF JUSTICE (Jan. 3, 2017), <https://www.justice.gov/opa/pr/justice-department-files-brief-address-solitary-confinement-juvenile-offenders-new-york>.

<sup>85</sup> Sentencing Reform and Corrections Act of 2015, *supra* note 5.

<sup>86</sup> *Davis v. Ayala*, 135 S.Ct. 2187 (2015).

<sup>87</sup> *In re Medley*, 134 U. S. 160, 170 (1890).

<sup>88</sup> *Davis v. Ayala*, *supra* note 82, at 2210 (Kennedy, J., concurring).



## IV. Success Stories

### A. Massachusetts

Since 2007, the Massachusetts Department of Youth Services (DYS) has made policy and practice changes to significantly reduce the use of solitary confinement.<sup>89</sup> DYS policy prohibits the use of room confinement as a form of discipline.<sup>90</sup> The agency does permit limited periods of isolation when a youth exhibits dangerous and disruptive behavior and less restrictive alternatives to control the behavior have failed.<sup>91</sup> However, staff must obtain authorization from agency administrators to use isolation for periods longer than 15 minutes, and staff must secure approvals from more senior officials outside of the facility as the requested time increases.<sup>92</sup> DYS staff are trained to use alternative measures—including de-escalation, behavior management, and conflict resolution techniques—and to assist youth who are placed in isolation to develop an “Exit Strategy” to get out of isolation quickly and transition back into regular programming.<sup>93</sup>

To address staff concerns that reducing the use of solitary would make facilities less safe, DYS engaged in extensive dialogue and training with staff,<sup>94</sup> soliciting their feedback and addressing their concerns directly. DYS also requires the documentation of all uses of room confinement in an electronic data system.<sup>95</sup> The collection and use of data has been a powerful tool to target problem areas and to persuade staff that the new measures are working.<sup>96</sup> In April 2016, the average time a youth spent in isolation was less than 1.25 hours.<sup>97</sup>

### B. Ohio

The state of Ohio offers another example of how thoughtful reforms can work to reduce the use of isolation. Following years of litigation brought by the U.S. Department of Justice and the Children’s Law Center of Kentucky, the Ohio Department of Youth Services (ODYS) entered into an agreement with plaintiffs to eliminate the use of seclusion in its juvenile correctional facilities.<sup>98</sup> In an examination of data required by the litigation, the agency found that the use of restrictive and punitive practices such as solitary confinement was actually correlated with higher rates of assaults on staff and youth.<sup>99</sup>

In order to make a sustainable change, ODYS implemented a plan called the “Path to Safer Facilities” from 2014 to 2016. The plan concentrated on preventative measures, meaningful activities for youth, behavioral health interventions, and consequences that help youth learn account-

<sup>89</sup> *Reducing Isolation in Youth Facilities Strategies and Lessons Learned*, COUNCIL OF JUVENILE CORRECTIONAL ADMINISTRATORS WEBINAR (May 15, 2015), <https://www.youtube.com/watch?v=4kF0CNXSAfM>.

<sup>90</sup> Massachusetts DYS Policy No. 03.03.01(a) “Involuntary Room Confinement”, (Mar. 15, 2013), <http://www.mass.gov/eohhs/docs/dys/policies/030301-involuntary-room-confine.doc>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 5-6.

<sup>93</sup> Presentation of Peter Forbes, Commissioner, Massachusetts Dep’t of Youth Services, Coalition for Juvenile Justice Conference, Washington, D.C., (Apr. 22, 2016).

<sup>94</sup> *Reducing Isolation in Youth Facilities Strategies and Lessons Learned from the Field*, *supra* note 85.

<sup>95</sup> Massachusetts Dep’t of Youth Services, *supra* note 86.

<sup>96</sup> *Reducing Isolation in Youth Facilities Strategies and Lessons Learned from the Field*, *supra* note 85.

<sup>97</sup> Presentation of Peter Forbes, *supra* note 89.

<sup>98</sup> Press Release, U.S. Dep’t of Justice, Justice Department Settles Lawsuit Against State of Ohio to End Unlawful Seclusion of Youth in Juvenile Correctional Facilities (May 21, 2014), <https://www.justice.gov/opa/pr/justice-department-settles-lawsuit-against-state-ohio-end-unlawful-seclusion-youth-juvenile>.

<sup>99</sup> Path to Safer Facilities, *supra* note 18.

ability without resorting to lockup.<sup>100</sup> Staff now focus on keeping all youth out of their rooms and engaged in programming as much as possible.<sup>101</sup> ODYS revised its policies by prohibiting the use of isolation as punishment and instead using other tools for discipline, including restricting access to privileges.<sup>102</sup> Treatment teams now develop customized interventions that consider individual mental health and behavioral needs to respond to a youth's rule violations rather than using a formal "one size fits all" disciplinary tool.<sup>103</sup> ODYS also instituted a formal review process which requires superintendents to make monthly reports on hours of isolation used, and a designated facility staff member must review incidents involving isolation.<sup>104</sup>

Following the implementation of these changes, the vast majority of incidents of isolation in Ohio now end within four hours, with the average length of seclusion being 2.83 hours.<sup>105</sup> All Special Management Units, which previously relied heavily on isolation without programming, are closed.<sup>106</sup> Officials have also seen acts of violence go down 22% and a reduction in total isolation time of 89% between February 2014 and February 2015.<sup>107</sup>

## V. The Path Forward: A National Campaign to Stop Solitary for Kids

The time is right in the United States for coordinated national action to end solitary confinement for young people. There is significant public recognition of the issue, and support from lawmakers and juvenile correctional administrators. State and local advocates are engaged in meaningful efforts. We know much more about what works to reduce youth solitary confinement in facilities. However, there has been no coordinated national campaign, communications strategy, resource center, or organized network of administrators who can help guide agency efforts and share lessons learned.

To fill this void, four organizations are partnering in Stop Solitary for Kids, a national initiative to end solitary confinement for youth in juvenile and adult facilities. The campaign is a joint effort by the Center for Children's Law and Policy (CCLP), a public interest law and policy organization that has long worked to reduce solitary; the Council of Juvenile Correctional Administrators (CJCA), an association of the directors of the state juvenile justice agencies; the Center for Juvenile Justice Reform at Georgetown University (CJJR), which provides training to agency administrators and staff from around the country in Certificate Programs conducted at the University; and the Justice Policy Institute (JPI), which specializes in media, communications, and research on juvenile justice and adult criminal justice issues. These organizations represent advocates, researchers, communications specialists, policy consultants, trainers of juvenile justice system administrators and personnel, and facility superintendents and agency administrators of state juvenile justice agencies.

Stop Solitary for Kids was officially launched on April 19, 2016, with a press conference at the National Press Club in Washington, DC. with the support of Roy Austin, Deputy Special Assistant

<sup>100</sup> Harvey J. Reed, *Abandon the Outdated Practice of Juvenile Seclusion*, CLEVELAND PLAIN DEALER, May 1, 2016, [http://www.cleveland.com/opinion/index.ssf/2016/05/why\\_its\\_time\\_to\\_abandon\\_the\\_ou.html](http://www.cleveland.com/opinion/index.ssf/2016/05/why_its_time_to_abandon_the_ou.html).

<sup>101</sup> Will Harrell et al, *The Ohio Model: A Report on the Transformational Reform of the Ohio Department of Youth Services, 2007-2015*, 27-28, U.S. DEP'T OF JUSTICE (Dec. 7, 2015), <https://www.justice.gov/opa/file/799466/download>.

<sup>102</sup> *Id.* at 18.

<sup>103</sup> *Id.* at 18.

<sup>104</sup> *Id.* at 18-19.

<sup>105</sup> *Id.* at 18.

<sup>106</sup> *Id.* at 19.

<sup>107</sup> Path to Safer Facilities, *supra* note 18, at 30.

to President Obama; Robert Listenbee, Administrator of OJJDP; New Jersey U.S. Senator Cory Booker; and the directors of the state juvenile justice agencies in Indiana, Massachusetts, Ohio, and Oregon.<sup>108</sup>

Stop Solitary for Kids developed a Position Statement that defines solitary confinement, presents the dangers posed by the practice, and lists eleven strategies that agency and facility administrators can use to reduce and eliminate solitary. A diverse group of organizations has signed on to the Position Statement, including the American Correctional Association, American Civil Liberties Union, American Probation and Parole Association, American Psychological Association, National Commission on Correctional Health Care, and National Council of Juvenile and Family Court Judges.<sup>109</sup>

Stop Solitary for Kids focuses on four core components. These strategies can be replicated by state, local, and international advocates. First, the campaign provides communications and outreach about the solitary confinement and the existence of effective alternatives. This is done through a resource-rich website ([www.stopsolitaryforkids.org](http://www.stopsolitaryforkids.org)), earned and social media, and coalition building with other organizations to broaden support for the movement to end solitary confinement. During the campaign's launch event, information about the impact of solitary confinement reached over three million people through dozens of news articles, coverage on National Public Radio, and social media.

Second, the campaign provides support for state and local agency administrators who want to reduce or eliminate solitary by developing lessons learned from administrators (e.g., in Massachusetts and Ohio) who have successfully done so. Solitary confinement is a longstanding practice in most facilities and there is often internal resistance to change. In order to build sustainable reforms that overcome resistance, the campaign works directly with those who operate facilities and juvenile justice agencies. The campaign partners with several state agencies and facilities each year to provide technical assistance and build capacity to reduce solitary confinement, eventually reaching a tipping point. Another key strategy is connecting successful agency administrators with peers interested in undertaking reforms. Stop Solitary for Kids will also create resources to address solitary confinement as an issue of facility staff health, since experience in key states demonstrates that staff in facilities with limited use of solitary experience less stress and fewer stress-related illnesses. The campaign is now field-testing the Room Confinement Assessment Tool ("RCAT"), an instrument to help facility superintendents and agency directors understand how solitary confinement is used in their facilities and to identify targeted interventions to safely reduce it.

Third, the campaign incorporates the voices of those directly affected by solitary confinement (youth, parents, and especially vulnerable populations such as lesbian, gay, bisexual, transgender and questioning youth) through membership on its Advisory Board. Stop Solitary for Kids also connects advocates with successful agency administrators.

Finally, the campaign will support federal efforts to end solitary in the executive, legislative, and judicial branches. The federal Office of Juvenile Justice and Delinquency Prevention (OJJDP), the top federal agency working on juvenile justice issues, could be a strong force for reform on this issue by adopting relevant administrative regulations, adding requirements in state juvenile justice plans (required for state receipt of federal funding), and funding training and technical assistance

<sup>108</sup> STOP SOLITARY FOR KID LAUNCH EVENT AT THE NATIONAL PRESS CLUB, APR. 19, 2016, <https://www.youtube.com/watch?v=173CfXLeMQs&feature=youtu.be>.

<sup>109</sup> A current list of supporting organizations is available at <http://www.stopsolitaryforkids.org/supporting-organizations/>.

to states and local jurisdictions. The campaign will continue to encourage OJJDP to support the movement to stop solitary for kids. Additionally, the campaign will continue to provide information, research, model policies, and administrator contacts to Congressional offices and state legislative committees working on reducing or eliminating solitary for youth.

The core components of Stop Solitary for Kids can also be used by advocates in counties, states, and other countries to advance reforms: educating key audiences about the harms of solitary confinement for youth; inclusion and direct outreach to facility and agency staff who use solitary confinement; incorporating the perspectives of youth and families affected by solitary confinement in meaningful ways; and connecting to other local, state, and international efforts to share resources and ideas.

## VI. Conclusion

The potential exists to stop the solitary confinement of youth in the United States. Venida Browder said, "I don't want another mother to have to spend a lifetime sentence like I am."<sup>110</sup> For Ms. Browder, that time did not come soon enough. She passed away in October, 2016. Her tragic death is a powerful reminder that solitary confinement destroys the lives of young people, families, and communities. With a coordinated effort, the U.S. must finally put an end to one of the most egregious abuses of children and, in doing so, help other countries find the path forward toward reform.

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<sup>110</sup> Carrie Johnson, *Solitary Confinement Is What Destroyed My Son, Grieving Mom Says*, NATIONAL PUBLIC RADIO (Apr. 18, 2016), <http://www.npr.org/2016/04/18/474397998/solitary-confinement-is-what-destroyed-my-son-grieving-mom-says>.



# End Detention of Children as Punishment

LEO RATLEDGE\*

## Abstract

*This article argues that the Convention on the Rights of the Child, read holistically, requires that the only justification for detaining a child is that they have been assessed as posing a serious risk to others' or their own safety and that the risk cannot be reduced to an acceptable level without their detention. In these exceptional circumstances, any necessary restriction of liberty must be authorised by a legal process with the child independently represented, must be frequently reviewed and must not be in a penal setting. The article also seeks to demonstrate the ineffectiveness of detention of children for any other purpose than these aims.*

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## Introduction

It is a global scandal that children are locked up in such large numbers, not only in penal systems, but also in administrative detention—in health, mental health, welfare, education, immigration control and other systems. Read as a whole, the Convention on the Rights of the Child, alongside the library of international standards on the detention of children, prescribes a very restricted use of detention for children, yet a principled approach often gives way to pragmatism in the debate on the detention of children.

In 2006, the UN's study on violence against children took a bold stand on what human rights standards require of detention for children, calling on States "to ensure that detention is only used for child offenders who are assessed as posing a real danger to others, and then only as a last resort, for the shortest necessary time, and following judicial hearing, with greater resources invested in alternative family-and community-based rehabilitation and reintegration programmes". This article will argue that not only is this the only approach that fully respects the rights of children, but it is also recognises the only aims that detention of children can reasonably be expected to achieve.

## Reading international standards holistically

Children's rights—like all other human rights—are interdependent and indivisible. The full extent, meaning and application of any right can only be established in light of the other intertwined rights. It is not possible to fully establish the extent of the provisions of the Convention on the Rights of the Child that explicitly address detention of children without examining how they are given meaning by the Convention as a whole.

### *The core detention standards*

The Convention on the Rights of the Child most clearly addresses the detention of children in article 37, requiring that the detention of a child may only be used as a measure of last resort and for the shortest appropriate period of time.<sup>1</sup>

The standard has become one of the foundation stones of international juvenile justice standards, reflected in the Beijing Rules,<sup>2</sup> UN Rules for the Protection of Juveniles Deprived of their Liberty,<sup>3</sup> the Vienna Guidelines<sup>4</sup> and countless other rules and resolutions. The term "last resort" clearly implies that detention must not be the only option available when a child is accused of or found to have committed a criminal offence. A range of non-custodial measures must be available to ensure that children are not detained where it is not justified<sup>5</sup> and detention must be the final option left.

<sup>1</sup> Convention on the Rights of the Child, art. 37(b), *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC] ("No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.")

<sup>2</sup> G.A. Res. 40/33, U.N. Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), rule 13.1 (Nov. 29, 1985). Note, the Beijing Rules use the stronger language, speaking of detention for the "minimum necessary period."

<sup>3</sup> G.A. Res. 45/113, U.N. Rules for the Protection of Juveniles Deprived of their Liberty, rule 1 (Dec. 14, 1990).

<sup>4</sup> Economic and Social Council Res. 1997/30, Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines), guideline 18 (July 21, 1997).

<sup>5</sup> Comm. on the Rights of the Child, General Comment No. 10: Children's Rights in Juvenile Justice, ¶ 23, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007) [hereinafter General Comment No. 10] ("The arrest, detention or imprisonment of a child may be used only as a measure of last resort (art. 37(b)). It is, therefore necessary—as part of a comprehensive policy for juvenile justice—to develop and implement a wide range of measures to

This general standard is bolstered by specific prohibitions on certain types of detention sentences, including life imprisonment without parole and any sentence that amounts to torture, cruel, inhuman or degrading punishment.<sup>6</sup> The Special Rapporteur on torture has notably recognised that this prohibition on cruel, inhuman and degrading punishment prohibits all forms of life sentence as well as sentences of an extreme length and mandatory sentences for children.<sup>7</sup> There is a recognition in this analysis that where a sentence is mandatory it cannot take into account the specific circumstances of a child and whether in those circumstances detention is necessary.

Related to the prohibition on torture is the requirement for States to protect the child from all forms of physical or mental violence.<sup>8</sup> Though not phrased in the same prohibitory language of the provisions on torture, article 19 of the CRC requires States to protect children from all forms of violence, including through legislative and administrative measures, which would prevent the imposition of any criminal sentence or form of detention that amounts to physical or mental violence. Violence in detention is the most common focus under this article—children in detention are very vulnerable to violence at the hands of staff, other detainees or themselves—but the article also prohibits detention where it is itself a form of violence. The Committee on the Rights of Child explicitly tied this standard to limits on detention in its General Comment on the right of the child to freedom from all violence, in which it called for detention to be only used as a last resort and only if in the best interests of the child.<sup>9</sup>

These specific standards set clear limits on the use of detention, but in themselves don't identify when detention of children is justified. It is clear that detention can never be "a last resort" or for "the shortest appropriate period" if it violates the prohibition on torture or amounts to physical or mental violence, but these standards alone do not point clearly to when detention would fulfil these standards. As the Committee has recognised when addressing violence against children, however, the broader principles of the Convention indicate when detention of children is justified when viewed as a whole.

### *Detention and the best interests of the child*

Under the CRC, in all actions concerning children, including those taken by legislative bodies and courts, the best interests of the child must be a primary consideration.<sup>10</sup> This article is one of the four general principles of the Convention, used to interpret and implement all of the rights of the child,<sup>11</sup> including those related to detention. The Convention demands that courts and legislative bodies limit detention not only to a last resort and for the shortest appropriate period, but also to make those decisions by considering the best interests of the child a primary consideration. The Committee on the Rights of the Child analysed the application of this principle in detail in its

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ensure that children are dealt with in a manner appropriate to their well-being, and proportionate to both their circumstances and the offence committed.").

<sup>6</sup> CRC, *supra* note 1, at art. 37(a).

<sup>7</sup> U.N. Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, ¶ 74, U.N.Doc. A/HRC/28/68 (Mar. 5, 2015).

<sup>8</sup> CRC, *supra* note 1, at art. 19(1) ("States Parties shall take all appropriate legislative, administrative, social educational measures to protect the child from all forms of physical or mental violence...").

<sup>9</sup> Comm. on the Rights of the Child, General Comment No.13 (2011): The right of the child to freedom from all forms of violence, ¶ 47(d)(iii), U.N. Doc. CRC/C/GC/13 (Apr. 18, 2011).

<sup>10</sup> CRC, *supra* note 1, at art. 3(1).

<sup>11</sup> Comm. on the Rights of the Child, General Comment No. 5 on the general measures of implementation of the Convention on the Rights of the Child, ¶ 12, U.N. Doc. CRC/GC/2003/4, (July 21, 2003); Comm. on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his best interests taken as a primary consideration, ¶ 1, U.N. Doc. CRC/C/GC/14, (May 29, 2013).



General Comment No. 14, recognising that it requires that the child's interest be considered on a case-by-case basis carefully balancing the interests of all parties to find a suitable compromise. However, where harmonisation is not possible, authorities and decision-makers must analyse and weigh the rights of all concerned, bearing in mind that the interests of the child have high priority above other considerations and of the public in general.<sup>12</sup>

Article 9 of the Convention is not often discussed in the context of sentencing children to detention, but its provisions have a clear application to children convicted of criminal offences and bolster the application of the best interests principle in the context of the detention of children. The article requires that "a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child."

Given the serious detrimental effects of detention of children and separation from the family, the circumstances in which it is in the child's best interests to be detained will clearly be very limited. Detention disrupts education, damages employment prospects and exposes children to violence. Even where detention is of the most humane standards, the disruption to the life of a child exacerbates the problems that children in conflict with the law already face. Bearing this in mind, it is difficult to foresee many situations where detaining children is in their best interests. The Committee on the Rights of the Child has, for example, recognised that detention on the basis of a child's immigration status would always contravene the principle of the best interests of the child,<sup>13</sup> a position now supported by a plethora of international and regional bodies.<sup>14</sup>

The Convention does, however, leave open the possibility of detention where it would be in the best interests of the child, and there are two clear situations in which this may be the case: where a child poses a serious risk to the public or poses that risk to him or herself. The best interests principle applies to the child who has been accused of an offence as well as the public at large and it cannot be in the best interests of either to risk serious harm to others or to allow a person to carry out that harm.

The best interests principle dovetails here with the limits on the detention of children as a measure of last resort for the shortest appropriate period, requiring that detention is only justified for one of these purposes and when no other measure can reduce that risk to an acceptable level.<sup>15</sup> The shortest appropriate period, standard then requires that the detention may only be used so long as those justifications continue to be true. Detention ceases to be compliant with the Convention at the point it is no longer required to prevent serious harm to the public or to the child.

This approach requiring the review of the necessity of ongoing detention also finds support in article 25 of the Convention, which requires the periodic review of the placement of children for

<sup>12</sup> Comm. on the Rights of the Child, General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration, ¶ 40, U.N. Doc. CRC/C/GC/14 (May 29, 2013)..

<sup>13</sup> Comm. on the Rights of the Child, *Report of the 2012 Day of General Discussion on the Rights of All Children in the Context of International Migration*, paras. 78, 79 (Sept. 28, 2012). It is worth noting that the Committee recommended non-custodial community-based accommodation allowing children to remain with family members rather than the separation of children from their detained parents.

<sup>14</sup> See Inter Agency Working Group to End Child Immigration Detention, *Summary of standards relating to child immigration detention*, August 2016.

<sup>15</sup> What constitutes an "acceptable level of risk" is a common theme across academic study in the areas of criminal justice and mental health. It is beyond the scope of this article to address what constitutes acceptable risk, but for an innovative attempt to quantify how this risk could be calculated in the context of forensic mental health detention, see Mossman, "Critique of Pure Risk Assessment or, Kant Meets Tarasoff", *Cincinnati Law Review* 2006.

the purposes of care, protection or treatment. The Committee on the Rights of the Child's general comment on juvenile justice applied this standard to the review of detention sentences, in which it called for all sentences imposed upon children to allow the possibility of release and that release should be realistic and regularly considered.<sup>16</sup>

### *The rehabilitative aims of juvenile justice*

More generally, children also require special protection in the justice system, including "to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society".<sup>17</sup> The Convention eschews punishment for a fundamentally rehabilitative approach to children in conflict with the law, an approach mirrored in juvenile justice standards around the world and perhaps most clearly expressed by the Inter-American Commission on Human Rights report on juvenile justice and human rights in the Americas, which argues that "the element of retribution is not appropriate within juvenile justice systems if the objectives pursued are the reintegration and rehabilitation of the child".<sup>18</sup>

This rehabilitative basis of the juvenile justice system gains further support from the Convention's requirement in article 6 that "States shall ensure to the maximum extent possible the survival and development of the child." This protection goes well beyond the right to life that is the focus of part 1 of the article, and has been interpreted holistically by the Committee on the Rights of the Child, to embrace the child's physical, mental, spiritual, moral and psychological and social development.<sup>19</sup> In making decisions about whether and how to impose detention, the State and its courts must consider the profoundly negative impact these measures may have on the development of the child.

### *Procedural rights*

The procedure to determine whether the justifications for detention have been met, and continue to be met, are usually less controversial than the argument over when detention is justified, but equally important in guaranteeing that detention is only used when necessary. Many of the standards that apply to children here are the same as those for adults: the presumption of innocence; the right to have the matter determined by a competent, independent and impartial authority; and the right to legal assistance, for example.<sup>20</sup> The process will need to be tailored to ensure that the child is able to fully participate in any legal proceedings, and precisely what is required here is a complicated policy matter,<sup>21</sup> but international justice standards are clear on the basic principles that in determining whether a child should be detained, this decision must be made through an independent legal process with the child independently represented.

<sup>16</sup> General Comment No. 10, *supra* note 5, ¶ 77.

<sup>17</sup> CRC *supra* note 1, at art. 40(1).

<sup>18</sup> Inter-American Commission on Human Rights, *Juvenile Justice and Human Rights in the Americas*, 13 July 2011. Available at: <http://www.cidh.org/countryrep/JusticiaJuvenileng/jjtoc.eng.htm>.

<sup>19</sup> Comm. on the Rights of the Child, General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child, ¶ 12, U.N. Doc. CRC/GC/2003/5 (Nov. 27, 2003)..

<sup>20</sup> CRC, *supra* note 1, at art. 40(2).

<sup>21</sup> For discussion of this issue, see CRIN's access to justice project. Available at: [www.crin.org/home/law/access](http://www.crin.org/home/law/access).

### *Ineffectiveness of detention*

The rights based argument should stand alone—clear violations of children’s rights are not justified even if they achieve some desirable end—but this position is bolstered by the evidence that the detention of children is ineffective for any other purpose than public protection or the protection of the child. It must also be acknowledged that many of the standards applicable in this area raise factual questions, such as “what is in the best interests of the child?”

One of the common claims made of detention as punishment is that it acts as a deterrent or is rehabilitative, that detention either lowers the rate at which children commit offences or lowers the rate of reoffending for those who are detained. The argument might be made here that detention is in the best interests of the child where the rehabilitation achieved improves the life of the child, leading him or her away from future offending. However, these arguments find little evidential support around the world.

Three major studies have been conducted in **Australia** examining whether detention acts as a deterrent on offending by children during the last 40 years. None of these studies have found any evidence to support the idea that detention of children is an effective way of preventing reoffending. A 1974 study found a lower reoffending rate among children detained following a conviction for vehicle theft, but higher rates of reoffending for all other categories of offence.<sup>22</sup> The study matched children based on their year of birth, category of offence, age at the time of the offence as well as previous convictions and judicial sanctions. Two decades later, a further study found that juveniles given custodial sentences were more likely to reoffend than those given non-custodial sentences.<sup>23</sup> In 2009, the Australian Institute of Criminology conducted a detailed, high quality longitudinal study of 152 offenders given custodial sentences and 243 given non-custodial sentences and found no significant difference in the likelihood of reconviction between these two groups.<sup>24</sup> Given the expense of custodial sentences, the effect on economic employment and the absence of evidence that detention has any specific deterrent effect, the Institute concluded that detention should be used very sparingly for juvenile offenders.<sup>25</sup>

In **Canada**, a meta-analysis of 50 studies dating from 1958 to 1999 involving a total of 336,052 offenders found that across these studies prison produced a slight increase in recidivism and there was a tendency for lower risk offenders to be more negatively affected by their experience of prison.<sup>26</sup>

In the **United States**, studies of the effect of more punitive sentencing have also demonstrated that far from decreasing reoffending, they serve to increase violent offending among children. A 2007 study analysing research from six US states examined the deterrent effect of transferring children to adult courts, a mechanism allowing for more punitive sentencing. Evidence from four of the states found that juveniles transferred to adult jurisdictions committed more subsequent violent or general criminal offences than those who had not been transferred. One of the studies found

<sup>22</sup> Kraus, “A comparison of corrective effects of probation and detention on male juvenile offenders”, *British Journal of Criminology*, 1994, 49:49-62.

<sup>23</sup> Cain, *Recidivism of juvenile offenders in New South Wales*, Sydney: NSW Department of Juvenile Justice, 1996.

<sup>24</sup> Weatherburn, Vignaendra and McGrath, *The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending*, Australian Institute of Criminology, 2009. Available at: [http://www.oijj.org/sites/default/files/documental\\_7655\\_en.pdf](http://www.oijj.org/sites/default/files/documental_7655_en.pdf)

<sup>25</sup> Weatherburn, Vignaendra and McGrath, *The Specific Deterrent Effect of Custodial Penalties on Juvenile Reoffending*, Australian Institute of Criminology, 2009, at p. 10.

<sup>26</sup> Gendreau and Goggin, *The Effect of Prison Sentences on Recidivism*, 1993. Available at: <http://www.publicsafety.gc.ca/cnt/rsrscs/pblctns/ffcts-prsn-sntncs-rcdvsm/index-eng.aspx>.

no difference in the recidivism rates while the remaining study found that transfer to adult jurisdiction resulted in a slight deterrent effect among a subset of the children covered by the study.<sup>27</sup> The research led the authors of the study to conclude that there was “sufficient evidence that the transfer of youth to the adult criminal justice system typically results in greater subsequent crime, including violent crime, among transferred youth; therefore, transferring juveniles to the adult system is counterproductive as a strategy for preventing or reducing violence.”<sup>28</sup>

The overwhelming balance of the evidence demonstrates that detention of children is not an effective means of preventing offending, but what it can achieve is keeping people away from the public where they pose a serious risk of harm. It would be a mistake, however, to present this as a way of preventing violence altogether: rates of violence in detention facilities for children can be incredibly high.<sup>29</sup> It would also be wrong to describe keeping those who are a risk to the public detained as a success in itself, as where this detention is not met with the full range of rehabilitative responses it is unlikely to reduce the risk an offender poses, fundamentally failing to meet the rehabilitative aims that should be at the core of a juvenile justice system.

While there is little evidence that detention of children is combating youth crime, there is a great deal of evidence that the use of detention for children is punishing those who are already vulnerable and marginalised and filling gaps left by inadequate social services, mental health care and drug treatment services. Young people in conflict with the law commonly experience inter-connected problems: educational deficits, low levels of literacy and employability, a history of neglect or abuse, unstable living conditions, economic deprivation or behavioural and mental health problems.<sup>30</sup> National studies focusing on groups of children disproportionately impacted by justice systems clearly illustrate this problem.

In the **United Kingdom**, the Prison Reform Trust carried out a study of children detained in the criminal justice system, including examining their social background. Half of these children lived in a deprived household or unsuitable accommodation, two-fifths were on the child protection register and/or experienced abuse or neglect; one third had an absent mother and more than a quarter had witnessed domestic violence. The report concluded that the high level of correlation between offending behaviour by children and the multiple forms of disadvantage they experience suggested that prevention of offending turns at least in part on tackling the deep-rooted and complex needs of these children.<sup>31</sup>

The Howard League too has found that children living in children’s homes were almost six times more likely to be criminalised than children in other placements and almost 20 times more likely to be criminalised than a non-looked after child. The research found that many of these offences related to minor incidents that would not have come to police attention had they occurred

<sup>27</sup> Hahn et al, “Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A report on recommendations of the Task Force on Community Preventive Services”, *Morbidity and mortality Weekly Report*, 30 November 2007, Vol. 56, No. RR-9. Available at: [http://www.campaignforyouthjustice.org/documents/CDCNR\\_ViolenceofLaws.pdf](http://www.campaignforyouthjustice.org/documents/CDCNR_ViolenceofLaws.pdf).

<sup>28</sup> Hahn et al, “Effects on Violence of Laws and Policies Facilitating the Transfer of Youth from the Juvenile to the Adult Justice System: A report on recommendations of the Task Force on Community Preventive Services”, *Morbidity and mortality Weekly Report*, 30 November 2007, Vol. 56, No. RR-9, at p. 8.

<sup>29</sup> See Paulo Sérgio Pinheiro, Independent Expert for the United Nations Secretary-General’s Study on Violence Against Children, *World Report on Violence Against Children*, p. 190. Available at: <http://www.unviolencestudy.org/>

<sup>30</sup> See Recommendation Rec (2003) 20 of the Committee of Ministers to member States concerning new ways of dealing with juvenile delinquency and the role of juvenile justice, Ch. 2, para. 2.

<sup>31</sup> Prison Reform Trust, *Punishing Disadvantage: A profile of children in custody*, 2010, p. vii.

in family homes.<sup>32</sup> Examples found in the report included one incident in which police were called to attend a children's home after a child broke a cup. The justice system is not only disproportionately punishing those who have been through care, but is punishing them for offences that for other children would never come to the attention of authorities.

In the **United States**, numerous studies have found that children with diagnosable mental health and/or substance use disorders are disproportionately represented in the justice system, making up as many as two-thirds of children affected<sup>33</sup> and as many as 30 percent of these disorders are so severe as to cause functional impairments.<sup>34</sup> Detention in these situations can worsen the symptoms children experience undermining any attempt to address the underlying issues related to offending. Clearly failing to take into account the health needs of children, including mental health, when deciding to impose a sentence of detention is also a failure to properly consider what is in the best interests of the child.

An attempt to respond to these complicated interrelating issues with detention is not only punishing those who are in many ways already victims, but is also doomed to fail in that it does not tackle the underlying problems that resulted in offending in the first place.

### Alternatives to detention or detention as the alternative?

There is something misleading in the discussion about alternatives to detention; the phrase itself implies that detention is a default response to offending, when international standards require that it be a last resort. Detention should be the alternative, yet criticism of the use of detention for children in conflict with the law nonetheless raises the obvious question this phrase implies: what can replace detention?

It is beyond the scope of this article to provide a full picture of a rights compliant juvenile justice system or to examine in depth the most effective measures to respond to different types of offending by children. However, in criticising the failure of detention to meet international standards and its aims, is an obligation to point to what would be effective and rights compliant replacement.

The Convention on the Rights of the Child approaches "alternatives to detention" in two ways: avoiding children becoming involved with the judicial system at all<sup>35</sup> and imposing non-custodial measures on a child once they are involved in judicial proceedings.<sup>36</sup> The Convention itself suggests a non-exhaustive set of alternatives to detention, including "care, guidance and supervision

<sup>32</sup> Howard League for Penal Reform, *Criminal Care: Children's homes are criminalising children*, 30 March 2016. Available at: <http://howardleague.org/publications/criminal-care/>.

<sup>33</sup> Meservey and Skowyra, "Caring for Youth with Mental Health Needs in the Juvenile Justice System: Improving Knowledge and Skills", *National Center for Mental Health and Justice Research and Program Brief Vol. 2, Issue 2*, May 2015.

<sup>34</sup> Shuffield and Coccozza, *Youth with mental health disorders in the juvenile justice system: Results from a multi-state, multi-system prevalence study*, National Center for Mental Health and Juvenile Justice, 2006. Available at: <http://www.ncmhjj.com/wp-content/uploads/2013/07/7.-PrevalenceRPB.pdf>.

<sup>35</sup> CRC, *supra* note 1, at art. 40(3)(b) ("States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognised as having infringed penal law, and, in particular: (b) whenever appropriate and desirable, measures for dealing with children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.").

<sup>36</sup> CRC *supra* note 1, at art. 40(4) ("A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.").

orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care.<sup>37</sup>

Restorative justice—that is measures that bring together offenders, their victims and their families in order to decide what the offender should do to repair the harm an offence has caused—too has a vital role in justice systems for children.<sup>38</sup> The aim of these practices is to repair the harm of the offence rather than inflicting harm on an offender.<sup>39</sup> These measures fall well in line with the rehabilitative approach promoted by the Convention on the Rights of the Child by ensuring that children are held responsible for their actions but eschewing a punitive response. The Committee on the Rights of the Child has explicitly discussed restorative justice in the context of realising the best interests of the child in the context of justice systems, when it noted that “the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.”

The expansion in use of restorative justice has enabled researchers to examine its effectiveness across several jurisdictions. In a review of ten studies of restorative justice conferences carried out in **Australia**, the **United Kingdom** and the **United States** involving between them a total of 1,879 offenders and 734 interviewed victims, indicated a modest but highly cost-effective reduction in repeat offending for people who had gone through restorative justice conferencing. More than this, restorative justice was most effective when used to combat serious offending and was most effective in response to violent crime.<sup>40</sup>

UNICEF’s compilation of studies examining the effectiveness of non-custodial measures also points to a variety of programmes more effective at reducing offending than detention.<sup>41</sup> Studies included within this compilation show that non-custodial measures can reduce offending by more than 70 percent. A study into the effectiveness of “multi-systemic therapy” in the **United States**—a programme focusing on intensive treatment in the community, focusing on work with school, family and peers—found a reduction in re-arrests among “chronic juvenile offenders” of between 25 and 75 percent compared to control groups. In **Thailand**, a study measuring the impact of a diversion process sending children to family and community group conferencing found a reduction in the number of children being prosecuted for second offences of between 15 and 19 percent.

Evidence beyond these examples abounds, demanding a response from those continuing to promote punitive detention based sentencing in the face of evidence that it is not as effective as the alternatives. It is time we realised that meeting international standards is not only the way to realise the human rights of children, but is also the most effective way of reducing offending by children. It is easy and common for politicians and the media to play on fears of successive generations that children are running amok and that this needs a harsh response to deter children, but it is clear that this approach ignores the evidence: there is a difference between appearing tough on crime and effectively dealing with the problem.

<sup>37</sup> CRC, *supra* note 1, at art. 40(4).

<sup>38</sup> General Comment No. 10, *supra* note 5, ¶ 10.

<sup>39</sup> For fuller discussion of the different forms of restorative justice, see Special Representative of the Secretary-General on Violence Against Children, *Promoting Restorative Justice for Children*, 2013. Available at: <http://srsg-violenceagainstchildren.org/page/1193>.

<sup>40</sup> See Strang et al, *Restorative Justice Conferencing (RJC) Using Face-to-Face Meetings of Offenders and Victims: Effect on Offender Recidivism and Victim Satisfaction. A Systematic Review*. 1 November 2013. Available at: <http://link.springer.com/article/10.1007/s10940-014-9222-9>.

<sup>41</sup> See UNICEF, *Toolkit on Diversion and Alternatives to Detention: What are the costs involved for diversion and alternatives compared to detention* 2008. Available at: [http://www.unicef.org/tdad/index\\_56509.html](http://www.unicef.org/tdad/index_56509.html).

## Conclusion

As the UN stands poised to launch its global study on children deprived of their liberty, it is time to take a principled approach to the detention of children, an approach that does not flinch from the full demands of children's rights or the reality that detention as a punishment fails children and society as a whole. It is clear that for detention to be consistent with the CRC as a whole it can only be justified where a child has been assessed as posing a serious risk to others' or for the child's own safety and where that risk cannot be reduced to an acceptable level without detention. It is time to end the detention of children as punishment.

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# Children and Diversion Away from Formal Criminal Justice Systems: A Perspective from an NGO Working on Criminal Justice Reform

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## Abstract

*International standards state that children should only be detained or imprisoned as a measure of last resort, in exceptional circumstances, and for the shortest possible period of time. As far as possible and wherever appropriate, children should be diverted away from the formal criminal justice system. This holds true for all children—all children under 18 years of age and over the age of criminal responsibility—regardless of the severity of the offence for which they have been arrested or charged. The Special Rapporteur on Torture has recommended the promotion of diversion as a means of preventing children from being subjected to torture or other ill-treatment whilst in detention.*

*The NGO Penal Reform International (“PRI”) has been working on criminal justice reform for children, since 1989, primarily in Africa, Central Asia, South Asia, the Middle East and the South Caucasus. PRI’s experience is that governments do not have sufficient commitment to diversion as a fundamental component of criminal justice systems for children. All too often, detention is the first and not the last resort for children. Diversionary measures, if they exist at all, are mere add-ons to the main structures of the criminal justice system. There is frequently a heavy reliance upon civil society organisations to provide the impetus and infrastructure for diversion, and the expectation that governments will subsequently shoulder the burden is not always met.*

*This article explores the dissonance between the (near) universal acceptance of the United Nations Convention on the Rights of the Child and related international standards and the reality that implementation of diversion measures on the ground is often partial and ad hoc. It considers why governments might be reluctant to implement reforms in favour of diversionary measures for children and how these obstacles might be overcome. It concludes that one of the most vital tools in the reformers’ toolbox is the use of evidence to build knowledge and confidence in the use of diversionary measures.*

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## International standards and conflicting realities

The UN Convention on the Rights of the Child<sup>1</sup> (UNCRC) has been in existence for over a quarter of a century as has the African Charter on the Rights and Welfare of the Child; both treaties are legally binding upon its States Parties. Other human rights standards concerned with criminal justice law and policy reform for children are enshrined in different types of UN or regional body non-treaty instruments—these complement the human rights treaties, have significant moral force and provide useful and practical guidance.<sup>2</sup> The international standards are certainly not new although they have evolved and have been elaborated upon over time.<sup>3</sup>

Collectively, this body of international standards asserts that criminal justice systems for children should promote the well-being of the child and react proportionately to the nature of the offence, taking into account the individual characteristics of the child. Justice and welfare systems should aim to prevent crime, take decisions which are in a child's best interests, treat children fairly and in a manner which is appropriate to their development, address the root causes of childhood criminality and rehabilitate and reintegrate children so they can play a constructive role in society in the future. As far as possible, children should be dealt with outside of the formal criminal justice system and diversion should be used, wherever appropriate, because entry into the criminal justice system can create an additional risk, both of violations of the rights of children and of re-offending by those same children.<sup>4</sup>

These standards do not imply that a child has no responsibility for their actions, nor that offending behaviour should be belittled or ignored. They also do not imply that children be left without the rehabilitative interventions that they will no doubt need. Diversion away from the formal justice system does not mean diversion away from a proportionate response and treatment. The standards reflect a view that children's accountability for criminal behaviour is not equivalent to

<sup>1</sup> The UNCRC has been ratified by 196 countries—most recently Somalia in October 2015. It is the most widely ratified international human rights treaty in history. The US has signed the treaty but remains the only UN member state not to have ratified it. UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3. <http://www.refworld.org/docid/3ae6b38f0.html>.

<sup>2</sup> The standards include UN General Assembly, United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules"): resolution/adopted by the General Assembly, 29 November 1985, A/RES/40/33, <http://www.refworld.org/docid/3b00f2203c.html>; UN General Assembly, United Nations Guidelines for the Prevention of Juvenile Delinquency ("The Riyadh Guidelines"): resolution/adopted by the General Assembly, 14 December 1990, A/RES/45/112, <http://www.refworld.org/docid/3b00f21d1c.html>; UN General Assembly, United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the "Havana Rules"): resolution/adopted by the General Assembly, 2 April 1991, A/RES/45/113, <http://www.refworld.org/docid/3b00f18628.html>; and the UN General Assembly, United Nations Rules for the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders (the "Bangkok Rules"): note / by the Secretariat, 6 October 2010, A/C.3/65/L.5, <http://www.refworld.org/docid/4dcbb0ae2.html>.

<sup>3</sup> See for example, UN Committee on the Rights of the Child (CRC), General comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, ("General Comment No.10), <http://www.refworld.org/docid/4670fca12.html>, UN Secretary-General (UNSG), Guidance Note of the Secretary-General: UN Approach to Justice for Children, September 2008, <http://www.refworld.org/docid/4a54bbf70.html>, Council of Europe, Committee of Ministers, 'Guidelines of the Committee of Ministers of the Council of Europe on Child Friendly Justice', 17 November 2010, [https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Del/Dec\(2010\)1098/10.2abc&Language=lanEnglish&Ver=app6&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true\\_\\_and](https://wcd.coe.int/ViewDoc.jsp?p=&Ref=CM/Del/Dec(2010)1098/10.2abc&Language=lanEnglish&Ver=app6&Site=CM&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383&direct=true__and) UN General Assembly, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems: resolution/adopted by the General Assembly, 28 March 2013, A/RES/67/187, <http://www.refworld.org/docid/51e6526b4.html>.

<sup>4</sup> In this regard, see Articles 37 and 40(3) (b) of the UNCRC; see also Rules 6 and 11 of Beijing Rules.

that of adults, and should consequently be modified, taking into account their level of maturity, because children *'differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law.'*<sup>5</sup> In the succinct words of the Special Rapporteur, *'[c]hildren should never be treated as if they were adults.'*<sup>6</sup>

This approach reflects an understanding that offending can be a behaviour that children 'grow out of', and that they are at a stage in their development when their beliefs, opinions and personalities are evolving and shifting, so that there is a significant potential for them to be informed and moulded by rehabilitative and educational measures. Punitive measures, on the other hand, do little to address the root causes of offending, can inhibit children's development and significantly diminish their future prospects.

At a global level, there is significant divergence amongst States in the manner of treatment of children who commit crime, or who are alleged to have done so. This reflects diversities of legal frameworks, domestic and international political agendas and hugely different constructions of childhood—no two systems are alike. The international standards do not set out to proscribe in detail 'what works' for children who offend. One commentator has argued that the UNCRC should be viewed as a *'strategic tool through which contextually appropriate policies and programmes might be constructed, rather than a "solution" to be uniformly applied.'*<sup>7</sup> They are normative standards which are flexible and adaptable to different legal, political, socio-economic and cultural contexts; as such they provide us with an *'indispensable benchmark against which to measure both progressive youth justice systems...and less developed ones.'*<sup>8</sup>

The pressure on States Parties to implement international standards is exerted from many different sources, including the media, civil society and from the UN Committee on the Rights of the Child itself (during the State Party reporting process to the Committee and in the form of its concluding observations and wider jurisprudence). Despite these pressures, it is commonplace for children to be processed through criminal justice systems that have punishment as their priority rather than a child's rehabilitation. Criminal justice systems for children around the world are a surprisingly accurate mirror reflecting society's perceptions of the 'good' and the 'bad' child, respectively. Children in conflict with the law overwhelmingly form part of the poorest and most marginalised sections of society and there are powerful correlations between levels of poverty, inequality and rates of offending. The shared understanding in many contexts, whether explicit or implicit, is that the objective of criminal justice systems should be punishment. This view is commonly held amongst police, staff working in facilities, the general public, the judiciary, the media and governments.

This emphasis on punishment rather than crime prevention, the fair administration of justice and rehabilitation, creates a climate where children are too often treated in the same way as adults. Harsh treatment becomes an integral part of their ongoing punishment as they are processed

<sup>5</sup> General Comment No. 10.

<sup>6</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Mendéz, A/HRC/28/68 (5 March 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, 73.

<sup>7</sup> Ansell, N. (2013) *The Convention on the Rights of the Child: Advancing Social Justice for African Children*, in Twum-Danso Imoh, A. and Ansell, N. eds., *Children's Lives in The Era of Children's Rights: The Progress of the Convention on the Rights of the Child in Africa* (Oxford, Routledge 2013)

<sup>8</sup> Kilkelly, U., (2008) *Youth Justice and Children's Rights: Measuring Compliance with International Standards* Youth Justice 8 (3) 187-192.

through the system with the result that detention is used as a measure of first, rather than last, resort. This is despite the fact that deprivation of liberty is widely understood to be harmful for children, as resulting in significant violations of their rights (rights including, *inter-alia*, denial of access to health care and education) and as resulting in a failure to protect children from violence.<sup>9</sup> The Special Rapporteur on torture states quite unequivocally that ‘[e]ven very short periods of detention can undermine a child’s psychological and physical well-being and compromise cognitive development.’<sup>10</sup> In addition, children deprived of their liberty are at ‘a heightened risk of violence, abuse and acts of torture or cruel, inhuman or degrading treatment or punishment.’<sup>11</sup> Often there are localised and domestic pressures calling for society’s protection from certain groups of children deemed to be out of control. Mediating and resolving these different pressures so that diversion becomes embedded as a practice is a complex task. The following looks at the scope of diversion, why it is of benefit to children and considers different approaches that can be used by practitioners to encourage strengthened implementation of diversionary measures.

## What is diversion?

For the purposes of this article, the following definition is adopted:

*‘Diversion means the conditional channelling of children in conflict with the law away from formal judicial proceedings towards a different way of resolving the issue that enables many — possibly most — to be dealt with by non-judicial bodies, thereby avoiding the negative effects of formal judicial proceedings and a criminal record, provided that human rights and legal safeguards are fully respected’.*<sup>12</sup>

Under this definition, diversion, in essence, is about taking steps to keep children away from formal criminal justice altogether. In this sense, diversion differs from alternatives to detention such as granting conditional bail or imposing a sentence of community service. The objective of diversion is to respond to the offending behaviour without recourse to the formal system. Nevertheless, there is often an overlap between such diversion and the formal system, insofar as the diversion itself may be initiated through the formal system. One related strategy for removing children from the formal justice system is, of course, to raise the age of criminal responsibility so that far fewer children are criminalised in the first place.<sup>13</sup>

<sup>9</sup> The literature on this topic is very broad. See for example: UN General Assembly, *Rights of the child : note / by the Secretary-General*, 29 August 2006, A/61/299, available at: <http://www.refworld.org/docid/453780fe0.html>; the United Nations High Commissioner for Human Rights, the United Nations Special Representative of the Secretary-General on Violence against Children, the United Nations Office on Drugs and Crime, *Prevention of and Responses to Violence against Children* (2012), [http://srsg.violenceagainstchildren.org/sites/default/files/publications\\_final/web\\_juvenile\\_justice\\_final.pdf](http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/web_juvenile_justice_final.pdf); Goldson, B. (2005) *Child Imprisonment: A Case for Abolition*, Youth Justice 5 (2) 77-90 and Bochenek M.G. (2016) *Children Behind Bars: The Global Overuse of Detention of Children*, Human Rights Watch, <https://www.hrw.org/world-report/2016/children-behind-bars>.

<sup>10</sup> Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, Juan E. Mendéz, A/HRC/28/68 (5 March 2015), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G15/043/37/PDF/G1504337.pdf?OpenElement>, at para 16.

<sup>11</sup> *Id.*

<sup>12</sup> UNICEF, (2009), *Toolkit on Diversion and Alternatives to Detention*, [http://www.unicef.org/tdad/index\\_55653.html](http://www.unicef.org/tdad/index_55653.html)

<sup>13</sup> For more discussion on this point see, Child Rights International Network (“CRIN”), *Juvenile Justice: Stop Making Children Criminals*, <https://www.crin.org/en/library/publications/juvenile-justice-stop-making-children-criminals>. CRIN has collected evidence which suggests that a number of States, globally, have already, or are planning to, lower the age of criminal responsibility.

Diversion can take place at any stage of proceedings and can be used on a discretionary basis by police, prosecutors, judges or other agencies such as councils or tribunals. These powers do need to be regulated and reviewed to ensure that discretion is always being applied in the child's best interests. Where possible, the assessment of a child's suitability for diversion should involve a social worker, probation officer or community member. The actual mechanisms in place for diversion can vary from a verbal warning from the police to a more significant obligation to attend a rehabilitation program. Ideally, there should be a range of options available at different stages. A wide range of actors have potential responsibility for implementing diversion measures; including counselling, mentoring, probation, social and welfare services. Civil society organisations often play a crucially important role.

### *Avoiding entry into the system*

No intervention at all in response to offending behaviour can be characterised as a form of diversion and can be used when it is considered that the family, school, or other relevant institution, has already reacted sufficiently to the offence. The Tokyo Rules specifically provide that '*where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender (drop the case) if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and the rights of victims.*'<sup>14</sup> In Austria, for example, the prosecutor may drop the case of a juvenile if the offence he or she is accused of is punishable by not more than five years of imprisonment, which includes quite serious offences such as robbery and extortion. The prosecutor must consider whether further intervention is necessary to prevent re-offending and must also take into account the importance of maintaining public confidence in law enforcement during this decision-making process.<sup>15</sup>

### *Interruption of the process by the police*

In many jurisdictions, police have powers to issue warnings or verbal cautions for first-time offenders who admit to the commission of a minor offence immediately. Such warnings usually consist of an exchange between the child and the police and can take the form of an informal verbal caution or, of a more formal warning, if there is enough evidence to support a prosecution. In New Zealand, for example, police frequently give informal warnings, sometimes accompanied by restorative actions to be undertaken by the offender, such as offering an apology to the victim or making reparations.<sup>16</sup> In some contexts, restorative diversion can be challenging for the police to implement, insofar as the police themselves are perceived as too corrupt to be granted such extensive discretionary powers.<sup>17</sup>

<sup>14</sup> Rule 5 (1) UN General Assembly, *United Nations Standard Minimum Rules for Non-Custodial Measures (The "Tokyo Rules")*: resolution/adopted by the General Assembly, 2 April 1991, A/RES/45/110, <http://www.refworld.org/docid/3b00f22117.html>.

<sup>15</sup> Bruckmuller, K. and Schumann, S. Of Justice and Juveniles in Austria: Achievements and Challenges in Chapter Two, 33 of *Juvenile Justice: International Perspectives, Models and Trends* edited by Winterdyk, J.A (2015, Taylor and Francis).

<sup>16</sup> McLaren, K. (2010) *Alternative Actions that Work: A review of the research on Police Warnings and Alternative Action*. Police Youth Services Group, New Zealand Police: Wellington.

<sup>17</sup> This point is made by Jaap Doek. Doek cites the experience in South Africa, where diversion has to be initiated by the judiciary, because the police are still tainted by their history as enforcers of apartheid policies. See, Haq Centre for Child Rights (2013), *International Colloquium on Juvenile Justice, A Report*, at 16, <http://haqrc.org/new-at-haq/international-colloquium-juvenile-justice-report-2/>.

### *Diversionsary measures that also address the causes of offending*

Where the nature of the offending is such that non-intervention or cautions are not in a child's best interests, then, police, prosecutors or judges should have the power to divert children towards rehabilitation services that can attempt to address their offending. These might include counselling, mediation, conferencing, treatment for substance abuse, education or classes to develop skills to deal with their offending behaviour (such as, by way of example, anger management skills). Such interventions primarily seek to deal with the child's behaviour in a constructive way, but they may also include an additional component of criminal sanction if the child does not comply with the diversion programs.

In Ethiopia, for example, a Community-Based Correction Program has been run by the NGO Forum for Sustainable Child Empowerment (FSCE) and Save the Children since 2004. It supports diversion by the police for cases where a child aged between nine and fifteen years of age has committed a first or petty offence.<sup>18</sup> The program brings together police and community workers with families, the child and other key individuals (including teachers) to provide intensive and individualised support for the child in community centers. Support includes assistance to children with their studies, vocational and recreational opportunities, as well as support to parents with respect to good parenting skills. The support program maintains links with businesses that provide apprenticeships. Although the program has been running for over ten years, it has not yet been scaled-up by the government to cover more areas and remains dependent upon funding from FSCE and Save the Children. An additional challenge facing the program is that, the involvement of parents as support recipients in fact results in discrimination both against children without parental care and also against those children living in street situations.

Measures of diversion often incorporate principles of restorative justice such as mediation or conferencing. While it is not directly referred to in the UNCRC, restorative justice has nonetheless been supported by the UN Committee on the Rights of the Child.<sup>19</sup> A pilot on diversion, with restorative justice components, was initiated in Jordan in 2011, with the support of UNICEF, PRI and others.<sup>20</sup> Under this system, when the Juvenile Police investigate a complaint, they may: (i) use an unconditional caution or warning; (ii) invite the child, the family and the victim to present their versions of events and then impose conditions to address the child's offending behaviour or (iii) instruct for compensation to be provided to the victim in the case of material damage having been caused. Probation officers, stationed in the Juvenile Police Department, follow up and monitor the settlement agreement in order to ensure that the child (and his or her parents) comply with the conditions imposed. A psychosocial specialist and probation officer conduct an evaluation of the child's compliance with the dispute settlement, present their recommendations to the Ministry of Social Development for action and keep the juvenile police informed. A case will be transferred to court in the event that a child maintains his or her innocence or if the dispute resolution is not successful.

<sup>18</sup> Save the Children (2012), 'Child Protection and Child Friendly Justice: Lessons Learned from Programmes in Ethiopia. Executive Summary', <http://resourcecentre.savethechildren.se/library/child-protection-and-child-friendly-justice-lessons-learned-programmes-ethiopia-executive>

<sup>19</sup> General Comment No. 10, para 10 states that '[t]he best interest of the child means [...] that the traditional objectives of criminal justice, such as repression/retribution, must give way, to rehabilitation and restorative justice objectives.'

<sup>20</sup> For a detailed account of the Jordan program see: United Nations Children's Fund, International Development Law Organization (2015), *Research Study: Promotion of Diversion and Alternative Measures to Detention for Children in Conflict with The Law*, <http://www.unicef.org.tn/?wpdmdl=3509>.

This pilot, though introduced without any basis in the penal law, was nonetheless a success. An evaluation conducted by PRI found that between January 2012 and October 2013, 70 percent of juvenile cases dealt with by the juvenile police had been diverted from the courts.<sup>21</sup> This compares to an estimated 30 percent of juveniles in the areas of Jordan that were not included in the pilot. The option of diversion, with a dispute settlement approach, has now been formally sanctioned in Jordan's new Juveniles Law (2014) which came in to force in January 2015.

Good diversion programs will allow police, judges or prosecutors to use a variety of different measures to ensure each child is treated as an individual. In the Netherlands, for example, the HALT program, which began in 1981, grants the police powers to implement a number of discretionary measures for the diversion of young people away from the formal criminal justice system.<sup>22</sup> Parents play a very important role, and the process can involve discussion between the parties involved, agreements to make reparations to the victim, an apology, learning assignments, and, on occasion, the imposition of community service sentences. Once the child has successfully completed the program, the police inform the child and the state prosecutor's office that the charges have been dropped. The HALT program was originally intended to cover minor offences but its scope has now been widened to include more serious offences such as theft or vandalism.

Children cannot be diverted to the HALT program if they are persistent offenders, if the alleged offence is too severe, or if they refuse to participate. In such cases, the police will transmit the case to the Public Prosecutions Office which also has the power to divert a case from further court processes by imposing community service or a fine. According to Liefwaard, a specialist in the Dutch criminal justice system for children, in practice *'most of the cases are diverted from the courts, either by the police or by the Public Prosecutions Office, which can be acclaimed warmly in light of article 40 (3) (b) CRC, calling upon States Parties to settle, whenever appropriate and desirable, juvenile criminal cases without resorting to judicial proceedings.'*<sup>23</sup>

## Some of the benefits of diversion

There are four main arguments for the benefits of diversion:

- it keeps children away from the harmful effects of formal criminal and penal systems;
- it addresses the reasons behind their offending and thereby reduces the risk of future re-offending;
- it provides victims of crime with redress; and
- it is cost-effective relative to pursuing a case through courts.

The harms for children of being processed through the formal justice system can include: (i) stigmatisation of the child (often very early in life); (ii) having a criminal record that can harm future employment and in turn result in further offending; (iii) manifold harms arising from time spent in police custody and pre-trial detention and from serving a sentence of imprisonment (including, exposure to violence, sexual abuse, disruption to positive familial and communal relationships); and (iv) damage to educational and future work prospects. It is argued that diversion mechanisms can be far more effective at rehabilitating a child who has committed a criminal offence than for-

<sup>21</sup> PRI, (2014), Promoting Human Rights-based Approach towards Vulnerable Groups in Detention in the Middle East and North Africa Region: Impact Evaluation, <https://www.penalreform.org/wp-content/uploads/2015/08/MENA-SIDA-Evaluation-Final-for-website.pdf>.

<sup>22</sup> Liefwaard, T. *Deprivation of liberty of children in the Netherlands*, Chapter 4 (Intersentia, 2008).

<sup>23</sup> Id., page 366.



mal justice systems that are, more often than not, tailored for adults. They can better identify and address the root causes of offending such as mental health issues or substance abuse. From the perspective of victims, it is argued that diversion offers more opportunity for victim participation in the treatment of the offender, in particular where such treatment involves a restorative or mediatory component between perpetrator and victim. Ultimately, such diversion may provide victims with a stronger sense of justice having been served.

A final argument for diversion is that it can be cheaper than pursuing a case through the formal justice system. The main costs for diversion programs are usually for training specialised staff and obtaining premises when establishing such a program. Additionally, diversion can involve ongoing overhead costs, such as, paying salaries and costs associated with the administration and provision of rehabilitation services. Overall, diversion is highly likely to be far more cost-effective than setting up new detention centres or courts. There are also future savings to be reaped from diversion, as a result of the positive long-term impact on children's health and potential tax revenues from future earnings. Diversion can also be very helpful in contexts where there are significant backlogs of cases, since it can free up court time and resources that can then be allocated for the most serious offences. Although the quantification of the cost-effectiveness of diversion interventions is a highly complex process, its cost-effectiveness can be a persuasive argument for policy-makers. Additionally, evidence suggests that diversion holds the potential to produce better outcomes with regards to the reduction of re-offending.<sup>24</sup>

There is evidence that diversion does indeed prevent re-offending and associated harms. However, diversion is not a panacea, and it should be emphasised that many children will still continue to offend despite having previously been diverted.

## **Diversion for girls—is it any different?**

Gender-based discrimination permeates all cultures. Although the number of girl offenders has increased quite dramatically in recent years, girls still represent a very small minority of children involved in the criminal justice system, and, consequently, they tend to be over-looked and ignored in the policy making process.<sup>25</sup> Girls in conflict with the law may face problems that are unique to them, or which affect them disproportionately as a consequence of their gender, thereby requiring a nuanced response.<sup>26</sup> Gender-specific programming has now been mainstreamed in North

<sup>24</sup> For an overview of cost assessment within the framework of the South African Child Justice Bill and Children's Bill see: UNICEF Innocenti Research Center (2007), *Reforming Child Law in South Africa: Budgeting and Implementation Planning*, [https://www.unicef-irc.org/publications/pdf/reformingchildlaw\\_reprint.pdf](https://www.unicef-irc.org/publications/pdf/reformingchildlaw_reprint.pdf).

<sup>25</sup> The International Centre for Prison Studies produces an annual World Female Imprisonment List which shows the number of women and girls held in penal institutions, as pre-trial detainees or having been convicted and sentenced, in 212 prison systems in independent countries and dependent territories. It is largely compiled from official figures. As of 2015, there were 700,000 women and girls in prison compared to 10.25 million in total. This figure is not disaggregated by age. The female prison population levels have grown much faster than male prison population levels since around 2000, with the number of women and girls in prison increasing by 50% in the past 15 years. For more information see: Roy Walmsley, *World Female Imprisonment List: women and girls in penal institutions, including pre-trial detainees/remand prisoners* (third edition), [http://www.prisonstudies.org/sites/default/files/resources/downloads/world\\_female\\_imprisonment\\_list\\_third\\_edition\\_0.pdf](http://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_imprisonment_list_third_edition_0.pdf).

<sup>26</sup> For more information about interventions and programming for girls in criminal justice systems see PRI (2014) *Neglected Needs: Girls in the criminal justice system*, <https://www.penalreform.org/resource/neglected-girls-criminal-justice-system/>.

America and, to a certain extent, in the United Kingdom, but it has not yet developed and gained very much widespread traction beyond this.<sup>27</sup>

Diversion measures need to be gender-sensitive in line with the Bangkok Rules which require that there are '*diversionary measures and pre-trial and sentencing alternatives...taking account of the history of victimisation of many women offenders and their caretaking responsibilities*'.<sup>28</sup> In practice this means that when designing diversion measures, it should be ensured that such measures account for the possibility that a girl may be pregnant or have caretaking responsibilities for other children that might prevent such girls from fully complying with provisions, such as attending community service work programs. Many girls in conflict with the law have experienced sexual abuse and violence. The relationship between such victimisation and offending is not well understood, but, any background of victimisation should be addressed as part of the diversion process, for example, by referrals to civil society organisations for counselling. Girls may have had unequal access to educational, vocational and employment opportunities compared to their male peers and this should also be taken into account when identifying the most appropriate diversionary response.

Empirical research on the effectiveness of diversion programs specifically designed for girls in the criminal justice system is sparse, perhaps reflecting the lack of programs overall. The research that is available, such as Oregon's Guidelines for Effective Gender Responsive Programming for Girls<sup>29</sup>, suggests that it is good practice to focus on relationship building, owing to the propensity of girls to do better with one-on-one interaction (by contrast to the predilection of boys for group work) and owing to their emphasis on communication based relationship development.

## Ensuring due process

It is imperative that diversionary measures respect and protect child rights, including the right to a fair trial and to due process. Concerns have been raised about an effect of widening the proverbial net whereby children whose actions would not normally have elicited any official state intervention receive a diversion measure. Therefore, diversion measures must only be applied in situations where a child's actions would otherwise lead to prosecution. Diversion measures can only be used where a child freely admits to committing an offence and willingly agrees to participate in a non-judicial alternative process. A child's parents or guardians may also be asked to consent to a diversion measure. There is a risk that children might feel pressured into agreeing to a diversionary measure following arrest even though they have not committed the offence. The child must always be aware that he or she may be acquitted if the case goes to court.

No child should be discriminated against in the selection of a diversion program, the options available or the process taken. When deciding what diversion measure to use, consideration must

<sup>27</sup> Sharpe, G. (2016), *Re-imagining Justice for Girls: A New Agenda for Research*, Youth Justice 16(1) 3–17 in which the author cites the Oregon's Guidelines for Effective Programming for Girls in the Justice System as being 'widely accepted as the conceptual blueprint for gender-specific programs for girls.' See also Prison Reform Trust (2013) *International good practice: alternatives to imprisonment for women offenders*, <http://www.prisonreformtrust.org.uk/portals/0/documents/international%20good%20practice%20final.pdf> for an overview of different gender-sensitive interventions.

<sup>28</sup> See the Bangkok Rules, and See for further information: PRI and the Thailand Institute of Justice (2013), *Guidance Document: United Nations Rules on the Treatment of Women Prisoners and Non-Custodial Measures for Women Offenders* (The Bangkok Rules), <https://cdn.penalreform.org/wp-content/uploads/2013/10/PRI-TIJ-Guidance-Document-on-Bangkok-Rules-October-2013.pdf>.

<sup>29</sup> Patton P. and Morgan M. (2002) *How to Implement Oregon's Guidelines: for effective gender responsive programming for girls*, Oregon Criminal Justice Commission, <http://www.equalaccessforgirls.org/cms-assets/documents/69010-521344.genderguidelines.pdf>.

be given to a child's gender, age and maturity, religion, culture, community, the child's own views and concerns, as well as to the child's best interests. In practice, children who have no family support can find themselves excluded from diversion programs that require parental involvement. In such cases creative alternatives are needed, such as the involvement of volunteers from the community to 'stand in' and assume the parental role for the purposes of the contemplated diversionary process.

In most countries that implement diversionary approaches, they are only seen as appropriate for children who commit minor offences such as petty theft and offences closely connected to their survival such as pick-pocketing or begging. Cases that involve serious forms of violence, such as murder or sexual assault, represent a much deeper conflict than that which is implicit in lesser offences, and the consequent stigma associated with these offences, as well as the anger felt by the community, and the victim, toward the offender in regards such offences, will be much more significant.<sup>30</sup> There is an assumption that diversion is not sufficient to achieve justice for the victim in these more serious instances since diversion lacks an aspect of symbolic public condemnation of the offender for the commission of the offense. And yet, some studies show that the effectiveness of restorative justice processes can be particularly great among serious offenders accused of violent crimes. Researchers go so far as to suggest that restorative justice can have a deeper healing impact within the context of serious offences than within the context of non-serious offences.<sup>31</sup> In the Philippines, the court is required to consider the option of diversion to restorative justice programs even for cases where a child is charged with a crime punishable by a sentence greater than six years of imprisonment, but less than twelve years. When the penalty is less than six years, the police, with the assistance from a social welfare officer, revert to mediation processes with regards to children as the norm.<sup>32</sup>

### **Some obstacles to implementation of diversionary measures and some suggestions for responding to them**

It is perhaps self-evident, but when States ratify the UNCRC, they are confronted with the challenging task of implementing it—this means making children's rights a reality, so that they shape and inform the varied environments in which children live. Article 4 of the UNCRC requires that States Parties '*undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention.*' When civil society talks about lack of implementation of the UNCRC, and specifically when it refers to failings in the implementation of provisions relating to criminal justice, the discourse often omits to link these failings with a lack of concrete and practical governance steps that are needed to make diversion a reality. These steps include:

<sup>30</sup> UN Special Representative of the Secretary-General on Violence against Children, (2013) *Promoting Restorative Justice for Children*, [http://srsg.violenceagainstchildren.org/sites/default/files/publications\\_final/srsgvac\\_restorative\\_justice\\_for\\_children\\_report.pdf](http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/srsgvac_restorative_justice_for_children_report.pdf).

<sup>31</sup> L. W. Sherman and H. Strang, (2007) *Restorative justice: the evidence*, (Esmée Fairbairn Foundation and The Smith Institute), p 71 and L. W. Sherman, H. Strang and D. Woods, *Recidivism Patterns in the Canberra Reintegration Shaming Experiments (RISE)*, Centre for Restorative Justice, Australian National University, 2000, [http://www.aic.gov.au/media\\_library/aic/rjustice/rise/recidivism/report.pdf](http://www.aic.gov.au/media_library/aic/rjustice/rise/recidivism/report.pdf).

<sup>32</sup> The Philippine Juvenile Justice and Welfare Act of 2006, section 37 and 23(c) cited in: United Nations Special Representative of the Secretary-General on Violence against Children, the United Nations Office on Drugs and Crime, *Prevention of and Responses to Violence against Children* (2012), [http://srsg.violenceagainstchildren.org/sites/default/files/publications\\_final/web\\_juvenile\\_justice\\_final.pdf](http://srsg.violenceagainstchildren.org/sites/default/files/publications_final/web_juvenile_justice_final.pdf).

- integrating diversion into a coherent legal framework;
- allocating sufficient resources to make sure that diversion initiatives are sustainable and effective;
- building confidence in diversion amongst stakeholders;
- raising awareness amongst the wider community;
- ensuring co-operation and co-ordination between different agencies; and
- working closely with, and supporting, civil society in implementation.

### *Integrating diversion into the law and policy framework*

Generating political will even for relatively small scale law and policy reform to introduce diversion can be very challenging. It can be difficult to establish clear evidence that diversion will work to rehabilitate children and prevent future offending (and indeed, diversion will, of course, not be successful for all children all of the time). Criminal justice reform often comes about in response to quite specific cases that have generated ‘moral panic’ coupled with a sense that something must be done, rather than careful consideration of what should be done. One example of this is the recent reform of India’s Juvenile Justice (Care and Protection of Children) Act, 2015 that allows juveniles in conflict with the law in the age group of sixteen years of age through eighteen years of age that are involved in Heinous Offences to be tried as adults. The Act came about following the rape and murder of a woman in Delhi in 2012 by a group of men and a boy of seventeen years old. There was considerable public outcry that the seventeen year old received a sentence of three years in a reform home (which constitutes the maximum punishment available under the Juvenile Justice (Care and Protection of Children) Act, 2000), which was considered inadequate. Consequently, public support increased for juveniles, sixteen years of age and older, to be tried and sentenced as adults in specific circumstances.

Despite these challenges, law and policy reform is essential and it provides us with the foundation stones for respect for children’s rights. Although a number of diversion projects can and do operate in the absence of a clearly articulated legal framework (for example, in Ethiopia and in Jordan before the introduction of the new juvenile justice law in 2014), it is ideal if the use of diversion is firmly entrenched in the law and even more conducive if the provisions of the UNCRC delineating detention of juveniles as a last resort, be incorporated into such a framework. This ensures sustainability, coherence, consistency, legitimacy and mitigates the risk of a change in government resulting in a rejection of diversion.

### *Allocating sufficient resources*

The question of adequate funding for implementation of children’s rights is a growing area of concern.<sup>33</sup> Its importance holds true for setting up a justice system for children as much as it does for adequate health care or education. A significant barrier to the implementation of diversionary measures is lack of available resources and a perception that diversion creates expenditures additional to those of the existing criminal justice system. Many countries have reformed their justice systems to align with international standards and, nominally at least, have made provision for

<sup>33</sup> See United Nations Human Rights Council, *Rights of the child: towards better investment in the rights of the child*. Resolution A/HRC/28/L adopted by the Human Rights Council. The UN Committee on the Rights of the Child has adopted General comment No. 19 (2016): Public budgeting for the realization of children’s rights CRC/C/GC/19.

diversion mechanisms—however, often, provisions in the law have not been matched by the requisite funding needed in order to implement such provisions.

This is an area where civil society could become more technically proficient and engaged with the highly political processes of mobilising, allocating and spending resources on children in conflict, both with respect to the law in general and with respect to diversionary measures in particular. During the budget planning process, it is important for civil society to provide evidence—where available—of how diversionary measures can reduce offending and thereby reduce the costs of running a formal justice system. The issue is complex since ministries which may incur savings from diversion programs (often the ministry of justice) are not always the same ministries charged with implementing diversion schemes (often ministries of social affairs); public expenditure on children in conflict with the law potentially cuts across a whole range of different ministries, including health, education and interior ministries, amongst others. However, there are nevertheless many arguments regarding cost-effectiveness that can be persuasively made in order to influence budget planning.

In order to influence public investment in criminal justice systems for children, it is important to analyse and track local and national budgets to determine if sufficient resources are mobilised, allocated and actually spent to realise the rights of children in conflict with the law. The main issue may not always be about needing more money but rather about ensuring that available resources are deployed efficiently and effectively in a framework that is transparent and accountable.<sup>34</sup> It is also important to stress that, unless diversion is properly resourced, while children might be diverted away from the formal justice system, they may not also receive the rehabilitation that they need.

### *Building confidence in diversion*

In many contexts there is a lack of confidence on the part of the judiciary and the police to make use of diversionary measures available to them. There is a commonly held view that, in fact, diversion is part of child protection which is “NGO work” and does not fall within the mandate of the justice system. One aspect of confidence building in diversion is ensuring that those implementing it are adequately trained; including the police, prosecutors, the judiciary, probation officers, lawyers, social workers, facilitators and mediators. Pilot projects can play an important role in exposing key actors to the reality of diversion, in the expectation that they can then become champions for this approach.

### *Raising awareness about diversion*

Practice, of course, varies from jurisdiction to jurisdiction, but another common obstacle to the use of diversion by the police, prosecutors, or others, is the fear of a loss of public confidence resulting from children being seen to be rewarded for bad behaviour, rather than being held accountable to victims and to society for their offending. One aspect of advocacy that is often overlooked is the importance of working with the wider community to build a consensus for the need for reform, and also on the strategies for carrying out such reform.

<sup>34</sup> For a suggested methodology for undertaking such a task, see Muchabaiwa B.L (2014). *Module 12: Budget Analysis and tracking in Advocacy and Campaigning*, Save the Children and Open University, <http://www.open.edu/openlearnworks/mod/resource/view.php?id=53747>.

The media can be a source of misinformation for the public: “The focus of the media on violent juvenile crime inevitably creates and feeds a feeling of insecurity in the general public.”<sup>35</sup> However, it is also an invaluable source of influence. Governments and civil society should reach out via the media, and via other means, to increase understanding within society of the realities of criminal justice systems for children. This is particularly true for progressive reforms, the success of which are supported by evidence, such as increased use of diversion measures, which are generally less well-known, and even less well understood, than imprisonment and fines. For example, whilst PRI was involved in supporting development of the Juvenile Police Department in Jordan it provided communications and media support to help the relevant government department to promote public confidence in the process as a restorative justice institution. An important message communicated by PRI, as part of its campaign, was that restorative justice can, in fact, be more onerous for a child to undertake than a period in detention, and, further, that such diversion is far more likely to be effective in challenging the offending behaviour of the relevant child.<sup>36</sup>

### *Co-operation and co-ordination*

Another important governance issue is the need to ensure that there are mechanisms in place to support effective co-operation and co-ordination of actors and service providers in different sectors; these may include police, prosecutors, schools, civil society organisations, community volunteers, businesses and health providers. Often this will mean that at the local level a management team is established that is concerned with conducting preliminary assessments of children and co-ordinating the implementation of the diversion regime.

### *An enabling environment for civil society*

There is a core of rights that act as the bedrock of an enabling environment for civil society. These include the rights to access information and to freedom of peaceful assembly, association, opinion and expression—online and offline—which are contained in a vast body of international law and inter-governmental commitments. In recent years, many countries have limited the space in which civil society operates and there is a growing trend for increased state regulation, intervention and scrutiny over civil society activities. A crucial aspect of implementation of the UNCRC involves putting in place the institutional, legal, political and administrative conditions and practices to ensure the existence and effectiveness of civil society.

In order to work with, and for, children in conflict with the law, civil society must have the freedom to operate within an enabling environment. This means that civil society organisations should be able to: register without crippling levels of bureaucracy; receive funding from different sources, including from foreign sources; monitor the treatment of children in detention; meet freely with judges and lawyers and have access to critical sets of data. Without these freedoms, civil society, whether international or domestic, is inevitably compromised in how much it can achieve in promoting the rights of children in conflict with the law and in working towards embedding diversion into criminal justice systems.

<sup>35</sup> Hamilton C. and Harvey R. (2005) *The Role of Statistics and Public Opinion in the Implementation of International Juvenile Justice Standards*, The European Institute for Crime Prevention and Control, [http://www.peacepalacelibrary.nl/ebooks/files/HEUNI\\_zkm3knzwi.pdf](http://www.peacepalacelibrary.nl/ebooks/files/HEUNI_zkm3knzwi.pdf).

<sup>36</sup> PRI (2014) *Promoting Human Rights-based Approach towards Vulnerable Groups in Detention in the Middle East and North Africa Region Impact Evaluation*, <https://www.penalreform.org/wp-content/uploads/2015/08/MENA-SIDA-Evaluation-Final-for-website.pdf>.

## A future for diversion?

Diversion interventions can ensure that children are held accountable for their actions, that the root causes behind their offending are addressed and that they are protected from the harms of involvement in the criminal justice system and of incarceration. Around the world, there is insufficient commitment to diversion as a fundamental component of criminal justice systems for children. Too often diversion is characterised as something that is ‘nice to have’—as a discretionary option to be implemented by civil society. Diversion is not always entrenched within existing systems and is frequently unsustainable without the ongoing financial and technical support of civil society. The normative international standards on diversion are flexible and adaptable to hugely different settings. However, tensions still remain between pressures to implement the international standards set against more localised and domestic pressures. Such pressures can arise from the likes of moral scares and panic regarding child offenders, societal demands for the punishment of such offenders and for protection from such “out of control” children, and from economic constraints.

Mediating and resolving these tensions is highly complex. If we wish to speed up the introduction and scaling-up of diversion within criminal justice systems for children, then it can be helpful to approach diversion from the perspective of the key governance steps that are needed to ensure implementation of diversion measures. These include: (i) legal and policy review and reform, so that diversion is embedded within the legal framework; (ii) allocation of sufficient and effective resources, so that diversion does not fail at the first hurdle, for lack of proper financing; (iii) building up awareness amongst key stakeholders, as well as the general public, to generate confidence and enthusiasm about diversion as a tool for ensuring accountability for criminal acts and (iv) ensuring civil society can operate freely in an enabling environment, to support and monitor governments in the implementation of diversion.

It is imperative to have a toolkit of strong arguments for the benefits of diversion for children, for victims, for society and for the public purse, when pushing for these governance measures. We need to be able to prove these benefits, by ensuring that pilot projects are carefully monitored throughout, using a wide range of different indicators, and that pilot projects are comprehensively evaluated in order to capture the full scope of benefits (if any).<sup>37</sup> Existing projects must also be regularly evaluated in light of compliance with international standards. The forthcoming Global Study on Children Deprived of Liberty<sup>38</sup> will be a useful contribution to the body of evidence and knowledge available around the use and practice of diversion. However, it remains vitally important for civil society and governments to monitor and evaluate diversion measures carefully to ensure they are as effective as possible, to build confidence in diversion, to inform and shape public discussions and to enable the sharing of learning. This evidence is not always gathered or readily available, even though it has the potential to contribute to a calmer and better-informed discussion of how to organise criminal justice systems for children that have diversion at their center.

<sup>37</sup> For a detailed outline of the sort of indicators that could be used see Wernham, M. *Prove it! The need for quality research, documentation and statistics as evidence for advocacy and programming*, First World Congress on Restorative Juvenile Justice held in Lima, Peru, 4-7 November 2009, [http://www.unicef.org/tdad/6mariewernham\(2\).pdf](http://www.unicef.org/tdad/6mariewernham(2).pdf)

<sup>38</sup> On 18 December 2014, the United Nations General Assembly requested for the Global Study on Children Deprived of Liberty to be carried out in Resolution A/RES/69/157 para 52 (d).

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# Deprivation of Liberty of Children: The Importance of Monitoring

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## Abstract

*Although nobody knows the exact figure, it is certain that the number of children deprived of liberty worldwide is extremely high. The deprivation of liberty of children happens in different places and context, and for a number of different reasons. It has been proven that youth confinement has long-lasting deeply harmful effects. Many studies and reports have demonstrated that the risk of children being abused, ill-treated, and even tortured in detention is very high. Accordingly, there is a need for specialised monitoring mechanisms to be implemented during visits to and inspections of all places where children are deprived of their liberty. Such mechanisms must entail a particular preventative focus, centered on children's rights, and are regrettably often lacking. For these reasons, Defence for Children International Belgium, with the support of the European Union, the Council of Europe, and other organizations, and in closed collaboration with an array of partners in Europe, has drafted and published a Practical Guide on monitoring centres where children are deprived of their freedom. The Practical Guide has as one of its aims a reduction in the number of children deprived of liberty, in view of the legal imperatives that the detention of children must be a measure of last resort and implemented for the shortest possible period of time. These fundamental principles must be part of the very aim of monitoring.*

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## Introduction

Youth confinement entails deeply harmful effects both during and after the period in which the children in question spend time in detention. Periods of time spent in detention can affect children not only on a psychological level, in a developmental sense, but also in terms of physical, mental and emotional integrity, and also with regards to their relations with the external world, their acquaintances and especially with their family.

It is also well known that the number of detained children in the world is extremely high, and that they are deprived of their freedom in different locations and for a number of different reasons.

These locations are generally closed to the public, with very few people being granted authorization to gain access. Therefore, little is known about what happens within such places of detention. Risk of abuse and misconduct, on both a large and small scale, is easily realized in such places. Sadly, history has shown that such centers can easily become extremely violent and traumatizing for the children held within them.

It is undoubtable that external oversight visits, whether at random or on a regular pre-determined basis, in these centers, are a key tool for the prevention of torture, inhuman or degrading treatment and other forms of violations of fundamental rights, and further ensure that the rights of those detained are both ensured and protected.

However, although a certain number of national and international authorities do carry out monitoring visits in all types of confinement centers, a study has highlighted the lack of specialized mechanisms for such visits, as well as a lack of a specifically child-rights oriented approach integrated into oversight visitation methodology.

Consequently, the Belgian NGO Defence for Children International (“DCI”) has launched and coordinated a project entitled ‘Children’s Rights Behind Bars’ (“CRBB”), within the framework of which DCI subsequently published the first practical guide on monitoring centers where children are deprived of their freedom, with a particular preventative focus centered on children’s rights.

## The Context of Child Confinement

The number of confined children in the world is extremely high (while an exact number of such children is not possible to ascertain, it is possible to approximate); they are deprived of freedom in various contexts, including: youth prisons; detention facilities together with adults; closed educational centers; orphanages; rehabilitation centers; psychiatric institutions; police stations and closed centers for foreign nationals, amongst others.

There are various reasons for child confinement, which include; suspicion of, or conviction for, the commission of crimes; detention as a result of a threat to the child; the use of drugs or other illicit substances; behavioral problems; breakdown of the family unit; truancy; mental health problems or migrant or undocumented status. As previously mentioned, youth detention is generally acknowledged as harmful to children in numerous respects.

Psychologists note that young people are generally greatly traumatized both upon entry and departure from a place of detention. In fact, regardless of a person’s age, deprivation of liberty exposes those detained to a high risk of suffering discrimination, physical and psychological abuse and other forms of ill treatment. These risks are even more severe in relation to children who are still developing physically, mentally, psychologically and emotionally.

Many children in the world are currently detained in contravention of international regulations which states that detention of children should be undertaken only as a measure of last resort, exceptionally and for the briefest period possible. While estimations have been put forward, comprehensive and reliable data with regards to the conditions surrounding the imprisonment of minors and on the treatment they receive in places of detention is not currently available. In this regard, a global study on detained children is soon to be released<sup>1</sup>.

There are numerous principles and mandatory regulations which are applicable to children deprived of their liberty, which are not sufficiently well known and are even more insufficiently respected.

Although oversight mechanisms exist on national and international levels, a study carried out within the framework of the CRBB project highlighted that the persons tasked with visitation of adult detention centers are often the same persons who conduct visitation of detention places for children. Such persons often lack youth training (with respect to, for example, childhood capacity and education) and knowledge of the rules, regulations, and specific indicators pertaining to children deprived of their liberty, and of how to conduct interviews and effectively communicate with children. In addition, practical child-oriented monitoring tools in prisons are often unavailable.

Inspections of this nature should not all follow the same format, and should account for the divergences in the rights and protections of adults and children in places of detention, and should also incorporate competences and criteria appropriate for various different types of places of detention.

External oversight mechanisms are a way of ensuring that norms are applied appropriately, provided that the oversight is performed by independent bodies, and further provided that it is performed on a regular basis. Oversight is essential to guarantee these rules are applied, to prevent any forms of violence and protect children against any form of abuse.

Relying on research reporting findings from fourteen European countries, the CRBB report's main aim is to consolidate the rights of detained children and more specifically reinforce the work of personnel performing visitation oversight, by providing guidance in the form of the *Practical Guide on monitoring centres where children are deprived of their freedom*.<sup>2</sup>

## The Development of the Project and Its Publication

The CRBB project enjoys rich and diverse support and partnership from participating countries and other actors. In all, some fourteen out of twenty-eight European Union countries are covered by the study by means of the participation of national chapters of DCI, university research centers, NGOs operating in the field of children's rights, ombudsmen for children and national prevention mechanisms, amongst others. Moreover, a group of international experts has supported the development of the project as a whole, which includes representatives from different oversight mechanisms, both of an international (the subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of the Committee against Torture

<sup>1</sup> The relevant project is the result of a United Nations General Assembly resolution adopted in December 2014 at the request of the United Nations Committee on the Rights of the Child, following an initiative by DCI, and which garnered support from over 90 other concerned organizations and UN agencies.

<sup>2</sup> Defence for Children International Belgium (2016), *Practical Guide on monitoring centres where children are deprived of their freedom*, <http://www.childrensrightsbehindbars.eu/fr/realisations/guide-pratique> (versions downloadable in English and French).

and the Committee Against Torture) and national (ombudsmen, national prevention mechanisms, judges, former members of juvenile institutions and experts on children's rights, juvenile justice and monitoring) character. The diversity of participants and range and depth of expertise makes for a rare, valuable and multidisciplinary initiative, which draws upon the input of various jurists, as well as psychologists, social workers, criminologists, tutors, university professors and academic researchers, etc. The aforementioned collaboration, and its depth of field experience and expertise, has proved a significantly conducive factor in terms of the development of the project, in terms of its practical relevance and content.

The project was initiated by a situational analysis which allowed a clearer understanding of how oversight is carried out at the national level. Some researchers consequently focused on the functioning of national control mechanisms in this regard, where they produce external oversight (in other words, where the relevant oversight does not entail inspections carried out by the detaining authorities themselves), and studied their working methods and practices, the tools available to them for monitoring purposes, their effectiveness and the results they have obtained, amongst others.

The study also examines complaint mechanisms available to youths in places of detention, and the extent to which such youths can lodge complaints to report all forms of violations (and whether they do so formally, informally, internally, externally, in written form or oral form and whether such complaints are submitted individually or as a group)

In order to ascertain this, meetings were held with officials concerned in various places of detention, in the form of individual interviews or focus groups. During this process, the majority of relevant places of detention were visited, and interaction with detained children also took place (while careful measures were taken to ensure that such children were in no danger of a reprisal as a result of the relevant intervention).

This research, which was carried out in all 14 countries concerned, yielded a number of national reports. In each report, existing oversight mechanisms are evaluated with a view to identifying best (and worst) practices in line with the entity's defined objectives and practical examples are included along with frequently encountered obstacles or difficulties. Some recommendations were drafted on how to further improve security visits. These elements can be found in a 'European Overview Report'<sup>3</sup> section which sums up all national research used to put together the Practical Guide, which has been the true outcome of the project.

The most relevant finding of the study has been a lack of independence of entities performing oversight. All too often oversight entities have authorities which are contingent on the executive, which are granted discretionally; and they often lack requisite authorities and resources with regards to parameters, such as the number of its members, the means available to it, the monitoring process it can undertake and with regards to the possibility of publication of reported findings and recommendations.

A lack of regular visits is also rightfully identified as an obstacle to oversight efficiency. Infrequent visits, visits which take place in isolation or at irregular intervals, or visits which suffer delay will scarcely work to prevent discrimination, abuse and any other kind of violation including ill-treatment and torture.

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<sup>3</sup> Defence for Children International Belgium (2015), *Children's Rights Behind Bars: Human Rights of children deprived of liberty: improving monitoring mechanisms.*, <http://www.childrensrightrbehindbars.eu/images/Childrens-Rights-Behind-Bars-A-European-Overview.pdf>

Insufficient means (of a financial, human or material nature) was equally raised as a recurring difficulty and harmful obstacle to the correct functioning of the oversight mechanisms studied. Oversight groups mainly consisted of volunteers performing their duties free-of-charge, who were provided neither with a venue for meetings nor with means to develop their tools, train or with which to undertake collaboration. The correct functioning of the oversight mechanism also entirely depends on its members' personal investment in the work of the relevant mechanism, which can also prove to be unreliable and precarious.

Moreover, some countries, such as Belgium, have not yet ratified the Optional Protocol for the United Nations Convention Against Torture (OPCAT) and do not have a national prevention mechanism which could ensure regular visits in all places of detention, including those for children.

Finally, it is clear that in certain contexts, there is a complete lack of external inspections of any kind (at the national level) in psychiatric institutions where children are often detained, either by their consent or against their will.

## The Content of the Practical Guide

The practical Guide on monitoring places where children are deprived of liberty was published in such a manner that it can also be consulted by people with no monitoring experience, or who have never visited such places of detention, as well as by oversight experts who wish to adapt their own methods when carrying out such visits. While possessing a theoretical and descriptive dimension, the Guide has the potential to be of increasing practical relevance the more it is used.

The beginning of the Guide sets the stage with fundamental questions: what are these places of detention? Who are the children whose liberty is deprived? What are they particularly vulnerable to? What are the principles and objectives of monitoring, and what does monitoring require in order to be efficient? What are the different relevant oversight bodies at national, European and international levels?

Next, the Guide develops its practical methodology, which is laid out by giving answers to the following questions: how is a monitoring strategy established? How can a visit be properly prepared, carried out and followed up upon? What is the appropriate duration for different types of visits? Who should visitation teams be composed of and what kind of training should such persons receive? What must one pay particular attention to during such visits? What specific modalities should be used in such visits?

An evaluation tool was also included at the end of the Guide, in order to help groups performing visitations gauge the degree to which children's rights are respected in a given place of detention.

The Guide stresses an oversight and monitoring methodology based on a 'rights-based approach', meaning that the checks that will take place will be in full compliance with the norms and rights recognized as applicable to detained children. All aspects of the Guide within the context of deprivation of liberty refer back to applicable norms and principles.

Let us take, for example, access to lawyers, a right which should be inspected via external oversight. Applicable Norms and principles stipulate that children should have the right to a lawyer, some form of legal assistance or a legal counsellor. Such representation must also be afforded free of charge and confidentiality in its regard must be guaranteed.

In the Guide, these principles are formulated in the form of questions: '*Do children have access to a lawyer/legal counsellor/legal assistant? Is this effective, confidential and free of charge?*' A series of detailed

indicators feature under each question, to allow the oversight groups to collate all responses which will help them to evaluate whether or not the rights are respected:

The indicators are divided into three parts:

1. The people who should be questioned in order to collect information (the managers and staff of the place of detention, the children, the lawyer, parents or tutors, as applicable...).
2. Aspects to be considered during the visit, such as paying attention to every part of the place of detention, without merely looking at the spaces where the person conducting the visit has been lead to by the detaining authorities. The behavior of individual persons, both in general and in the presence of the oversight group, equally to be observed.
3. Verification and corroboration of information by means of written documentation (registries, archives, reports...).

Finally, the Guide's conclusions provide a series of indications on how to evaluate the existence, functioning, accessibility and efficiency of ways to issue complaints in connection with violations of the rights of children, and a series of additional conclusions on requisite elements for effective oversight. The Guide contains several annexes, one of which explains ways to interview children and another of which contains a charter for child protection, recommended for adoption by groups performing oversight.

## How to Use the Practical Guide

The Guide follows a practical and manageable format. It is aimed at a varied readership, and it consequently has the flexibility, on the one hand, for adaptiveness to varying circumstances, and, on the other hand, can be consulted by persons with differing levels of knowledge, such as professionals experienced in oversight, as well as those who are new to the subject.

The Guide is aimed at a diverse audience: professionals involved in oversight visitation; personnel of existing mechanisms at national and international levels; judges and other legal representatives; NGOs; administration services; inspection services; ministers and Members of Parliament, as well as those who will report the visitation findings to parliamentary committees and ensure follow-up on recommendations in legislative or regulatory texts. This last aspect of the Guide is significant insofar as it aims towards informing substantive and institutional changes.

Oversight should preferably take place in a formal manner within the framework of monitoring visits, but it can also be informal. It is of particular importance that oversight teams incorporate personnel with different fields of competence; the more these different representatives communicate and collaborate, the more effective the oversight work will be.

One must also consider that this Guide has the potential to be used by children in places of detention as an auto-evaluation tool, which can have a highly positive effect insofar as it constitutes, for such children, an autonomous act on their own behalf, and not something imposed by an external figure.

Finally, the Guide is also intended to serve as an additional training tool for monitoring experts.

## Project Follow-Up

Continued promotion of the Guide, and the raising of awareness of the Guide is important to encourage its use. It has therefore been presented to the Children's Rights Committee of the United

Nations, the United Nations Sub-Committee for Torture Prevention, the Council of Europe's Committee for Torture Prevention, and at the national level in many countries, as well as many pertinent conferences.

The Guide is currently available in French and English. However, translation into other languages is expected. Translation into Italian, Polish, Hungarian, Russian, Spanish and German have also been requested. Some training tools and modules will be made available, together with adaptations for other regions in the world (to take into account regional standards applicable to Africa, the Middle-East and Latin America).

## Conclusions

To the extent that the Guide seeks to contribute to the improvement of living conditions for children and to ensuring their rights when they are detained, the Guide also aspires to contribute to a reduction in the number of children in detention, as a whole.

How can the persistence of child detention and its severe affects best be explained, despite the myriad of rules and principles which aim to regulate and limit such detention, and notwithstanding all that is known and which arises from studies and reports with regards to the harmful effects of detention on children?

These persistent severe effects are undoubtedly the result of a number of factors. First of all, the decision to lock up children is all too often the first and only solution considered by judicial and administrative authorities. It is therefore necessary to focus on the problem from the perspective of the discretion of the entity mandating such confinement, be it a judicial authority finding for punishment following conviction for a criminal act, or a doctor aiming to protect the child, or a public authority deciding the fate of a child without a legal residence permit (whether accompanied by family members, or not). Much still needs to be done before viable alternatives to detention can be given priority in a systematic way that would ensure such alternatives are made legal and that they can be extended competently and in a manner which is both sufficient and accessible. This should be the subject of continued focus.

Another determinant factor arises from whether a minor in a given jurisdiction is subjected to a specialized juvenile justice system, or to the same justice system as adults.

Finally, not all states conform to applicable regional and international human rights laws to the same extent, and there is consequent divergence in the extent to which states resort to child confinement.

As soon as children are imprisoned, a lack of balance between children and adults always prevails. This results in a power imbalance which favors one side, and which makes the other side vulnerable, and which generates a risk of abuse of power. To fight against this imbalance and these harmful effects, a shift in modes of thinking amongst legislators and detaining authorities alike is required.

Oversight generally augments transparency. Where children are entrusted to institutional care, in public institutions for the most part, a responsibility arises for the relevant authorities to take care of them and respect their rights. More transparency and better training will help achieve such respect.

Only in this way shall genuine respect of rights of children deprived of their liberty be achieved. The Guide intends to contribute to such effective realization.





# Model of Psychosocial Intervention for Children Deprived of Liberty in a Juvenile Justice Framework: Efficiency Through International Standards

FRANCISCO LEGAZ CERVANTES\*, JUAN JOSÉ PERIAGO MORANT\*\*, AND AMPARO POZO MARTÍNEZ\*\*\*

## ABSTRACT

*It is essential that public, non-profit, and private entities responsible for deprivation of liberty within juvenile justice systems comply with international standards and promote mechanisms that allow for continuous assessment of the achievement of objectives pursued by judicial measures. In this regard, the entities that manage facilities for the deprivation of liberty of children must have the achievement of the proper rehabilitation and reintegration of children as their main objective—that is to say, the development of comprehensive educational programmes that allow children to overcome factors that caused or contributed to juvenile criminal behaviour.*

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## 1. Introduction

Taking into account international standards and the legal, policy, and regulatory frameworks that uphold juvenile justice systems, this article establishes the basic elements of a child-friendly educational model for children in detention, which prioritises their rehabilitation and reintegration. The model is a methodology of work based on the best interests of the child, tailored to his or her individual needs. The foundations of this model lie in the creation of a safe and structured environment, as well as in behavioural, cognitive, emotional and relational lines of action, which should be supported by a motivational structure. It is organised in six phases of intervention which will be described hereafter.

The article begins with an analysis of the main international rules concerning the detention of children in conflict with the law, as well as the principles deriving from these rules. A proposal is then made for the development of a child-friendly educational model of psychosocial intervention for young offenders who are deprived of liberty. Finally, the article addresses the importance of establishing evaluation processes of such intervention models to ensure, through objective data, their quality and efficiency.

## 2. Deprivation of Liberty in Juvenile Justice Systems

### *a. Overview of international standards*

The question of what constitutes an adequate response to the offending behaviour of children in conflict with the law has been a constant subject of debate within international institutions and amongst lawmakers in many states. The objective of all juvenile justice systems should be to provide effective and proportional responses to both the crime committed and the individual circumstances of the offender in question, while ensuring his or her wellbeing and the utmost respect for his or her rights as a child.

Historically, the legal systems of several states have upheld the need to provide distinct judicial responses and treatment to young offenders. This requires the establishment of a specific system of criminal responsibility for children and young people that differs from that used for adult offenders. This constitutes the starting point for the development of an effective child-friendly educational model of intervention.

A specialised judicial system for young people stems fundamentally from the special characteristics of the individuals involved (the children), whose state of development and physical and mental maturity means that they need special care and protection. Consequently, any response of judicial or extra-judicial nature, such as mediation or community and family group conferencing, should be guided by the best interest of the child, aiming to promote the children's personal development, improve their competences, life skills, and vocational training in order to achieve their successful social reintegration and avoid recidivism.

Deprivation of liberty, used as a last resort in the most serious cases of criminality, has also evolved significantly within domestic legal systems. Initially, detention was used primarily for retributive purposes. Nowadays, detention has increasingly become oriented towards achieving education and the proper reintegration of an offender within a community. These goals constitute the key element for the development of an appropriate child-friendly intervention model.

The educative and re-integrative purposes of the deprivation of liberty have become incorporated into domestic laws and have become key focus points for international organisations. International organisations are particularly interested in the wellbeing of children, and their work focuses on improving juvenile justice systems in order to offer age-appropriate and tailored solutions for the treatment and rehabilitation of child offenders.

The United Nations (UN) has paid special attention to young people in conflict with the law and to ensuring compliance with the principal objectives of the Convention on the Rights of the Child, by means of the creation of legal texts, reports, and studies by its principal bodies, the dedication of resources, materials, and staff to these ends. The main legal instruments on the protection of the rights of young people deprived of their liberty are now set out in a series of UN treaties, including:

- ~ The International Convention on the Elimination of All Forms of Racial Discrimination (1965).
- ~ The International Covenant on Civil and Political Rights (1966).
- ~ The International Covenant on Economic, Social and Cultural Rights (1966).
- ~ The Convention on the Elimination of All Forms of Discrimination against Women (1979).
- ~ The Convention against Torture and other Cruel, Inhuman or Degrading Treatment (1984).
- ~ The Convention on the Rights of the Child (1989).
- ~ The Second Optional Protocol to the International Covenant on Civil and Political Rights (1989).
- ~ The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990).
- ~ The Optional Protocol of the Convention on Torture (2002).

Additional international legal instruments further regulate issues related to deprivation of liberty, including that of children:

- ~ The Nelson Mandela Rules (former Standard Minimum Rules for the Treatment of Prisoners) (UN General Assembly resolution 70/175, December 17, 2015).
- ~ The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (UN General Assembly Resolution 40/34, 29 November, 1985).
- ~ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN General Assembly Resolution 43/173, 9 December, 1988).

- ~ The Basic Principles for the Treatment of Prisoners (UN General Assembly in Resolution 45/111, 14 December, 1990).
- ~ The UN Standard Minimum Rules for Non-Custodial Measures (Tokyo Rules) (UN Assembly General Resolution 45/110, 14 December, 1990).
- ~ The Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters (UN Economic and Social Council Resolution 2002/12, 24 July, 2002).
- ~ The UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) (UN General Assembly Resolution 65/229, 16 March, 2011).

It must be pointed out that a series of rules and standards refer specifically to the deprivation of liberty of children. These include:

- ~ The UN Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) (UN General Assembly Resolution 40/33, 29 November, 1985).
- ~ The UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) (UN General Assembly Resolution 45/112, 14 December, 1990).
- ~ The UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules) (UN General Assembly Resolution 45/113, 14 December, 1990).
- ~ The UN Guidelines for Action on Children in the Criminal Justice System (Vienna Guidelines) (UN Economic and Social Council Resolution 1997/30).
- ~ The UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (UN Economic and Social Council Resolution 2005/20).

There are significant differences between the juvenile justice systems of different states. As a result, responses to children's antisocial behaviour are not always homogenous. Nevertheless, over the years, the aforementioned rules and UN standards have provided a clear direction in terms of expectations for national juvenile justice systems.

Although some of the aforementioned standards are not legally binding, they constitute major efforts and key contributions to the construction of more child-friendly and efficient criminal justice systems, in three ways. First, they can be used at the domestic level by states to review and improve legislation in the field of juvenile justice. Second, they can help states in the development of local and regional strategies. Third, at the supranational and international levels, the rules and standards constitute a clear example of 'good practices' that states can adapt to their respective national needs and implement domestically.

Several UN organs have been particularly active in promoting good standards regarding juvenile justice, and particularly on deprivation of liberty: the Human Rights Council (HRC), the Office of the High Commissioner for Human Rights (OHCHR), the UN Committee on the Rights of the Child (CRC), the UN Office on Drugs and Crime (UNODC) and the United Nations Children's Fund (UNICEF). The Human Rights Council, for instance, affirmed its commitment to effectively integrate children's rights into its work, and has conducted a series of thematic debates on this topic, some of which focused on juvenile justice and deprivation of liberty ("Report of the Human Rights Council on its nineteenth session", of August 16, 2012).

The recent "Report by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment", of March 5, 2015, constitutes an important piece of analysis on the current state of respect for children's rights in detention and provides insightful recommendations to improve the *status quo*. In this report, the UN Special Rapporteur expresses concern for the growing

public perception that juvenile crime is a rising trend. This perception, usually the result of information provided by the media based on a few serious cases, can influence political discourse and lead to the adoption of legislation on the treatment of juveniles in conflict with the law that takes an inappropriate approach, and is often disproportionately punitive in nature.

General Comment No. 10 of the UN Committee on the Rights of the Child, 'Children's Rights in Juvenile Justice', of April 25, 2007, constitutes an important source of guidance and recommendations for Member States in their efforts to establish proper juvenile justice systems that comply with the Convention on the Rights of the Child and provide appropriate responses to offenses committed by children.

All those rules and UN standards provide a general legal framework for the regulation of children deprived of liberty. Under this framework, states are legally obliged to provide adequate safeguards for children deprived of liberty, and to provide responses to offending behaviours that comply with the almost universally ratified Convention on the Rights of the Child.

Against this background, it is fundamental to establish strict compliance mechanisms in accordance with the international corpus of laws on the rights for children deprived of liberty and the minimum standards they establish. This is in fact the starting point for the construction of child-friendly juvenile justice systems worldwide. Similarly, it is desirable that existing educational models are adapted to the requirements of international standards and integrated into juvenile justice systems favouring the education and proper reinsertion of the child into his or her community.

#### ***b. The importance of having a distinct juvenile justice framework in every country***

Before any intervention model dealing with young offenders deprived of their liberty can be developed, legislation regulating the criminal responsibility of children should be introduced. It should establish a separate framework for juvenile justice while complying with international standards on children's rights.

Such a framework should first establish that acts that are not punishable when committed by an adult cannot be punishable when committed by a child. Therefore, the only acts that can constitute offences under the criminal juvenile justice system are those which also constitute criminal offences under general criminal law.

It is also vitally important to distinguish between criminal behaviour and antisocial behaviour which does not qualify as a crime and should not come under the juvenile justice system. Certain behaviours that are linked to behavioural or socio-economic problems, such as non-attendance at school, begging, failure to comply with timetables established by parents, lack of discipline at home, running away from home, etc are sometimes categorised as 'status offences' in Anglo-Saxon systems. Such behaviours should be met with efforts to divert children from the formal justice system to institutions aimed at their protection and education, so that steps may be taken to address the root causes of such behaviour. In this way, confusion will be avoided between the sphere of the retributive and educational juvenile penal system and that of the protective and educational child welfare services.

Children's offending behaviour should only come under the jurisdiction of the criminal juvenile justice system in a limited number of cases, on the basis of its severity. The response to offending behaviours should be proportionate to the individual circumstances of the crime and of the child, and should address the damage and the violated legal right. Only in exceptional and serious circumstances should juvenile justice respond with the most severe punishment of deprivation of

liberty. It is clear from all international standards that deprivation of liberty is a measure of last resort and that alternative measures should be employed whenever possible.

Juvenile justice, in comparison with general criminal justice, should be fundamentally educational in nature, and should be based on the crucial distinction that its sanctions do not follow the same objectives as adult criminal justice. Accordingly, it appears necessary to establish a separate framework for juvenile justice within the domestic legal systems of states, while still providing for the standard procedural guarantees recognised as universal human rights. Therefore, the protection of the best interests of the child requires that traditional aspects of criminal sanctions, which for adults are largely punitive, be replaced by appropriate measures, such as: mediation, probation, community services, etc., which are grounded in the necessity of providing education for young offenders. On this basis, a series of appropriate measures should be established and made available, allowing for the involvement of the young offender in all activities which will allow his or her reintegration into society and preventing recidivism. Taking this principle as a starting point, the fundamental objective of deprivation of liberty as a sanction in juvenile justice systems should be the prevention of future criminal behaviour by the child. Therefore, the successful reintegration of the child into his or her community requires the use of efficient intervention models.

In many states, due to the complexity of criminal codes, they are accompanied by subsidiary legislation and further regulations adopted in order to facilitate the adoption of juvenile laws. Such legislation is fundamental to the establishment of efficient intervention models that are tailored to ensure strict compliance with the law, while at the same time thoroughly detailing all the judicial procedures, functions, and competences of relevant bodies and actors.

Regarding this need for a separate juvenile justice framework and taking into account the different considerations outlined in the *“Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment”*, of March 5, 2015, we will briefly highlight some key aspects of the report, which need to be considered when regulating the deprivation of liberty of children:

- The establishment of a minimum age for criminal responsibility (MACR) of at least 12 years, with the possibility of it being raised up to 18 years by national legislations, and the establishment of adequate and tailored educational responses outside of the framework of criminal justice systems for cases involving a child offender who has not reached the MACR. Such responses must be established within the framework of child protection laws rather than juvenile justice, thereby avoiding generating the perception of impunity and consequently social pressure.
- It is crucial to guarantee that children in conflict with the law are sentenced within the juvenile justice system of the state and never under the criminal justice system for adults. This includes a prohibition on laws, policies, and practices allowing children to be subject to sentences and punishments applicable to adults, such as the death penalty or life imprisonment.
- It is equally important to guarantee that detention will never be used as a form of punishment against migrant children. Accordingly, under no circumstances should migrant children be deprived of their liberty unless they have committed a crime, it being agreed upon that the act of crossing a border does not amount to a crime. Public administrations should establish adequate models for guardianship that do not result in the deprivation of liberty of migrant children under juvenile justice law.
- Children should not be detained on the premises of law enforcement establishments for longer than is legally permitted by the juvenile justice framework and should always be sepa-

rated from adults. Police stations are custodial units and are not responsible for measures involving the deprivation of liberty, whether provisional or definitive. Children should be brought before a court as required by law and should be tried with procedural guarantees. Therefore, legal counsels should be present during police interrogations and judicial proceedings. Juvenile criminal laws must also determine the maximum amount of time for which a young person can be deprived of their liberty, as well other provisions that concern the time period of pre- and post-trial detention or any particular circumstances and procedures which could result in the shortening of the period of deprivation of liberty.

- Under no circumstances should places for the detention of children be referred to as prisons or penitentiaries. These spaces should be considered and conceived as educational spaces that allow models of educational intervention to be carried out. The use of the architectural models for adult prisons and of models for correctional intervention designed for adults can greatly hinder the successful application of an intervention model that seeks to protect the best interest of the child.

All juvenile criminal laws must be accompanied by standards and rules that provide for different responses to children's offending behaviours, in terms of the imposition and execution of sentences. These regulatory standards are particularly necessary in the context of deprivation of liberty and are often the real instrument that guarantees respect for children's rights in cases involving deprivation of liberty. Such standards, which should be passed by the relevant legislative authority, should clearly prohibit confinement in rooms or so-called isolation cells, corporal punishment, and strip searches of children. These standards should also regulate the use of restrictions or force when a child's behaviour poses a threat to him- or herself or to others, as well as contact between the child and their family or legal representatives. Ultimately, such prohibitions and rules should be set out in the regulatory framework that regulates the day-to-day life of juvenile detention centres. This can, in effect, prevent recourse to improvised regulations lacking sufficient reflection and judgement arising from the need to provide an immediate response to the behaviour of a child. Likewise, public administrations should implement decrees setting out minimum standards for the architectural conditions of detention centres.

The deprivation of children's liberty should always remain a public service. This does not mean that the service cannot be provided by non-profit or private entities, as long as service ownership remains public. This service, whether provided by private or civil service employees, should always be subject to juvenile justice legislation, applicable regulations established by the relevant public authorities and adequate supervision by public authorities.

Monitoring and evaluation procedures should also feature in the appropriate regulation, clarifying the role of judges, public prosecutors, the public administration and ombudsmen in carrying out these procedures. The implementation of monitoring mechanisms is crucial to prevent ill-treatment and ensure that centres are operating in accordance with national and international standards and requirements. Monitoring should also help in the planning of yearly improvements for each centre.

Lastly, reference must be made to the importance of ensuring the appropriate provision of resources and staff in all places where children are deprived of their liberty. It is vitally important that professionals are meticulously selected with clear knowledge of the specific educational project to which they will be assigned. The objective should always be to select mature, professional adults, capable of establishing an appropriate relationship with the children, and who will help



to promote their growth and personal development. Continuous training and specialisation will always be a key factor for all those who are involved with young offenders, whether policemen, judges, prosecutors, lawyers, guards, educators, teachers, instructors, psychologists, or doctors, among others.

### 3. Psychosocial intervention model for children deprived of their liberty

Taking the aforementioned international standards as a starting point, interventions in the cases of children deprived of their liberty must be fundamentally educational in nature, tailored to the individual needs of each child, and involve the family, school and the community (UNODC, 2013). Thus, the prior assessment of psychosocial characteristics of an individual child is a vital requirement for intervention, which must take into account the care, protection, and support of the child's social, educational, psychological, medical and physical well-being (Beijing Rules, 1985). The type of intervention carried out will determine whether a successful reintegration of the child into his or her community is possible (Scott & Steinberg, 2008).

Various international standards stress that education and the successful social reintegration of children are the ultimate aims of sentences involving deprivation of liberty (UNODC, 2013). Accordingly, education in this context is defined as a process of intervention into both the deficiencies and needs of the child, which caused or contributed to the criminal behaviour, as well as the protective measures which can favour positive developments. Furthermore, together with the development of an individualised treatment programme, it is also necessary to strengthen the links of children to their family and community. Indeed, the aim is to achieve successful social reinsertion, and actions carried out in the fields of education, therapy, schooling, professional training, and labour placement are crucial to enable the child to take on a constructive and productive role in society (Beijing Rules, 1985).

In light of the above, measures involving juvenile detention should always have the development of a comprehensive and individualised educational intervention that is tailored to the child's level of maturity, removes all risk factors that encourage criminal behaviour, and promotes protective factors to enable successful social reinsertion, as their objective.

Such intervention must be carried out in a safe and structured environment that favours personal development and satisfies the individual and social needs of the child, while also providing stability and confidence. This means that measures which involve the deprivation of liberty should be carried out in detention centres specifically designed for children, facilities which can provide for their needs and guarantee their rights during the implementation of the measure.

Furthermore, these centres must guarantee the protection of children from harmful influences and from risk situations (Beijing Rules, 1985). In order for them to do so, the existence of both an educational project and internal set of regulations is crucial. Such a project should be undertaken by a multi-disciplinary team of professionals with specific training in juvenile justice, and internal regulations ought to structure and guide the different measures carried out, as well as the periodical evaluation of their effectiveness and of the youths' situations, thereby complying with article 25 of the Convention of the Rights of the Child.

Taking into account the aforementioned considerations, a successful **model of psychosocial intervention** should have as its starting point a safe, fair, and educational background, implemented through the coherent organisation of space, time, activities and persons. Any intervention developed in this framework should be based on four main lines of action:

- The behavioural line of action which favours the acquisition of behaviours that facilitate coexistence with other people.
- The cognitive line of action which tackles any cognitive deficits presented by the child, and which prevents the consolidation of patterns of criminal behaviour.
- The emotional line of action which, from a therapeutic point of view, intervenes in emotional aspects that favour the adequate personal development of the child.
- The relational-emotional line of action which establishes a model of relations and interactions between children, between professionals, and between professionals and children, basing interactions on mutual respect and trust.

These four lines of action should be supported by a motivational structure which favours the process of giving responsibility to children, which involves them in the process of change, and progressively grants them autonomy. Programmes should be developed and designed to reduce the risk factors identified in the initial assessment and to strengthen the pre-existing factors that could facilitate the child's successful reintegration.

This framework of child-friendly intervention, implemented in places of deprivation of liberty, is carried out by means of a motivational system that integrates the aforementioned lines of action and programming, and must adhere to the following phases of intervention with the child.

#### *a. Admission*

This first phase of the psychosocial intervention model refers to actions that are carried out immediately after the admission of the child to a detention centre. As previously mentioned, admission must be carried out in accordance with the law, safeguarding the protection of fundamental rights and basic procedural guarantees, in accordance with Article 40 of the Convention on the Rights of the Child.

Therefore, at the time of admission, children must be received by technical staff who will provide them with an explanation of their legal situation, tailored to their individual level of maturity and understanding. The focus ought to be on creating an environment of trust and security, thus reducing the psychological and emotional effects of detention. It should also be pointed out that different studies have demonstrated that cognitive functions, and in particular those regarding reasoning, planning, problem solving, and impulse control, among others, are not fully developed until 20 years of age (Johnson, Blum, & Giedd, 2009; Scott & Steinberg, 2008), thus implying that moral development is also not complete during adolescence (Taber-Thomas et al., 2014). For this reason, it is necessary to dedicate the first moments of admission to ensuring that children understand what detention in the centre implies, and why their behaviour has led to its imposition.

Subsequently, written information must be provided outlining the children's rights and obligations, internal regulations governing the functioning of the detention centre, and information on all aspects pertinent to the carrying out of sentences and the organisation of day-to-day life. This information should be provided in an easy and accessible language and in the mother tongue of each child, so as to facilitate comprehension.

To conclude, it is essential to ensure that the child is aware of his or her judicial and administrative situation and understands the consequences of detention. In this regard, the involvement of a tutor or mentor, as used in some intervention models, is of great importance. From the moment of admission, this professional becomes a point of reference for the child, to whom any queries, prob-

lems, doubts, or needs that arise as a result of detention may be directed, thereby offering much more personalised care and support during the first few days of detention helping to ease concerns or uncertainties often experienced by the child.

### *b. Initial assessment*

Every intervention involving children deprived of liberty must commence with an in-depth assessment of each individual child. This allows for the detection of risk factors, as well as protective factors, that the child may have, allowing for the identification of the main objectives of individual treatment programmes.

This evaluation must be carried out by a team composed of professionals drawn from different areas of expertise, encompassing medical, psychological, social, familial and educational assessments. The medical assessment must be carried out immediately upon admission. Subsequently, and with the least delay possible, the child is to be interviewed and evaluated for the compilation of a psychosocial report which will determine the treatment program to be followed in his or her particular case (Beijing Rules, 1985). Whenever the circumstances allow, interviews are to be carried out with members of the child's social and family circles, as a way of supplementing the information provided. Equally, all previous documentation that exists on the case is to be revised in order to achieve a comprehensive vision of the case, with a view to facilitating understanding of all aspects of the child's life (medical, psychological, social, familial, and educational).

### *c. Development of an individualised treatment programme*

Children deprived of their liberty must be able to access educational, emotional development, and cognitive-behavioural programmes that are suited to their intrinsic characteristics and aim at alleviating the risk factors identified during the initial assessment. Approaches that allow for the involvement of the child, their family, and their community in the development of such programmes are recommended (UNODC, 2013).

Moreover, the programmes mentioned above should be based on explanatory theoretical models of the offending behaviour and also on intervention techniques whose efficacy has been shown (Martínez-Catena & Redondo, 2013). In this regard, although there are numerous approaches on which traditional treatment programmes have been based, several must be given particular mention: *Social Learning Theory* (Burguess & Akers 1996), *Cognitive-behavioural model* (Maciá, Méndez, & Olivares, 1993) or *Multisystemic Therapy* (Edwards, Schoenwald, Henggeler & Strother, 2001). Currently there is a clear tendency of choosing as a reference model *The Risk-Need-Responsivity Model* (Andrews and Bonta, 2006, 2010), as it displays the greatest conformity with the guidelines of the UNODC by insisting on the need to direct intervention towards the eradication of risk factors already identified (UNDOC, 2013). This model directly links intervention to the results of the initial assessment, identifying the aims of treatment for young offenders (principles of risk, necessity, and responsiveness) on the basis of the risk factors already identified.

Once the child has been assessed, treatment must be carried out in an individualised manner, firstly by defining the objectives for each child, as well as the way in which the attainment or non-attainment of these goals will be evaluated. Subsequently, actions must be designed which will be carried out in order to achieve these objectives, and for that matter, alleviate risk factors and strengthen the protective factors identified in the initial assessment. The actions implemented must focus on health, psychology, education, work, family, and the social sphere, as appropriate,

as a way of guaranteeing a comprehensive action that promotes the full development of the child and that favours his or her reintegration.

#### *d. Review of the treatment programme*

While continuously respecting international standards on the subject, it is also essential to periodically evaluate the completion of the objectives identified in the individualised treatment programme and the circumstances relevant to his or her placement (Article 25 CRC, 1989). Therefore, in order to be able to carry out a thorough assessment throughout the treatment programme, objectives must be accompanied by standardised tools for data collection (tests, scales), indicators for the achievement of the objectives and expected outcomes.

The review of the treatment programme allows the efficiency of the programme (level of achievement of objectives) and its effectiveness (the results of the implementation of the treatment programme) to be gauged, offering opportunities to modify the actions initially planned, or to intensify the intervention in specific areas in which the results do not match the expectations.

#### *e. Preparation for release*

Prior to release, it is essential to emphasise the need to progressively increase the autonomy and responsibility of the children as well as their participation in their social environment in order to favour the establishment of stable external links that favour social reintegration once detention has ended.

In the final stage of detention, efforts should be made to consolidate the skills acquired by the child during detention, and to prepare his or her for release from the centre, with special importance being given to training and occupational work-related courses and activities as a way of promoting tailored social reintegration. The prevention of reoffending is also of great importance, with the purpose of allowing the child to generalise the protective factors developed in everyday situations, so that the child can acquire mechanisms to cope with risk factors which could be present in their family and social environment.

#### *f. Post-detention follow-up*

It has become clear that the period immediately after detention is critical as the young offender no longer has the structure and supervision provided by the detention centre. In some cases, the young person may continue to display risks of recidivism and/or return to social or family environments that hinder their reintegration. With this in mind, it is essential to integrate a final phase focusing on post-detention follow up within psychosocial models of intervention (UNODC, 2013).

In this context, some countries have juvenile justice systems that guarantee a follow-up period after the detention, thereby encouraging the implementation of this very important phase to achieve the full social reintegration of the child.

## **4. The need for evaluation of intervention models for juveniles deprived of liberty**

The evaluation of interventions conducted in the field of juvenile justice involves the establishment of an empirical data collection mechanism, in order to analyse the effectiveness of treatment

programs. Pertinently, international law stresses the need to carry out structured and systematic evaluations.

The Interagency Panel on Juvenile Justice of the UNODC (IPJJ), in its report “Criteria for the Design and Evaluation of Juvenile Justice Reform Programmes” (2011), highlights the importance of applying clear criteria in quantifying the direct effects of interventions carried out in the field of juvenile justice, aiming at the development of a comprehensive approach in order to assess the impact that different intervention models have on young offenders.

In this report, the IPJJ uses the definition of ‘evaluation’ of the Committee of Development Assistance of the Organisation for Economic Cooperation and Development (2002), “An evaluation is an assessment, as systematic and objective as possible, of an on-going or completed project, programme or policy, its design, implementation and results. The aim is to determine the relevance and fulfilment of objectives, developmental efficiency, effectiveness, impact and sustainability. An evaluation should provide information that is credible and useful, enabling the incorporation of lessons learned into the decision-making process of both recipients and donors” (p.21) adapting it to the evaluation of interventions developed in the field of juvenile justice. With this in mind, different interventions with children in conflict with the law should meet five evaluation criteria: relevance, effectiveness, efficiency, impact, and sustainability.

Following the **relevance** criteria, on the one hand the intervention must be adjusted to international standards and ensure compliance with the rights of children in conflict with the law.

On the other hand, the intervention objectives must be formulated according to the needs of beneficiaries, including the existence of a causal logic between the objectives and the design and selection of activities to be carried out. Thus, the main objectives ought to refer to accountability, rehabilitation, and reintegration of the child in a broad sense, as well as to the elimination of individual risk factors that prompted the involvement of children in the juvenile justice system.

Finally, the objectives of the intervention should only be formulated after conducting a structured, comprehensive, and multidisciplinary assessment, focused on identifying the criminogenic needs of the child.

The **effectiveness** of the intervention refers to the extent to which the desired objectives have been achieved. In evaluating the achievement of objectives, the objectives must have incorporated associated instruments, mechanisms for verification, indicators, criteria and expected results. To the maximum extent possible, the instruments for the evaluation should be standardised and scientifically validated tools, and indicators should be based on them as a way to facilitate pre- and post-comparison as well, so as to encourage the development of criteria that facilitate a thorough and quantitative evaluation and assessment of the results. In this sense, risk assessment instruments used in some structured intervention models facilitate both the initial identification of the risk factors associated with criminal behaviour, as well as the formulation of objectives and their regular evaluation.

An **efficient** intervention is one that uses its resources in an adequate way, towards the generation of desired outcomes. A way of guaranteeing the efficiency of interventions with children deprived of liberty is to ensure that detention centres have quality management systems that evaluate management processes and operating procedures.

That said, in achieving transparency in internal management of detention centres, as well as in evaluating the needs of children in detention, it is paramount that states design independent bodies responsible for evaluating the efficiency of these institutions.

The criterion of **impact** quantifies the general consequences of the intervention, both negative and positive. In response to this evaluation criterion, there is a need for the continuation of assessments regarding the effects of treatment programmes targeting those deprived of liberty once their period of detention concludes. Follow-up after detention periods and the systematic collection of data (especially related to recidivism) can prevent future negative effects of the intervention and increase its effectiveness, signalling out which programs have revealed major positive effects.

The criterion of **sustainability** is closely linked to that of impact, signalling the likelihood that positive effects of the intervention continue over time, once detention has been completed. Generally, the continuation of such benefits depends on the number and quality of social resources available for this purpose, and is largely subject to the economic investment made by states.

Therefore, in order to guarantee the achievement of the objectives, as well as reduce recidivism in children in conflict with the law, it is important that states make an effort to economically invest into external resources targeted at children after the end of their detention period.

## 5. Conclusions

It is essential that juvenile justice systems take the strict compliance of international standards that lay down minimum obligations as their point of reference. Similarly, it is necessary that states have, at their disposal, laws which create a separate framework for juvenile justice. Such laws, which define and regulate juvenile criminal responsibility, will unambiguously determine the aim, scope and extent of the juvenile justice system. As such, the distinction between juvenile justice and other legal areas such as child protection and the general criminal system will be clear.

Once a distinct juvenile justice legal framework is in place, regulations or a body of rules is also required in order to help develop and detail the law. These rules contribute to the establishment of efficient models of intervention oriented towards strict compliance with the law and thoroughly detail all aspects, procedures, tasks, and competences of the involved organisms and actors.

Taking this as a starting point, it is then essential to establish intervention models which take into consideration the severity of the crime committed, the individual circumstances of the child, and his or her stage of development. Such models should be tailored to the child's needs and shortcomings. Their primary aims should be the education and subsequent reintegration of the child into his or her community. To this end, it is necessary to carry out an initial individual assessment, on the basis of which an individualised treatment programme will be developed, intervening in all areas that affect the child and establishing objectives that can be scientifically quantified to periodically assess their achievement and effectiveness.

Therefore, it is also necessary to have a follow-up system that allows for the continued and systematic review of interventions carried out with children deprived of their liberty as a means of evaluating the efficiency and sustainability of the model. Accordingly, the indicators of this assessment system should adhere to the minimum international standards and focus on the achievement of the ultimate aim of the intervention: the education and reintegration of children in conflict with the law.

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# III.

## Children Deprived of Liberty in Non-Traditional Contexts

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# The Principle of No-Detention of Migrant Children in International Human Rights Law

PABLO CERIANI CERNADAS\*

## Abstract

*This paper examines how International Human Rights Law regulates the right to liberty of children in the context of migration policies and practices. Firstly, it argues that depriving a child's liberty due to their migration status or their parents' is forbidden by international treaties as the Convention on the Rights of the Child and the Convention on the Rights of Migrant Workers and Their Families. Complementarily, it describes the increasingly firmed jurisprudence developed on this issue by the Committees that monitor these conventions, reaffirming that States have to end any kind of migration-related detention of children and families. Throughout the paper, some key international human rights law principles are invoked in order to strengthen the arguments against detention of child migrants.*

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## I. Introduction

During the last two decades international migration has been increasingly included in the agenda of numerous initiatives, policies and discussions at the national, regional, and global levels. The vast majority of the analysis on this issue, regardless of the source, concludes that migration is a multidimensional and structural component of contemporary societies worldwide. Therefore, it includes, both in its causes and consequences, a large variety of factors such as culture, the economy, labor, family, politics, trade, international relations, and human development, among others. In this context, irregular migration has not only become part of this structural and global scenario, but also the only available avenue for millions of people seeking adequate living conditions after being victims of human rights deprivations in their countries of origin.

In spite of the multidimensionality and systemic distinctive condition of international migration, numerous policies aimed at responding to the challenges posed by migration have been prioritizing only one viewpoint: the security approach. A general allegation of public order and national and international security concerns have led to the development of a large number of migration control mechanisms at international borders, but also beyond those borders—through what is known externalization of migration control<sup>1</sup>—and inside the territory: that is, extending border control to social control within the territories of destination countries. Among those responses, what has become evident is a dramatic growth of policies and practices directed at depriving migrants and asylum seekers of their liberty.

The current trends in international migration are also evidence of another particularity in comparison with migration flows in the past: the increasing number of children that migrate either with their parents, other adults or unaccompanied. Every year, thousands of children flee from their countries of origin in extremely vulnerable circumstances—namely, human rights deprivations-. This context of vulnerability tends to increase in transit and destination countries, particularly due to the lack of protection of their rights at all those stages. One of the factors that contribute to such vulnerability is that children have also been the object of the migration control mechanisms developed by many States which are designed to respond to irregular migration flows, including detention. Therefore, every year and in every region, thousands of child migrants are deprived of their liberty due to their migration status or their parents.

This paper will focus, first of all, on how the issue of child migration-related detention is reflected by the International Human Rights Normative Framework, particularly through treaties adopted by the State Parties to the United Nations. Special attention will be paid to the Convention on the Rights of the Child (CRC) and the Convention for the Protection of All Migrant Workers and Member of Their families (CMW). Additionally, in the following section, some key human rights principles will be taken into consideration.

The following section will focus on the interpretation of these international treaties by key UN Human Rights Mechanisms, with particular attention to the bodies in charge of the protection of the two groups affected when it comes to child migration-related detention practices, namely, children and migrants. Hence, the human rights standards developed on this subject by the Committee

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<sup>1</sup> On the process of Externalization of Migration Control Policies, see the following Reports submitted by the UN Special Rapporteur on the Human Rights of Migrants: a) *Regional study: management of the external borders of the European Union and its impact on the human rights of migrants*. A/HRC/23/46, May 24<sup>th</sup>, 2013; b) *Banking on mobility over a generation: follow-up to the regional study on the management of the external borders of the European Union and its impact on the human rights of migrants*. A/HRC/29/36, May 8<sup>th</sup>, 2015. See also: Red Cross & International Federation of Red Cross. *Externalizing migrant vulnerabilities and rights?* Brussels, 2013.

on the Rights of the Child (CRC Committee) and the Committee on the Rights of Migrant Workers (CMW Committee) will be at the core of this analysis, especially those made in the last five years.

The key conclusions from the above noted analysis could be summarized as follows: a) the international human rights law does not provide a legal base that could legitimize the deprivation of the liberty of children in the context of migration procedures; and b) key UN Committees have been increasingly and repeatedly calling to end any kind of child detention practice in the context of migration policies. Consequently, the last section will address the particular duties that arise from the banning of child migration-related detention, such as the obligation of developing alternatives to detention, ensuring due process safeguards and developing a Best Interest Determination procedure.

## II. Absence of normative justification for child migration-related detention

The first and strongest argument against child detention in the context of migration is that there is no legal base within the International Human Rights Law framework. Namely, none of the human rights treaties include a provision that authorizes the restriction of children's right to liberty within migration control procedures or on the ground of their migration status or that of their parents. In this section the arguments that validate this assumption will be described in detail.

### 1. *The Convention on the Rights of the Child (CRC)*

Two articles of the CRC, Article 37 and 40, provide for the right to liberty of every person under 18 years old, namely children according to article 1 of this Convention. The critical part on this issue is article 37(b), which reads as follows: "No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a last resort and for the shortest appropriate period of time". This clause protects the right to liberty, firstly through the prohibition of arbitrary detention as it is regulated in other human rights treaties, such as the International Convention on Civil and Political Rights.

Secondly, and more importantly, the protection of children's right to liberty has specific characteristics due to what is called the Last Resort Principle. While the principle of exceptionality of detention of adults prevails in the cases of pre-trial detention, when it comes to children the exception standard applies also to children convicted for committing a crime. In addition, this exceptionality is not a regular one as detention is only accepted when it is the last resort. Therefore, other measures must be put in place far before a deprivation of liberty is taken into consideration.

In order to examine this article in relation to the situation of migrant children, the paramount question is on the scope of this provision. In this regard, it is critical to note that Article 37(b) of the CRC is only directed to address the possibility of detaining children in the context of juvenile justice, that is, due to criminal-nature offenses. Furthermore, it is not aimed at being applied within administrative procedures or when an administrative infraction or status is being discussed. As it will be briefly explained further, according to international human rights law, breaching migration law, that is, not having a residence permit or entering a country without proper authorization, cannot be considered a criminal felony. The CRC Committee explicitly endorsed this standard.<sup>2</sup> Consequently, the logical conclusion is that child migration-related detention is out of the scope of

<sup>2</sup> The CRC Committee affirmed that "children should not be criminalized or subject to punitive measures because of their or their parents' migration status" (*The Rights of All Children in the Context of International Migration. 2012 Day of General Discussion Background Paper*. Geneva, September 2012).

CRC article 37(b). This is the standard adopted by the body that the international community has created for interpreting the CRC: the UN Committee on the Rights of the Child.

The CRC Committee, firstly, affirmed more than a decade ago, in relation to unaccompanied children, that “children should not, as a general rule, be deprived of liberty.”<sup>3</sup> More recently, it asserted that the detention of children on the sole basis of migration status is not in accordance with the CRC.<sup>4</sup> In addition, it stated that “the detention of a child because of their or their parents’ migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status.”<sup>5</sup>

Finally, it has to be noted that Article 40 of the CRC also provides for the circumstance of children deprived of liberty and is undoubtedly directed solely to criminal cases. Its clauses regulate detention conditions and due process safeguards of children that could exceptionally, and as a last resort measure, end up in detention after having committed a criminal offense. Therefore, due to the arguments that have already been explained, this article does not apply to migration procedures either.

## *2. The Convention on the Rights of All Migrant Workers and Member of Their Families*

Having concluded that the CRC does not contain any provision that would allow child migration-related detention even as a last resort measure, it is time to explore the provisions of the Convention on Migrant Workers. It will be explained in this section that when the CMW addresses the issue of detention of migrants, there is no reference to children. Moreover, the allusions to children in detention are only in the clauses that regulate the cases of migrants involved in criminal offenses.

Through a first approach to CMW’s articles related to the detention of migrants, it is noted that the decisive legal basis is the recognition of the right to liberty and the prohibition of arbitrary detention in Article 16, which reads as follows: “1. Migrant workers and members of their families shall have the right to liberty and security of person. (...) 3. Any verification by law enforcement officials of the identity of migrant workers or members of their families shall be carried out in accordance with procedure established by law. 4. Migrant workers and members of their families shall not be subjected individually or collectively to arbitrary arrest or detention.”

Based on these paragraphs of Article 16, the CMW Committee asserted two key pronouncements that could be understood as guiding principles on this matter. Firstly, the CMW forbids criminalization of irregular migration, namely, the deprivation of liberty as a punishment of breaching migration laws.

“The Committee considers that crossing the border of a country in an unauthorized manner or without proper documentation, or overstaying a permit of stay does not constitute a crime. Criminalizing irregular entry into a country exceeds the legitimate interest of States parties to control and regulate irregular migration, and leads to unnecc-

<sup>3</sup> CRC Committee. General Comment No. 6. *Treatment of Unaccompanied and Separated Children Outside their Country of Origin*. 1 September, 2005, para. 40.

<sup>4</sup> CRC Committee. *The Rights of All Children in the Context of International Migration*. 2012 Day of General Discussion Background Paper. Geneva, September 2012.

<sup>5</sup> *Ibidem*.

essary detention. While irregular entry and stay may constitute administrative offences, they are not crimes per se against persons, property or national security.”<sup>6</sup>

Secondly, the detention of migrants under the CMW could only be an exceptional and last resort measure. In the CMW Committee’s view, “any custodial or non-custodial measure restricting the right to liberty must be exceptional and always based on a detailed and individualized assessment. Such assessment should consider the necessity and appropriateness of any restriction of liberty, including whether it is proportional to the objective to be achieved. The principle of proportionality requires States parties to detain migrant workers only as a last resort, and to give preference to less coercive measures, especially non-custodial measures, whenever such measures suffice to achieve the objective pursued. In all such cases, the least intrusive and restrictive measure possible in each individual case should be applied.”<sup>7</sup> It is important to note that this exception should have a particular entity, due to the fact that an administrative issue could not have the same level of exceptionality that pre-trial detention within criminal procedures has according to international law.

The rest of the paragraphs of Article 16 do not have any references to children. Most of them recognize a set of due process safeguards in the context of detention in both migration and criminal procedures, including the right to free legal aid, to consular protection and access to justice. The last section refers to the right to compensation in cases of unlawful detention.

After making clear that migration-related detention can solely be a very exceptional measure, it is paramount for the goals of this paper to carefully read Article 17 CMW. While the sections of this article regulate the conditions of detention in the exceptional cases that this coercive measure is applied, its relevance is given by the explicit mentions of children in some of the clauses.

Article 17(2) asserts that “accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication”. Considering that the rest of this clause refers to the separation between “convicted” and “accused” persons, it is crystal clear that this regulation is only applicable to criminal procedures. It is important to keep in mind that the CMW does not permit considering irregular migration as a crime. Likewise, when Article 17(4) mentions that “juvenile offenders shall be separated from adults and be accorded treatment appropriate to their age and legal status”, it is regulating criminal procedures, as it can be evidenced by its reference to “period of imprisonment” and the aim of “social rehabilitation”.

Summarily, the CMW provisions that rule the right to liberty of migrants and their families do not provide any argument that could justify the detention of children in the context of migration policies. It is blatantly obvious that the only two clauses of articles 16 and 17 that make reference to children, and to be more precise, “juvenile persons”, are only directed to criminal cases, namely, they do not apply to administrative migration procedures. Furthermore, none of the sections that regulate migration-related detention make any allusion to children, adolescents or any other category of persons under 18 years old.

<sup>6</sup> CMW Committee. General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families. CMW/C/GC/2. 28 August 2013, para. 24

<sup>7</sup> CMW Committee. General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families. CMW/C/GC/2. 28 August 2013, para. 26.



### *3. Additional remarks on the absence of a legal base for child migration-related detention*

CRC and CMW are certain enough in the sense that they do not authorize the deprivation of liberty of a child due to his or her migration status or their parents'. Aiming at complementing this assumption, this section briefly addresses this issue through some key recognized principles of international human rights law.

The *Principle Pro Personae (Pro Homine)* is explicitly contained within the vast majority of human rights treaties at an international and regional level, including the conventions described before.<sup>8</sup> The core practical aspects of this principle are: a) human rights have to be protected through the most progressive norm that could be applied in each case; and b) while human rights rules have to be interpreted as widely and progressively as possible, the clauses that restrict the recognition or the conditions of exercise of any human right have to be interpreted restrictively. As a corollary, it would not be possible to assert that a restriction on the right to liberty would be tacitly permitted in a particular article of an international treaty which does not explicitly authorize such limitation. In addition, it can be affirmed that this conclusion is strengthened by the supreme principle that rules children's rights: the Best Interests of the Child Principle.

Another cornerstone principle of international human rights law, the *Principle of Non-Discrimination*, could be invoked within this discussion. It has been verified that CRC only authorizes child detention in cases of criminal felonies, and thus administrative detention is not accepted. Therefore, no person under 18 years old could be deprived of his or her liberty within an administrative procedure or due to an administrative offense. Validating migrant children administrative detention would make an exception to that general rule that would only be applicable to those children with specific nationality or migration status. In contradiction with the obligation under this *jus cogens* principle,<sup>9</sup> specific groups of children would be subject to a different treatment regarding their right to liberty solely because of their nationality or their migration status or that of their parents.

A supplementary argument is based on the *Principle of Legality*. Based on this critical principle that not only rules human rights law but also law in general, every human rights treaty that comprises the right to liberty establishes that detention will always be arbitrary if it is not properly regulated by law. Furthermore, it is not reasonable to affirm that while human rights conventions assert that States are not able to deprive someone of liberty on grounds not covered by the legislation, international treaties cannot validate such restriction to a paramount human right based on a tacit interpretation of their provisions.

<sup>8</sup> See in this regard articles 41 CRC and 81 CMW.

<sup>9</sup> Among other international human rights bodies, the Inter-American Court of Human Rights recognized the *Ius Cogens* nature of the Principle of Non-Discrimination. It is important to note that the IAHRC endorsed this standard through an Advisory Opinion on the rights of migrants in irregular situation. See IAHRC Court, Advisory Opinion No. 18/03, *Juridical Condition and Rights of Undocumented Migrants*. 17 September, 2003. Another paper on this Report describes in detail that this Court has also endorsed the Principle of No Detention of Children in the context of migration policies, in its Advisory Opinion No. 21/14, *Rights and Guarantees of Children in the Context of International Migration and/or in Need of International Protection*. 19 August, 2014.

### III. Interpretation of Universal Human Rights Law: the Principle of Non-Detention of Child Migrants in the UN Treaty-Bodies Jurisprudence

The previous section of this paper was meant to demonstrate that the key human rights treaties to be considered regarding child migration-related detention do not include any provision that would authorize this practice. In order to complement and deepen that analysis, this section briefly summarizes the decisions taken on this issue by the UN bodies created to interpret those treaties.

#### 1. *The Committee on the Rights of the Child*

As a result of the increasing number of children involved in international migration flows, as well as the responses to this phenomenon by a number of States, the issue of the detention of migrant children has increasingly been brought to the attention of the CRC Committee. Consequently, in the last years there have been numerous opportunities for evaluating such practices through the provision of the Convention. In 2012, the CRC Committee called a Day of General Discussion on the Human Rights of All Children in the Context of Migration, a symptom of that changing trend.

In that opportunity, the Committee firmly asserted that the “detention of a child because of their or their parent’s migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status”.<sup>10</sup> The Committee not only stated that this standard applies to unaccompanied and separated children, as it had done in its General Comment No. 6, but also to migrant children with their parents. Contrary to the arguments in favor of child detention on the basis of ensuring the family unit, the Committee affirmed the following:

States should adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life through legislation, policy and practices that allow children to remain with family members and/or guardians if they are present in the transit and/or destination countries and be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved.<sup>11</sup>

Since then, the CRC Committee has been undoubtedly reaffirming this interpretation, particularly through the *Concluding Observations and Recommendations* to State Parties in the context of the evaluation of their Periodic Reports. As examples of this tendency, it is worthy to transcribe some excerpts of the CRC more recent decisions:

- ❖ “The Committee welcomes the decision made by the State party in December 2010 to end the detention of children for immigration purposes. Nevertheless, the Committee is concerned that: (...) (d) Children can be detained in the course of asylum processes, including in short-term holding facilities upon entry into the State party, and age-disputed children seeking asylum can be detained in adult facilities; (...) the Committee recommends that the State party: (d) Cease the detention of asylum-seeking and migrant children;”<sup>12</sup>

<sup>10</sup> CRC Committee. *The Rights of All Children in the Context of International Migration. 2012 Day of General Discussion Report and Recommendations*. Geneva, August 2012, para. 78.

<sup>11</sup> *Ibidem*, para. 79.

<sup>12</sup> Committee on the Rights of the Child. *Concluding Observations: United Kingdom and Northern Ireland*. CRC/C/GBR/CO/5, 12 July 2016, para. 76-77.

- ❖ “The Committee is concerned that: (a) Asylum-seeking families with children are being systematically detained for lengthy periods in highly unsuitable conditions, and alternatives to detention are often not available to them; (...) The Committee recommends that the State party: (a) Expeditiously and completely discontinue the detention of children on the basis of their or their parents’ immigration status and provide alternatives to detention that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts, without requiring proof of the availability of unreasonably high daily subsistence funds.”<sup>13</sup>
- ❖ “The Committee is concerned about the situation of unaccompanied migrant children in the State party who cannot access special protection and assistance measures. It is concerned that the State party does not sufficiently consider the best interests of the child as a guiding principle in all initial assessment processes and subsequent arrangements. It notes with concern the number of children subjected to administrative detention (...) The Committee is also concerned about: (a) The situation of unaccompanied migrant children automatically placed in waiting zones of airports or hotels, and other administrative detention facilities (locaux de rétention administrative), sometimes detained with adults (...). The Committee recommends (...) (a) Adopt the necessary measures, including those of a legal nature, to avoid the detention of children in waiting zones through increased efforts to find suitable alternatives to deprivation of liberty and place children in appropriate accommodation.”<sup>14</sup>
- ❖ “(a) Migrant children being kept in detention centres for migrants and reports of violence and abuse against children in those centres; (c) Reports that many migrant children are deported without a preliminary process to determine their best interests (...) The Committee recommends that the State party: (a) Take all measures necessary to end the administrative detention of migrant children and continue to establish community-based shelters for them, in accordance with articles 94 and 95 of the General Act on the Rights of Children and Adolescents, ensuring that these shelters comply with the Convention and are regularly monitored. (c) Establish a best interests determination process for decisions relating to migrant children and always carry out due process with procedural safeguards to determine the individual circumstances, needs and best interests of the child prior to making a decision on his or her deportation.”<sup>15</sup>

The language of the Committee is categorical. States have to *cease, discontinue, end* or *avoid* the detention of migrant and asylum-seeking children. This obligation applies not only in the case of unaccompanied and separated children, but also when migrant children are with their parents. In addition, it is important to note that the Committee makes no reference to the “last resort” standard from Article 37 CRC. The ruling is no detention, with no exception. Therefore, as it will be analyzed further, alternative measures have to be put in place for children and families.

<sup>13</sup> Committee on the Rights of the Child. Concluding Observations: Slovakia. CRC/C/SVK/CO/3-5, 20 July 2016, para. 52-53.

<sup>14</sup> Committee on the Rights of the Child. Concluding Observations: France. CRC/C/FRA/CO/5, 23 February 2016, para. 73-74.

<sup>15</sup> Committee on the Rights of the Child. Concluding Observations: Mexico. CRC/C/MEX/CO/4-5, 3 July 2015, para. 59-60.

## 2. *The Committee on Migrant Workers and Their Families*

During the last years, the CMW Committee experienced a similar process as the CRC Committee in this global scenario where the number of migrant children has notably increased. Hence, a growing amount of issues related to children's rights in the context of migration has been brought to its attention. In the General Comment No. 2, as it was already described, the Committee asserted that the detention of migrants could only be an exceptional and last resort measure within migration procedures. Subsequently, it affirmed that "children, and in particular unaccompanied or separated children, should never be detained solely for immigration purposes".<sup>16</sup>

Similarly, the CMW has reaffirmed the *principle of non-detention* of migrant children, asserting the following:

It has been repeatedly stated that the detention of child migrants cannot be, in any case, in line with the principle of best interest of the child (...) there is a consensus that unaccompanied or separated children from their families should not be deprived of liberty. Families with children should also not be deprived of liberty, and cannot be justified on the grounds of preserving family unit.<sup>17</sup>

As in the case of the CRC Committee, this assumption can also be verified through the *Concluding Observations and Recommendations* to State Parties of the CMW. Below are excerpts that exemplify this matter:

- ❖ "The Committee recommends that the State party: (a) Ensure that administrative detention is used as a measure of last resort only and that non-custodial alternatives are promoted, in line with the Committee's general comment No. 2 (2013) on the rights of migrant workers in an irregular situation and members of their families; (b) Expeditiously and completely cease the detention of children on the basis of their or their parents' immigration status, and adopt alternatives to detention that allow children to remain with family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved, consistent with their best interests, and with children's rights to liberty and family life."<sup>18</sup>
- ❖ "Detain migrant workers for having violated the law on migration only in exceptional circumstances and as a last resort; and ensure in all cases that they are held separately from ordinary prisoners, that women are detained separately from men, that conditions of detention are in conformity with international standards and that alternatives to detention are used for children and their families and for unaccompanied minors."<sup>19</sup>
- ❖ "The Committee encourages the State party to continue focusing on the situation of unaccompanied migrant children and to respect the principle of the best interests of the child. In particular, the State party should: (...) (c) Strengthen cooperation with transit and destination countries in order to ensure that unaccompanied migrant children are not detained for having entered transit or destination countries in an irregular fashion, that children who are

<sup>16</sup> CMW Committee. General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families. CMW/C/GC/2. 28 August 2013, para. 33.

<sup>17</sup> CMW Committee Contribution to the General Comment No. 35 of the Human Rights Committee, Geneva, 2014, [http://www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/CMW\\_DGC9\\_en.doc](http://www.ohchr.org/Documents/Issues/Detention/DraftBasicPrinciples/CMW_DGC9_en.doc).

<sup>18</sup> Committee on Migrant Workers. Concluding Observations: Turkey. CMW/C/TUR/CO/1, 31 May 2016, para. 48.

<sup>19</sup> Committee on Migrant Workers. Concluding Observations: Senegal. CMW/C/SEN/CO/2-3, 20 May 2016, para. 27.

accompanied by family members are not separated from them and that families are housed in protection centres.”<sup>20</sup>

The standards developed by the CMW Committee are as categorical as the ones established by the CRC. On the one hand, the Committee reaffirms that in the context of migration policies, depriving migrants of liberty should only be a measure of last resort. On the other hand, regarding children, the Committee leaves out the last resort principle and asserts that States have to cease the detention of children, and they have to do it *expeditiously* and *completely*. Once again, this assumption is not only applicable to unaccompanied and separated children, but also to children with their parents who are entitled to be housed, if necessary, in *protection* centers. In addition, the CMW Committee, based on the language of the Convention, notes that while the main responsibility is of the State under whose jurisdiction the children are, States of origin have also particular duties aimed at ending the detention of children due to their migration status.

### 3. Additional Remarks

The language that has increasingly been used by both Committees is clear enough in the sense that none of the Conventions they interpret allow States to deprive children’s liberty on the grounds of their migration status or the migration status of their parents. This conclusion can be reaffirmed through a number of key principles of International Human Rights Law. In this regard, along with the abovementioned principles of *Non-discrimination*, *Pro Personae* and the *Best Interests of the Child*, the following principles examined below contribute to strengthen the prohibition of child migration-related detention.

According to the *Principle of Dynamism* or *Effectiveness*, human rights treaties have to be interpreted in a manner that could effectively protect the rights enshrined in the Human Rights Normative Framework. Similarly, regional specialized bodies, such as the European and the Inter-American Court of Human Rights, have invoked the Principle of *Effet Utile* and have described human rights treaties as *living instruments*.<sup>21</sup> In a context characterized by a dramatic increase in challenges that augment the vulnerability of migrant children, it is imperative that human rights provisions applicable to those circumstances are understood according to the purposes and goals of the respective convention. It has been explained above that neither the CRC nor the CMW authorize the deprivation of children’s liberty within migration procedures.

Furthermore, a dynamic, effective or living interpretation in the light of present-day conditions could only lead to reaffirming that there is no exception that could justify that type of coercive measure, namely, that detention in this context is never in the best interest of the child. Consequently, provisions such as CRC article 20, aimed at protecting unaccompanied children, and article 22 about children seeking asylum based on human rights, humanitarian and refugee international law-, could be the appropriate tools for these circumstances, rather than a curb on the right to liberty of migrant children based on a provision, in this case article 37, which does not allow such restriction.

This assumption is even more robust when the *Principle of Progressiveness* is taken into consideration, which entails that States have to permanently make steps directed toward improving the

<sup>20</sup> Committee on Migrant Workers. Concluding Observations: El Salvador. CMW/C/SLV/CO/2, 2 May 2014, para. 49.

<sup>21</sup> See for instance, within an extended and robust jurisprudence on this matter, the following cases: Inter-American Court of Human Rights, *Case of Baena Ricardo et al v. Panama*, Judgment of February 2, 2001. European Court of Human Rights. *Case Marckx v Belgium*, Appl No. 6833/74, Judgment of 13 June 1979.

scope of protection of the human rights of everyone under their jurisdiction. In the complex scenario of children affected by migration in extremely vulnerable circumstances, it would be expected that the interpretation of the human rights normative framework is aimed at strengthening their protection rather than regressively justifying the restriction of basic rights even to an extreme that is beyond the literal text of the treaties. As it has been mentioned before, key principles as the *Pro Personae* and the *Best Interests of the Child* would only reaffirm this postulation.

Moreover, it is widely accepted that the interpretation and implementation of human rights norms have to prioritize those individuals that are included in *groups in vulnerable circumstances*. It has been largely and increasingly evidenced the tremendously vulnerable condition of children in the context of migration. Specialized reports elaborated by Governmental and Intergovernmental Bodies, International Agencies, Civil Society Organizations and Academics have not only described in details the vulnerable circumstances of migrant children in transit and destination countries, but they specifically highlighted that the protection measures to be implemented in those cases could not include the deprivation of their liberty. For instance, the International Organization for Migration has pointed out in 2008 that “the impropriety of detaining migrant children becomes clear when one considers that Article 37 applies to juvenile offenders who, given the reintegration aim of the CRC, should, in the case of conviction, only be deprived of liberty as a last resort. Moreover, many migrant children most likely fall into the category of victims in the sense of Article 39, rather than of juvenile offenders in the sense of Article 40”<sup>22</sup>.

After revising the principal pieces of the international human rights normative framework, as well as the key principles of human rights law and the interpretation of both by the bodies specifically created for this task, there is an indubitable and robust case against the detention of children in the context of migration policies. This solid assumption became even stronger with the fundamentals provided by the UN Special Rapporteur on Torture. Indeed, in his 2015 Annual Report submitted before the Human Rights Council, the Rapporteur affirmed that such practice is not only always in contradiction to the Best Interest of the Child, but it may also constitute a cruel, inhuman or degrading treatment:

“Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children (...) the principle of ultima ratio that applies to juvenile criminal justice is not applicable to immigration proceedings (...) Deprivation of liberty in this context can never be construed as a measure that complies with the child’s best interests. Immigration detention practices across the globe, whether de jure or de facto, put children at risk of cruel, inhuman or degrading treatment or punishment.”<sup>23</sup>

#### IV. The Duty to Create and Put in Place Alternatives to Detention

A direct corollary of the banning of child detention in the context of migration policies is that States have to respond to irregular migrant children and families through procedures and practices

<sup>22</sup> International Organization for Migration & Touzenis, Kristina. *Human Rights of Migrant Children*. International Migration Law No. 15. Geneva, 2008, p. 33

<sup>23</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez. A/HRC/28/68, 5 March 2015, para. 80.

that do not include the deprivation of their liberty. Namely, they have to design what is called Alternatives to Detention which cannot comprise a restraint on children's liberty. Both the CRC and CMW Committees, as it has been described before, have repeatedly recommended State Parties of the respective Convention that instead of detention they should create alternatives. The Special Rapporteur on Torture<sup>24</sup> and the Special Rapporteur on Migrants,<sup>25</sup> among other key UN human rights mechanisms, have reaffirmed this specific obligation.

In this regard, as it has been quoted above, the Committees recommended that, if necessary, States should house children and families in non-custodial, appropriate protection centers. Similarly, the UN Special Rapporteur on Torture asserted that

...in certain circumstances it is possible for States to place children in a shelter or other accommodation when it is based on the purpose of child care, protection and support (...) States are required to favour measures that promote the care and well-being of the child rather than the deprivation of liberty. Facilities that grant accommodation for migrant children should have all the material conditions necessary and provide an adequate regime to ensure comprehensive protection from ill-treatment and torture, and allow for their holistic development.<sup>26</sup>

Having in mind this clear standard, taking alternatives to detention seriously would entail a number of specific obligations aimed at effectively fulfilling children's rights in these particular circumstances. Some of these duties could include, among others, the following:

A primary obligation would be that these alternatives be explicitly regulated by law. Secondly, actual mechanisms and resources should be available in order to ensure their appropriate implementation. Thirdly, applicants, either administrative and/or judicial servants, should be mandated by law to instrument these alternatives, as well as to do it in a case-by-case basis according to the Best Interests of the Child. This obligation would imply the duty to develop proper arguments to justify the use or not of each alternative provided by law. Evidently, if none of them is applicable to a particular case, it could not lead to detention, but to exploring other measures aimed at protecting children. Fourthly, the alternatives should be developed and implemented by bodies and through procedures aimed at guaranteeing a comprehensive fulfilment of the rights and well-being of children in the short and long term. Last, but definitively not least, independent mechanisms directed to monitoring the use of these measures by the competent authorities, as well as measuring their impact on children, should be put in place.

## V. Closing Remarks

Throughout this paper, it has been possible to evidence that the paramount instruments of International Human Rights Law do not authorize that children can be subject to immigration detention practices.

The first and foremost argument that validates this assumption is that there is no treaty or convention that permits any type of deprivation of children's right to liberty due to their migration

<sup>24</sup> "States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status. States should make clear in their legislation, policies and practices that the principle of the best interests of the child takes priority over migration policy and other administrative considerations" (UN Special Rapporteur on Torture, 2015, para. 80).

<sup>25</sup> In this regard, see the Report of the Special Rapporteur on the Human Rights of Migrants, François Crépeau. A/HRC/20/24, 2 April 2012.

<sup>26</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez. A/HRC/28/68, 5 March 2015, para. 80.

status or that of their parents. An in-depth review of the provisions enshrined in the Convention on the Rights of the Child and the Convention on the Rights of All Migrant Workers and Their Families firmly revealed that they do not authorize child migration-related detention.

Secondly, core principles of human rights law strengthen the rule concerning the non-detention of children within migration policies. The cornerstone of the CRC, the Principle of the Best Interest of the Child, as well as the founding principle of the entire human rights system, the Principle of Non-Discrimination, and the Principle Pro Persona (*Pro Homine*), can only lead to that conclusion. In addition, the Principle of Legality, a General Principle of Law, could not validate a restriction on the right to liberty of children without an explicit regulation.

Thirdly, the interpretation of Human Rights Treaties by the bodies created for that purpose, namely, the Committees on the Rights of the Child and on the Rights of Migrant Workers, have been increasingly categorical on this issue. States must take all appropriate measures in order to cease, end or avoid children and families immigration detention. The human rights principles previously mentioned, along with the Principles of Effectiveness (or Dynamism) and Progressiveness, ratify the prohibition of child administrative detention in the context of migration procedures. Human Rights Law indicates that groups in vulnerable circumstances, such as children affected by migration, are entitled to specific and additional protection measures. It has been highlighted by the UN Special Rapporteur on Torture that child immigration detention, rather than a protective approach, could entail an inhuman or degrading treatment.

Based on these arguments, it can be argued that there is a principle within International Human Rights Law that forbids migration-related detention of children and families. The corollary of this principle is the obligation to put in place Alternatives to Detention, which should include a number of specific measures aimed at effectively fulfil this critical duty.

Finally, it is important to take into account that the measures directed to ending child immigration detention should be part of a comprehensive, rights-based approach to the issue of children affected by migration, including its root causes and the impact on their rights and development in the short and long term. This major challenge should contain, among many other elements, the development of comprehensive and alternative responses to irregular migration, both in general and in particular in the case of children and families.

In this regard, it has been asserted by UN Committees, Special Rapporteurs and other human rights mechanisms, that States should adopt legislative and other measures in order to put in place a Best Interest Determination Procedure for unaccompanied and separated children, as well as to ensure that the Best Interest of the Child and other human rights principles guide the decisions related to migrant families. In conclusion, what is needed is for children to be treated first and foremost as children. This basic principle could and should only be effectively addressed when every step is based on the human rights norms and principles that have been shaped by the international community.





# “It Is Now Clear”: Immigration Detention as a Particular Form of Torture or Ill-Treatment of Refugee and Migrant Children

BEN LEWIS\*

## Abstract

*The report of the Special Rapporteur on Torture, Mr. Juan E. Méndez, concerning torture and ill-treatment of children deprived of their liberty (A/HRC/28/68), provides one of the strongest recommendations to-date confirming that detention of children in the context of international migration is never an acceptable practice. In this respect, the report represents the most recent articulation of what has been a paradigm shift in the way that international and regional human rights experts have come to view the detention of refugee and migrant children over the past two decades—namely, that the detention of a child for reasons related to their or their parents’ migration status is never in the best interests of the child and will always constitute a child rights violation. Building upon the work of the UN Committee on the Rights of the Child, as well as other UN and regional human rights experts, the Special Rapporteur’s report makes a number of important contributions that both reinforce and expand our thinking about why such a prohibition on child immigration detention is necessary. This article reacts to key aspects of the Special Rapporteur’s report, seeking to highlight the links between child immigration detention and torture or ill-treatment. It also seeks to provide some legal and historical context for the emerging consensus that the detention of children on the basis of their or their parents’ migration status is never in the best interests of the child and will always constitute a child rights violation. Finally, it will provide some practical discussion of why the immigration detention of children is not necessary, highlighting the many available alternatives to detention for refugee and migrant children around the world. In particular, this article will explore the finding of the Special Rapporteur that the physical, psychological, and developmental harms to children implicit to the immigration detention environment can amount to torture or cruel, inhuman or degrading treatment (“CIDT”), illustrating how the practice is not necessary to meet the legitimate migration aims of the State, and how human rights-compliant alternatives to detention are available which both protect children from torture and ill-treatment and respect child rights to liberty and family.*

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“...it is now clear that the deprivation of liberty of children based on their or their parents’ migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children.”

Juan E. Méndez, Special Rapporteur on Torture  
Report on torture and other ill-treatment of children deprived of their liberty, para. 80

## Introduction

Increasingly all around the world, children are on the move; forced to migrate across borders without adequate documentation, often fleeing war, violence, abuse, poverty, or as a result of trafficking or smuggling. Within this context, undocumented refugee, asylum seeker and irregular migrant children are highly vulnerable to a number of serious human rights abuses, including the threat of arbitrary arrest, detention, and torture or other ill-treatment.

It is important to recall that every child, regardless of their migration status, enjoys the fundamental right to liberty, which is guaranteed under the Universal Declaration on Human Rights, the International Covenant on Civil and Political Rights (“ICCPR”), the Convention on the Rights of the Child (“CRC”), and every other major international and regional human rights instrument. The Special Rapporteur has pointed out that the prohibition of torture is one of the few absolute and non-derogable human rights standards, a peremptory norm of customary international law or *jus cogens*.<sup>1</sup> Consequently, so too is the prohibition on arbitrary detention, including any arbitrary detention that arises in the context of administrative immigration enforcement.<sup>2</sup> In accordance with the right to liberty, and being conscious of States’ primary obligation to safeguard children from torture and ill-treatment, States must protect migrant children against all forms of illegal or arbitrary deprivation of liberty, including any deprivation of liberty that amounts to torture or other cruel, inhuman or degrading treatment or punishment.

Yet despite a clear and non-derogable international legal framework, every day, all around the world, refugee, asylum seeker and irregular migrant children continue to be subjected to arbitrary immigration detention. As noted within the Special Rapporteur’s report, “States frequently detain children who are refugees, asylum seekers or irregular migrants for a number of reasons, such as health and security screening, to verify their identity or to facilitate their removal from the territory.”<sup>3</sup> Sometimes, children are detained without the knowledge of State authorities, for example because there is a failure to properly conduct age assessments, or due to a lack of appropriate child screening and identification. At other times children are knowingly detained, for example when they are detained together with their parents or guardians on the basis of maintaining family unity.

A number of human rights experts have noted with concern that child migrants are systematically detained when crossing international borders, both with their parents or guardians, or when unaccompanied or separated from their caregivers.<sup>4</sup> Detention centres are frequently unsafe, overcrowded, and are fundamentally ill-equipped to provide children with the proper support and

<sup>1</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 23, Human Rights Council, U.N. Doc. A/HRC/28/68 (March 5, 2015) [hereinafter *Report of the Special Rapporteur on Torture*].

<sup>2</sup> Working Group on Arbitrary Detention, *Report of the Working Group on Arbitrary Detention*, ¶ 51, Human Rights Council, U.N. Doc. A/HRC/22/44, (24 December 2012).

<sup>3</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, *supra* note 1, ¶ 59.

<sup>4</sup> See e.g., François Crépeau, *Report of the Special Rapporteur on the Human Rights of Migrants*, ‘Detention of Migrants in an Irregular Situation, A/HRC/20/24 (2 April 2012).

protection to which they are entitled. For these reasons, the Special Rapporteur has noted that the unique vulnerability of children deprived of their liberty requires higher standards and broader safeguards to prevent and eliminate torture and ill-treatment within places of detention, and that immigration detention itself is a particular form of ill-treatment of refugee and migrant children.<sup>5</sup>

Section I of this paper briefly explores the scope of the concepts of torture and CIDT. Section II then enumerates a series of child rights violations within the context of immigration detention that demonstrate how child immigration detention amounts to torture or ill-treatment. Section III explains why, in light of these violations, there is now an emerging and well-articulated prohibition on the immigration detention of children in international human rights law. Section IV concludes with a discussion of how to implement this prohibition on child immigration detention via the adoption and implementation of rights-respecting alternatives to detention.

## Discussion

### 1. Definition and scope of torture and ill-treatment in international law

The legal definitions of torture and CIDT (“ill-treatment”) encompass a wide range of abuses prevalent in the context of administrative immigration detention. Under international law, any infliction of severe pain or suffering, whether physical or mental, by a State actor or with State instigation, consent, or acquiescence can constitute torture or ill-treatment, depending on the circumstances.

While only intentional acts causing severe pain or suffering can qualify as torture,<sup>6</sup> ill-treatment can include the infliction of severe pain or suffering without the same purposeful intent, including situations of negligence or even those that lack a specific purpose.<sup>7</sup> Meanwhile, “degrading treatment or punishment” does not require a demonstration of “severe” pain or suffering. The European Court of Human Rights has explained that this classification depends on the totality of the circumstances, including “the duration of the treatment; its physical and mental effects; and, in some cases, the sex, age, and state of health of the victim.”<sup>8</sup> Additionally, the particular humiliation of the victim may be sufficient to meet the threshold for “degrading treatment or punishment” even if the pain or suffering is not severe.<sup>9</sup>

As noted in the Special Rapporteur’s report, in its general comment No. 2, the Committee against Torture interpreted States’ obligations to prevent torture as wide-ranging and as “indivisible, inter-related and interdependent” with the obligation to prevent ill-treatment, because conditions that give rise to ill-treatment frequently facilitate torture itself.<sup>10</sup> In this respect, States are obligated to take “positive effective measures” to ensure that both torture *and* ill-treatment are effectively prevented.<sup>11</sup> This includes taking positive measures to ensure non-discrimination and the protection

<sup>5</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, *supra* note 1, ¶ 17.

<sup>6</sup> U.N. Convention against Torture, art. 1, Dec. 10, 1984, 1465 U.N.T.S. 85, available at <http://www2.ohchr.org/english/law/cat.htm> [hereinafter *CAT*].

<sup>7</sup> Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 188, Human Rights Council, U.N. Doc. A/HRC/13/39/Add.5 (February 5, 2010).

<sup>8</sup> *Keenan v. United Kingdom*, App. No. 27229/95, ECtHR, ¶ 109 (2001).

<sup>9</sup> Manfred Nowak, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 187, Human Rights Council, U.N. Doc. A/HRC/13/39/Add.5 (February 5, 2010).

<sup>10</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, *supra* note 1, ¶ 24.

<sup>11</sup> UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 4, CAT/C/GC/2, (24 January 2008).

of “certain minority or marginalized individuals or populations especially at risk” of torture or ill-treatment, including asylum seekers and refugees, among others.<sup>12</sup>

These considerations are highly relevant to abuses committed against refugee and migrant children in the context of immigration detention. Children in the context of international migration are already in a situation of particular vulnerability to abuse, discrimination, and exploitation due to their age and often irregular migration status. Likewise, children are always in a vulnerable position within places of detention because of their relative powerlessness compared to migration and/or detention officials. Finally, we know that immigration detention has historically been one of the “most opaque areas of public administration” making accountability for torture and ill-treatment especially difficult in the context of immigration detention, as opposed to criminal or institutional custody of children where there is often greater independent oversight and access to accountability mechanisms.<sup>13</sup>

## 2. Torture and ill-treatment in the context of child immigration detention

Based on the above scope of torture and CIDT under international law, a number of studies demonstrate why child immigration detention is a particularly concerning form of torture or ill-treatment of children.

At the outset, we know that detention has a profound and negative impact on child health and well-being.<sup>14</sup> Even very short periods of detention can undermine child psychological and physical well-being and compromise their cognitive development.<sup>15</sup> Children held in immigration detention are at a heightened risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder such as insomnia, nightmares and bed-wetting.<sup>16</sup> Reports on the effects of immigration detention on children have also found higher rates of suicide, suicide attempts and self-harm, mental disorder and developmental problems, including severe attachment disorder.<sup>17</sup> Importantly, they found “marked differences between adults and children in the distress associated with various incidents”,<sup>18</sup> lending evidence to the “unique vulnerability

<sup>12</sup> UN Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, ¶ 21, CAT/C/GC/2, (24 January 2008).

<sup>13</sup> UN High Commissioner for Refugees (UNHCR), *Association for the Prevention of Torture (APT) and the International Detention Coalition (IDC), Monitoring Immigration Detention: Practical Manual*, p 21, 2014.

<sup>14</sup> See, e.g., International Detention Coalition, *Captured Childhood*, (2012), p 48; see also Alice Farmer, *The impact of immigration detention on children*, Forced Migration Review, September 2013.

<sup>15</sup> No Child in Detention Coalition, *‘Dad, have we done something wrong?’*, 2014, p. 5.

<sup>16</sup> See, e.g., Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014); International Detention Coalition, *Captured Childhood*, (2012); Dudley, M, Steel, Z, Mares, S, and Newman, L. *Children and young people in immigration detention*, *Curr Opin Psych* 25: 285–292, (2012); Hamilton, C, Anderson, K, Barnes, R, and Dorling, K. *Administrative detention of children: a global report*, United Nations Children’s Fund, New York (2011); Lorek, A, Ehntholt, K, Nesbitt, A et al. *The mental and physical health difficulties of children held within a British immigration detention center: a pilot study*, *Child Abuse Neglect* 33: 571–585, (2009).

<sup>17</sup> M Dudley and B Blick, Appendix E to *The heart of the nation’s existence – a review of reports on the treatment of children in Australian detention centres*, ChilOut (2002); S Mares and J Jreidini, *Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues*, *Australian and New Zealand Journal of Public Health* 520 (2004); Human Rights and Equal Opportunity Commission, *A Last Resort? National Enquiry into Children in Detention* HREOC, (April 2004); Z Steel, S Momartin, C Bateman, A Hafshejani, D M Silove, N Everson, K Roy, M Dudley, L Newman, B Blick, S; Z Steel, *The politics of exclusion and denial: the mental health costs of Australia’s refugee policy*, p.10 (May 2003).

<sup>18</sup> Z Steel, p.8 (May 2003).

of children deprived of their liberty” and the subsequent requirement of higher standards for children in the assessment of whether detention is a truly necessary and proportionate measure.<sup>19</sup>

There are also numerous documented cases of physical and sexual abuse against children in places of immigration detention. In the Special Rapporteur’s report, he notes that children in immigration detention “have been tied up, gagged, beaten with sticks, burned with cigarettes, given electric shocks, and placed in solitary confinement, causing severe anxiety and mental harm.”<sup>20</sup> Similarly, successive Australian national inquiries into the immigration detention of children over a 10 year period noted an “unacceptably high risk of sexual and physical abuse” and “numerous incidents” of sexual assault, particularly for young girls.<sup>21</sup> Such practices are all too common and have been noted across geographic regions and immigration detention regimes.<sup>22</sup>

The Special Rapporteur’s report also notes that many child migrants suffer appalling and inhuman conditions while detained, including: overcrowding, inappropriate food, insufficient access to drinking water, unsanitary conditions, lack of adequate medical attention, irregular access to washing and sanitary facilities and to hygiene products, lack of appropriate accommodation and other basic necessities.<sup>23</sup> But immigration detention has also been found to harm children even in relatively humane or so-called “child friendly” detention environments.<sup>24</sup> This is because immigration detention can contribute to or exacerbate a number of pre-existing psychosocial and developmental vulnerabilities frequently experienced by children in the context of migration. These vulnerabilities may include previous violence or trauma experienced in their home country or during migration; disruption of the family unit and parental roles; and a lack of basic needs being met. For these reasons, according to the European Court of Human Rights, even short-term immigration detention of children may be a violation of the prohibition on torture and other ill-treatment, because a child’s vulnerability and best interests outweigh the Government’s interest in attempting to control or stop irregular migration.<sup>25</sup>

Finally, immigration detention has demonstrated profound and negative impacts on refugee and migrant families. The longer a family spends in detention the more likely the family is to break down, as detention undermines the ability of adults to parent adequately, creates or exacerbates parental mental health problems, and damages parents’ ability to provide the emotional and physical support children need for healthy development.<sup>26</sup> The institutional effects of detention disempower parents from their role as carers, providers and protectors, causing children to take on roles, responsibilities, and emotional burdens disproportionate to their age, such as dealing with authorities (e.g. immigration officials or detention guards) or providing support and comfort to

<sup>19</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, supra note 1, ¶ 17.

<sup>20</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, supra note 1, ¶ 60.

<sup>21</sup> Australian Human Rights Commission, *A last resort? National Inquiry into Children in Immigration Detention* (2004); Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention* (2014).

<sup>22</sup> See, e.g., Human Rights Watch, *Detained and at Risk: Sexual Abuse and Harassment in United States Immigration Detention*, (25 August 2010).

<sup>23</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, supra note 1, ¶ 61.

<sup>24</sup> See JRS Europe, *Becoming Vulnerable in Detention: Civil Society Report on the Detention of Vulnerable Asylum Seekers and Irregular Migrants in the European Union* (The DEVAS Project), June 2010; see also No Child in Detention Coalition, *‘Dad, have we done something wrong?’*, 2014.

<sup>25</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, supra note 1, ¶ 62, citing *Popov v. France*, judgement of 19 January 2012; *Rahimi v. Greece*, judgement of 5 April 2011; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, judgement of 12 October 2006.

<sup>26</sup> International Detention Coalition, *Captured Childhood*, (2012).

their parents.<sup>27</sup> The best interests of the child are further undermined when parents or guardians are detained and their children are transferred to an alternative care system. The separation of children from their parents or guardians for reasons related solely to one's migration status is inherently discriminatory, is in conflict with the right of the child to family life, and erodes the proper functioning of families. As a result of family separation caused by immigration detention, children often lose the support and protection of their parents, or are forced to take on roles beyond their level of maturity. For this reason, the UN Committee on the Rights of the Child ("CRC Committee") has clarified that migrant families with children should be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved.<sup>28</sup>

### 3. The emerging prohibition on child immigration detention in international law

Because, the CRC "is *lex specialis* on the human rights protections afforded to children",<sup>29</sup> this section will pay particular attention to the development of the prohibition on child immigration detention by the CRC Committee, the foremost independent experts on interpreting and monitoring implementation of the CRC by its State parties.<sup>30</sup>

As the Special Rapporteur's report correctly highlights, "the best interests of the child must be a primary consideration in every decision on initiating or continuing the deprivation of liberty of a child", therefore child detention can only be justified when it is necessary, proportionate, and consistent with the best interests of the child.<sup>31</sup> In their Report of the 2012 Day of General Discussion on *The Rights of all Children in the Context of International Migration*, the CRC Committee found that the detention of children based on their or their parents' migration status can never be in the best interests of the child, and will therefore always constitute a child rights violation:

*"Children should not be criminalized or subject to punitive measures because of their or their parents' migration status. The detention of a child because of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child. In this light, States should expeditiously and completely cease the detention of children on the basis of their immigration status."*<sup>32</sup>

This CRC Committee recommendation recognizes that immigration detention—even for relatively limited duration or in contexts that are relatively "child friendly"—is never an appropriate place for children, because it is not a strictly necessary or proportionate measure which respects the child's best interests.

Since 2012, a growing number of UN and regional human rights bodies, including the Special Rapporteur, have joined the CRC Committee in finding that immigration detention is never in the best interests of the child, and therefore a clear violation of child rights. What has emerged is a growing clarity and international consensus around a prohibition on the use of detention for refugee, asylum seeker and migrant children when the justification for such detention is based upon the irregular migration or residency status of the child or of their parents or guardians. This

<sup>27</sup> Ibid.

<sup>28</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, ¶ 79.

<sup>29</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, *supra* note 1, ¶ 19.

<sup>30</sup> United Nations Human Rights Office of the High Commissioner, 'Committee on the Rights of the Child', <http://www.ohchr.org/EN/HRBodies/CRC/Pages/CRCIndex.aspx>.

<sup>31</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, *supra* note 1, ¶ 25.

<sup>32</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, ¶ 78.

finding is based on a number of well-established international norms regarding the rights of the child, which bear highlighting.

a) Children are children first and foremost

The starting point of the international child protection framework is that all children, without distinction, discrimination or exception, are entitled to child rights. The principle of non-discrimination ensures that all the rights protected in the CRC apply to “each child within their (States Parties) jurisdiction, without discrimination of any kind irrespective of the child’s or his or her parents’ or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or status.”<sup>33</sup> The CRC Committee has explicitly stated that the principle of non-discrimination applies regardless of a child’s nationality or immigration status:

“The enjoyment of rights stipulated in the Convention is not limited to children who are nationals of a State Party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children – including asylum-seeking, refugee and migrant children – irrespective of their nationality, immigration status or statelessness.”<sup>34</sup>

As a result, States are obligated to protect the rights of all children, regardless of their or their parents’ migration status, and State policies aimed at protecting children must include irregular migrant children and make them a specific target group for social protection. However, in practice, there is frequently a tension between national legal frameworks governing immigration control, and those governing child protection. As a result, children in an irregular migration situation are adversely affected by restrictive migration laws and policies, and are not sufficiently considered or protected as children, first and foremost, under national systems for child protection.

b) The best interests of the child must be a primary consideration

In addition to non-discrimination, one of the central protections of the CRC is the principle of the best interests of the child. This principle recognizes that in “all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”<sup>35</sup> The CRC Committee has stated that:

“a determination of what is in the best interests of the child requires a clear and comprehensive assessment of the child’s identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. Consequently, allowing the child access to the territory is a prerequisite to this initial assessment process. The assessment process should be carried out in a friendly and safe atmosphere by qualified professionals who are trained in age- and gender-sensitive interviewing techniques.”<sup>36</sup>

<sup>33</sup> CRC, art. 2.

<sup>34</sup> UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 1 September 2005.

<sup>35</sup> CRC, art. 3 (1).

<sup>36</sup> UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside Their Country of Origin*, CRC/GC/2005/6, 1 September 2005, ¶ 20.



States are obligated to consider the child's best interests as a primary consideration in any immigration decision, including the decision of whether to detain a child or her parents or guardians on the basis of their migratory or residence status or lack thereof.

c) The child's best interests take precedence over administrative considerations

It is also important to note that the best interests of the child take precedence over the administrative considerations of the State. As articulated in the case of *Popov v. France* by the European Court of Human Rights:

"The child's extreme vulnerability is the decisive factor and [the child's best interest] takes precedence over considerations relating to [migration] status."<sup>37</sup>

For this reason, the Special Rapporteur urged States to "make clear in their legislation, policies and practices that the principle of the best interests of the child takes priority over migration policy and other administrative considerations."<sup>38</sup>

d) Immigration detention is *never* in a child's best interests

As has been noted, given the detrimental effects that detention and family separation have been shown to have on refugee, asylum seeker and irregular migrant children, the CRC Committee has stated clearly that "the detention of a child because of their or their parents' migration status constitutes a child rights violation and always contravenes the principle of the best interests of the child."<sup>39</sup> This finding has now been supported by an overwhelming number of UN and regional human rights experts.<sup>40</sup> This finding has also been supported by a multitude of civil society and National Human Rights Institution reports looking specifically at the issue of child immigration detention, which are too numerous to mention here.<sup>41</sup>

This finding was well-articulated in the Special Rapporteur's report, when he stated:

"Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children. . . . The Special Rapporteur therefore concludes that the principle of *ultima ratio* that applies to juvenile criminal justice is not applicable to immigration proceedings. The deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity because the measure is not absolutely essential to ensure the appearance of children at immigration proceedings or to implement a deportation order. Deprivation of liberty in this context can never be construed as a measure that complies with the child's best interests."<sup>42</sup>

<sup>37</sup> *Popov v. France*, Requête nos 39472/07 et 39474/07, Council of Europe: European Court of Human Rights, 19 January 2012, ¶ 91.

<sup>38</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, *supra* note 1, ¶ 80.

<sup>39</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, ¶ 78.

<sup>40</sup> See Inter-Agency Working Group (IAWG) to End Child Immigration Detention, *Summary of standards relating to child immigration detention*, November 2015.

<sup>41</sup> See, e.g., the civil society submissions made to the Committee on the Rights of the Child's 2012 Day of General Discussion on "The Rights of All Children in the Context of International Migration."

<sup>42</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture*, *supra* note 1, ¶ 80.

e) The child's best interests not to be detained extend to the entire family

Furthermore, the CRC protects the child's right to family and makes clear that children should never be separated from their parents or guardians unless it is considered in the child's best interests to do so.<sup>43</sup> Specifically, the CRC Committee has found that children must remain with their family unless there are decisive reasons, based on the child's best interest, for legal separation. Article 9 of the CRC provides:

"States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence."<sup>44</sup>

It should also be recalled that the child's right to family extends beyond the mere biological family or any single or traditional model for a family. In this regard, the CRC Committee has stated that "[t]he term 'family' must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom."<sup>45</sup> The provisions of Article 9 concerning the separation of children from their parents also extends "to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship."<sup>46</sup>

For this reason, when a child's parent or guardian is at risk of immigration detention, the child's right to liberty and family life extend to the entire family. As both the Inter-American Court of Human Rights and the Special Rapporteur's report have asserted:

"when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family."<sup>47</sup>

#### **4. Toward the practical implementation of rights-based alternatives to child immigration detention**

Taken together, the above principles have led the CRC Committee and a number of other relevant UN and regional human rights bodies to call for States to "expeditiously and completely" cease the immigration detention of children and, by extension, the family unit.

Instead, States must prioritize alternatives to detention ("alternatives") that promote the care and well-being of the child. As articulated by the CRC Committee:

<sup>43</sup> CRC, art. 3(1).

<sup>44</sup> CRC, art. 9(1).

<sup>45</sup> Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (Article 3, paragraph 1), ¶ 59.

<sup>46</sup> Committee on the Rights of the Child, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (Article 3, paragraph 1), ¶ 60.

<sup>47</sup> Juan E. Méndez, *Report of the Special Rapporteur on Torture, supra* note 1, ¶ 80; Inter-American Court of Human Rights, *Advisory Opinion OC-21/14 of August 19, 2014, 'Rights And Guarantees of Children in The Context of Migration and/or in Need of International Protection'*.

*“To the greatest extent possible, and always using the least restrictive means necessary, States should adopt alternatives to detention that fulfil the best interests of the child, along with their rights to liberty and family life through legislation, policy and practices that allow children to remain with family members and/or guardians ... and be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved.”<sup>48</sup>*

Indeed, “more governments are taking steps to explore and implement alternatives, ranging from scoping studies and small-scale pilot projects to significant policy developments and systemic change.”<sup>49</sup> There is also growing consensus on the need to research and understand the elements of successful alternatives to detention at the UN and regional levels, as well as in a number of domestic contexts.<sup>50</sup>

This can be linked, among other things, to the mounting recognition that detention is expensive, damaging to individuals and does not deter irregular migration.<sup>51</sup> Interest in alternatives to detention has also stemmed from growing litigation on the illegal and arbitrary application of immigration detention, and from increasing evidence that alternatives can be highly effective in achieving the legitimate migration objectives of the State without resorting to the use of custodial measures.

So what are alternatives to detention in the context of child and family migration? Alternatives to immigration detention may be defined as, “any law, policy or practice by which persons are not detained for reasons relating to their migration status.”<sup>52</sup> The phrase ‘alternatives to immigration detention’ is not an established legal term nor a prescriptive concept, but a fundamentally different way of approaching migration governance which focuses on community engagement and support from a human rights-based perspective. Building trust, respecting and valuing the dignity of the individual, and providing a fair, transparent process are fundamental to alternatives, particularly when dealing with children and families.

A number of States have already begun implementing effective alternatives for children and families, proving that alternatives can help States to provide appropriate accommodation and care to child refugees and migrants without resorting to unnecessary immigration detention. When implemented properly, research finds that alternatives offer a range of benefits to States and migrants alike, including:

- Compliance – Alternatives maintain high rates of compliance and appearance, on average 90% compliance. A study collating evidence from 13 programs found compliance rates ranged between 80% and 99.9%.<sup>53</sup>

<sup>48</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, ¶ 79.

<sup>49</sup> Sampson, R.; Mitchell, G., *Global Trends in Immigration Detention and Alternatives to Detention: Practical, Political and Symbolic Rationales*, Journal on Migration and Human Security (2013), p. 98.

<sup>50</sup> See generally, Sampson, R., Chew, V., Mitchell, G., and Bowring, L. *There Are Alternatives: A Handbook for Preventing Unnecessary Immigration Detention (Revised)*, (Melbourne: International Detention Coalition, 2015) [hereinafter *There are alternatives*].

<sup>51</sup> International research has found that immigration detention is not an effective deterrent of asylum seekers and irregular migrants in either destination or transit contexts. Detention is not only expensive and harmful, it also fails to impact on the choice of destination country and does not reduce numbers of irregular arrivals. Studies have shown asylum seekers and irregular migrants either are: not aware of detention policy or its impact in the country of destination; may see it as an inevitable part of the journey, and do not convey the deterrence message to other back to those in country of origin. International Detention Coalition (2015), *Briefing Paper: Does Detention Deter?*, available at: <http://idcoalition.org/detentiondatabase/does-detention-deter/>; see also, Alice Edwards, *Back to Basics*, page 1.

<sup>52</sup> Sampson et al., *There are alternatives*, p. 7.

<sup>53</sup> Sampson et al., *There are alternatives*, p. 17.

- Cost Savings – Alternatives cost on average 80% less than detention.<sup>54</sup>
- Voluntary Return – Alternatives increase independent departure and voluntary return rates for refused cases, an average of 65% with up to 82% reported.<sup>55</sup>

Additionally, successful alternative to detention programs can reduce wrongful detention and litigation; reduce overcrowding and long-term detention; better respect, protect and fulfil the human rights of children; improve integration outcomes for approved cases; and improve child health and welfare.

Unfortunately, to-date many governments that do utilize alternatives to detention have focused on unnecessarily restrictive or criminal-justice based models, such as onerous reporting and monitoring, or on different forms of conditions or restrictions on liberty. However, such alternatives are largely not appropriate for children, and research findings indicate that overly onerous conditions actually have an adverse effect on compliance and successful case resolution outcomes.

On the other hand, a number of countries have had success with community-based models with a focus on individual early intervention, need and risk assessments, case management, welfare assistance and independent legal advice. Indeed, the most successful alternatives to detention are those that use constructive engagement and support, rather than enforcement, to ensure individuals are able to comply with migration procedures, thus reducing and eliminating the need for detention at all.<sup>56</sup> Although such programs sometimes make use of residential facilities as part of a migration management system, the location of the child or family is not of primary concern. Instead, the focus is on assessing each case and ensuring that the community setting contains the necessary structures and conditions that will ensure the child's best interests are protected, and enable the family or guardian to work towards a successful resolution of the child's migration status with authorities.

These programs tend to successfully screen and assess the migrant population so that they can better make informed decisions about management and available alternative options. They use early intervention to support individuals throughout the bureaucratic administrative process via the provision of interpreters, legal assistance, and case managers who provide quality advice and assist the individual to explore all the legal options available to him or her, including both options to remain in the country legally and, if needed, avenues to depart the country safely. Finally, these programs treat individuals with respect and dignity, both ensuring that basic needs are met, and also working with individuals as part of the same "team", rather than through an adversarial process.

The International Detention Coalition ("IDC"), a leading global expert on immigration detention and alternatives to detention, has undertaken a global program of research to identify and describe various rights-based alternative models around the world. This program of research is—to date—the most in-depth study on alternatives to immigration detention that exists, and is described in detail in the report, *There Are Alternatives*.<sup>57</sup> The report outlines a model framework for governments to explore, develop and implement community-based alternatives to detention in line with existing human rights obligations. This framework, the Community Assessment and

<sup>54</sup> Sampson et al., *There are alternatives*, p. 44.

<sup>55</sup> Sampson et al., *There are alternatives*, p. 39.

<sup>56</sup> See Jesuit Refugee Service Europe, *From Deprivation to Liberty. Alternatives to Detention in Belgium, Germany and the United Kingdom* (December 2011); Cathryn Costello & Esra Kaytaz, *Building Empirical Research into Alternatives to Detention: Perceptions of Asylum-Seekers and Refugees in Toronto and Geneva* (UNHCR, June 2013).

<sup>57</sup> Sampson et al., *There are alternatives*, ii78.

Placement (CAP) model represents a global best practice for States seeking to “expeditiously and completely” cease the immigration detention of children.<sup>58</sup>

A key finding of the IDC’s research is that there are a variety of mechanisms currently in use internationally that can prevent the arbitrary detention of children and that effectively support children and families in the community. Many of these mechanisms may not even be considered “alternatives to detention” in a traditional, narrow, or legalistic understanding of the term but are nonetheless worthy of further attention, support, and funding. In line with these findings, the IDC has sought to expand current policy debates beyond a narrow interpretation of alternatives by looking more broadly at a variety of alternative mechanisms that successfully allow asylum seekers and irregular migrants to reside in the community, while ensuring safety, compliance and cost-effectiveness.

## Conclusion

In highlighting the particular intersection of immigration detention and the torture and ill-treatment of children, the report of the Special Rapporteur on Torture, Mr. Juan E. Méndez, concerning torture and other ill-treatment of children deprived of their liberty is a valuable contribution to international standard setting. At the same time, by reinforcing and building upon the emerging global consensus that child immigration detention is never in the best interests of the child and always a child rights violation, the Special Rapporteur’s report may be seen as yet another example of the need to “expeditiously and completely” cease the practice of child immigration detention and to urgently prioritize the implementation of rights-respecting alternatives, of which there are many readily available options. The IDC’s Community Assessment and Placement model represents a global best practice and is available to States, UN partners, and civil society organisations seeking to help expeditiously and completely end the immigration detention of children.

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<sup>58</sup> See, International Detention Coalition, *The Revised Community Assessment and Placement (CAP) Framework*, available at <http://idcoalition.org/CAP/>.

# The Inter-American Court of Human Rights Standards Towards the Universality of a Rule of Non-Detention of Migrant, Asylum-Seeker, and Refugee Children

ROMINA I. SIJNIENSKY\*

## Abstract

*This article arises from the growing consensus in the international arena on the need for the cessation of the detention of children as a form of immigration control or deterrence. Three nuanced understandings can be identified on what the principle of non-detention consists of: first, detention should be employed only as a last resort; second, that detention infringes upon the best interest of the child principle; finally, that detention is unnecessary for the purposes of immigration control. This article thoroughly examines the extent and implications of the principle of non-detention for immigration control of migrant, asylum-seeker and refugee children. It specifically addresses whether this principle implies a last resort analysis or a blanket ban. Consistent with this, it examines the standards set forth in Advisory Opinion 21/2014 of the Inter-American Court of Human Rights, which were endorsed in the 2015 thematic report on children deprived of their liberty adopted by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. It also attempts to explain the divergences in approaches to the principle of non-detention of migrant, asylum-seeker and refugee children and to question to what extent the right to liberty of migrant children is compatible with the legitimization of the last resort detention. In establishing the basis for the universality of a rule of non-detention of migrant, asylum-seeker and refugee children, this article encourages the ban on the criminalization of children and on their detention for immigration control.*

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*The reassuring growth of international tribunals is the sign of a new era, and we have to live up to it, to ensure that each of them makes its contribution to the continuing development of international law in the pursuit of international justice.<sup>1</sup>*

## I. Introduction

In a time when the movement of accompanied and unaccompanied children between borders is on the rise,<sup>2</sup> immigration detention has come to the forefront of human rights issues. There is no unambiguous data on the overall number of children detained for migration purposes in the Americas, but an examination of the primary countries where detention takes place gives us a picture of the current situation. Official figures in Mexico indicate that 38,514 children in 2015<sup>3</sup> and 13,287 children were presented before immigration authorities from January to May 2016.<sup>4</sup> In the United States of America 39,399 unaccompanied children and 38,639 children in family units<sup>5</sup> were apprehended in 2015<sup>6</sup>. Almost 26,000 unaccompanied children and more than 29,600 children in family units were apprehended in the first semester of 2016.<sup>7</sup> In Canada, while there are no official figures, the Canadian Council for Refugees reported that at least 82 children were detained in 2015, mostly on the grounds that either their identity was not able to be established or due to a flight risk.<sup>8</sup>

In this context, an emergent growing consensus gained momentum in the international arena on the need to stop child detention for immigration control or deterrence. Accordingly, in April 2016 the UN Secretary General urged States to never detain children for immigration control purposes.<sup>9</sup> Also, a call for adopting alternatives to detention was launched.<sup>10</sup> This statement put forward by the UN Secretary General aptly reflects the imperative need to adopt a child-centred approach in the context of migration, requiring the non-detention of migrant, asylum-seeker and refugee children as well as the proper implementation of such standards in practice.

The principle of non-detention consists of the following three nuances: first that detention should be employed only as a last resort; second, that detention infringes the principle of best interest of

<sup>1</sup> Speech given by Mr Antônio Augusto Cançado Trindade, Former President of the Inter-American Court of Human Rights, on the occasion of the opening of the judicial year of the European Court of Human Rights, 22 January 2004. ECtHR, Annual Report 2003, Council of Europe, May 2004, p. 31.

<sup>2</sup> UNHCR, Global Trends, Forced Displacement in 2015.

<sup>3</sup> Secretaría de Gobernación de México, Boletines estadísticos, III. Extranjeros presentados y devueltos, 2015, available at: [http://www.politicamigratoria.gob.mx/es\\_mx/SEGOB/Extranjeros\\_alojados\\_y\\_devueltos\\_2015](http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Extranjeros_alojados_y_devueltos_2015)

<sup>4</sup> Secretaría de Gobernación de México, Boletines estadísticos, III. Extranjeros presentados y devueltos, 2016, available at: [http://www.politicamigratoria.gob.mx/es\\_mx/SEGOB/Extranjeros\\_presentados\\_y\\_devueltos](http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Extranjeros_presentados_y_devueltos)

<sup>5</sup> Family Unit represents the number of individuals (either a child under 18 years old, parent or legal guardian) apprehended with a family member by the U.S. Border Patrol.

<sup>6</sup> United States Border Patrol, Southwest Family Unit Subject and Unaccompanied Alien Children, Apprehensions Fiscal Year 2015, available at: <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2015>.

<sup>7</sup> United States Border Patrol, Southwest Family Unit Subject and Unaccompanied Alien Children, Apprehensions Fiscal Year 2016, available at: <https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016>.

<sup>8</sup> Canadian Council for Refugees, Immigration detention statistics 2015, available at: <http://ccrweb.ca/sites/ccrweb.ca/files/immigration-detention-statistics-2015.pdf>. See also the 2016 Report by the International Human Rights Program of the Faculty of Law of the University of Toronto “No Life for a Child”. A Roadmap to End Immigration Detention of Children and Family Separation, indicating that “between 2010 and 2014, an average of 242 children were detained each year” in Canada, p. 9.

<sup>9</sup> UN, *In safety and dignity: addressing large movements of refugees and migrants*. Report of the Secretary-General. A/70/59, 21 April 2016, para. 56.

<sup>10</sup> Id.

the child; finally, that detention is unnecessary for the purposes of immigration control. Thus, the extent and implications of the non-detention principle need to be addressed, as it appears that the position of the regional tribunals, universal bodies and special mandates lacks uniformity.

The lack of uniformity surrounding the extent and implications of the non-detention of children has led to subtle differences in the understanding of the following issues: whether the non-detention of children for immigration control or deterrence implies that the State can exceptionally resort to such measures or a blanket ban; the way in which alternatives to detention should be conceptualized, as well as the minimum conditions or requirements that should be met by facilities designed to accommodate child migrants. Disentangling these issues might prove seminal to the universal understanding and conceptualization of such a principle to overcome the paradigm of child detention in the context of migration.

This article advances the idea that the principle of non-detention encompasses a blanket ban, as developed by contemporary international practice. The evolving standards on the issue of non-detention of migrant, asylum-seeker and refugee children advanced by the Inter-American Court in its Advisory Opinion 21/2014 constitute novel contributions toward the universality of this rule. While the standards set forth by the Inter-American Court emerge from the Americas, they are not limited to a regional interpretation but have universal significance. In 2015, the thematic report on children deprived of their liberty by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment endorsed this interpretation. In establishing the basis for the universality of a rule of non-detention of migrant, asylum-seeker and refugee children, this article encourages the ban on the criminalization of children and on their detention for immigration control.

To this end, this article will be divided as follows: it will first advance the need to decriminalize irregular migration, as developed by the Inter-American Court of Human Rights in its contentious jurisdiction. Then, it will look into the disparate international practice on the issue of child detention. Next it will address the evolving interpretations on the topic by the Advisory Opinion 21/2014 from the Inter-American Court. Then, it will explore whether the non-detention of children for immigration control or deterrence implies a last resort analysis or a blanket ban. Finally, this article will show some examples of international acceptance and State practices towards implementing the detention principle as a blanket ban. This article will conclude by developing a set of final remarks.

## II. Departing point: the need to decriminalize irregular migration

From a human rights perspective it can be affirmed that migration should not be catalogued as a crime.<sup>11</sup> Furthermore, to migrate has even been recognized in some national jurisdictions as

<sup>11</sup> *Report of the Special Rapporteur on the human rights of migrants*, Ms. Gabriela Rodríguez Pizarro, "Human rights of migrants deprived of their liberty", E/CN.4/2003/85, 30 December 2002, para. 73 ["Infractions of immigration laws and regulations should not be considered criminal offences under national legislation. [...] Irregular migrants are not criminals *per se* and they should not be treated as such. Detention of migrants on the ground of their irregular status should under no circumstance be of a punitive nature"]; *Report of the Working Group on Arbitrary Detention*, A/HRC/7/4, 10 January 2008, para. 53 ["...criminalizing illegal entry into a country exceeds the legitimate interest of States to control and regulate irregular immigration and leads to unnecessary detention"]; *Report of the Special Rapporteur on the human rights of migrants*, Mr. Jorge Bustamante, "Impact of the criminalization of migration on the protection and enjoyment of human rights", A/65/222, 3 August 2010, para. 73 ["States should remove laws, policies, plans and programmes aimed at criminalizing irregular migration and should not consider breaches of immigration law a crime or punish such breaches with detention"]; *Report of Special Rapporteur on the human rights of migrants*, Mr. François Crépeau, "Detention



a human right.<sup>12</sup> Therefore, joint efforts should be made to adjust any laws and practices that still view migration under a criminal lens.<sup>13</sup> Instead, a rights-based approach should be adopted.

Within the scope of its mandate, the Inter-American Court has made remarkable contributions to the separation of immigration and criminal matters. It has dismantled persisting notions that immigration is associated with the criminal sphere, including that detention should be used as a method to control and deter irregular entrance and stay in a country.

Among these contributions stands first the ruling on the non-criminalization of irregular migration, where the Court held that there can be no criminal penalties or deprivation of liberty with a punitive purpose for non-compliance with immigration law. Also, undue prolongation of the detention of migrants in order to comply with an expulsion or deportation order was found to substantially transform the measure, turning it essentially into a punitive response.<sup>14</sup>

This standard was developed in the landmark *Vélez Loo* case,<sup>15</sup> which dealt with the detention of an Ecuadorean national in Panama who was penalized, in accordance with the applicable law at that time, to two years of imprisonment for having irregularly entered the country and breached a re-entry ban. He served this sentence in the biggest prison in Panama, remarkably called “La Joyita” (the little jewel), together with persons prosecuted and convicted of the commission of ordinary crimes.<sup>16</sup> In assessing the arbitrariness of the punitive measure, the Inter-American Court resorted to a necessity and proportionality scrutiny. It held that to impose a sentence as a penalty or punishment for circumventing immigration laws was beyond the power of States to control and regulate the entry and stay of foreigners in its territory.<sup>17</sup> The Court further found that any rule establishing a punitive sanction was disproportionate based on the understanding that, in a democratic society, punitive power should only be exercised to the extent strictly necessary to protect fundamental legal assets from the most serious attacks.<sup>18</sup>

Another central standard addressed by the Court in the *Vélez Loo* case was the separation of facilities for persons prosecuted or convicted of the commission of criminal offences and those intended to house irregular migrants.<sup>19</sup> This criterion addresses the different purposes of the measures, on which the Court stated that prisons serve a purpose that is incompatible with the nature

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of migrants in an irregular situation”, A/HRC/20/24, 2 April 2012, para. 13 [“...irregular entry or stay should never be considered criminal offences: they are not *per se* crimes against persons, property or national security. It is important to emphasize that irregular migrants are not criminals *per se* and should not be treated as such”].

<sup>12</sup> See, for example, Article 40 of Ecuador’s Constitution; Article 1° of Uruguay’s Migration Law No. 18.250 and Article 4 of Argentina’s Migration Law No. 25.871.

<sup>13</sup> In the Americas, see Chile, Law Decree No.1094 of 1975, Foreigners Law (*Ley de Extranjería*), Articles 69 and 87, and Operation Streamline in the United States of America. See for example, Joanna Jacobbi Lydgate, *Assembly-Line Justice: A Review of Operation Streamline*, 98 Cal. L. Rev. 481 (2010). In Europe, a research conducted in 2010 showed that “in 17 EU Member States irregular border crossing or irregular stay [was], at least on paper, considered a crime.” European Union Agency for Fundamental Rights, *Fundamental rights of migrants in an irregular situation in the European Union*, Luxembourg, 2011, p. 42.

<sup>14</sup> IACtHR, *Case of Vélez Loo v. Panama. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 23, 2010 Series C No. 218, para. 117.

<sup>15</sup> For an analysis of this case, Romina I. Sijniensky, “Limitaciones al uso de medidas privativas de libertad para el control de los flujos migratorios: comentario al caso Vélez Loo Vs. Panamá de la Corte Interamericana de Derechos Humanos”, *Opus Magna Constitucional Guatemalteco 2011 (Tomo IV)*, Instituto de Justicia Constitucional, Guatemala, 2011, pp. 71-97; Marie-Benedicte Dembour, *When Humans Become Migrants: Study of the European Court of Human Rights with an Inter-American Counterpoint*, Oxford University Press, 2015.

<sup>16</sup> IACtHR, *Case of Vélez Loo v. Panama. Preliminary Objections, Merits, Reparations, and Costs*. Judgment of November 23, 2010 Series C No. 218, paras. 94 and 201.

<sup>17</sup> *Id.* at para. 169.

<sup>18</sup> *Id.* at para. 170.

<sup>19</sup> *Id.* at paras. 206-210.

of a possible detention of an immigrant. Therefore, States should ensure that they possess specialised facilities for immigrants with “suitable physical conditions and an appropriate regimen for migrants.”<sup>20</sup>

A non-criminalization standard was also later adopted by the European Court of Justice in the cases of *El Dridi*<sup>21</sup> and *Achughbabian*<sup>22</sup> in which the Luxembourg Court barred provisions that allowed for a sentence of imprisonment as a criminal law penalty for irregular stay, inasmuch as this measure does not comply with the objectives set forth in Council Directive 2008/115/EC on common standards and procedures in Member States for returning illegally staying third-country nationals. However, in what can be framed as a regressive interpretation in the case of *Celaj*, which concerned an imprisonment sentence for breach of an entry ban, the Court found that domestic legislation which provides for a prison sentence as a criminal law penalty for unlawful re-entry of a third-country national does not infringe EU Law.<sup>23</sup>

The non-criminalization standard aimed at distinguishing between criminal acts and irregular immigration also applies to migrant children. However, further and more specific implications have been developed by the Inter-American Court when it comes to the detention of children by introducing a perspective that took into account the Convention on the Rights of the Child. In this respect, the Advisory Opinion 21/2014 departed from the standards set in the *Vélez Loor* case to deepen the analysis from a child-centred approach, as will be explained below.

### III. Lack of uniformity in international practice on the issue of child detention

One of the points highlighted by the applicant States in the request for Advisory Opinion 21/2014<sup>24</sup> was that a general characteristic of migration laws and regulations is the lack of inclusion of a child-centred approach. In other words, migration laws and regulations rarely include necessary provisions that contemplate a distinct response to irregular migrant children. Therefore, either provisions intended for adults apply to children or the lacunas are filled by resorting to notions and institutions pertaining to juvenile justice.<sup>25</sup> An example of the disregard towards considering

<sup>20</sup> Id. at para. 272.

<sup>21</sup> CJEU, Case C-61/11 PPU, *Hassen El Dridi alias Soufi Karim*, Judgment of 28 April 2011, para. 62 [“Directive 2008/115, in particular Articles 15 and 16 thereof, must be interpreted as precluding a Member State’s legislation, such as that at issue in the main proceedings, which provides for a sentence of imprisonment to be imposed on an illegally staying third-country national on the sole ground that he remains, without valid grounds, on the territory of that State, contrary to an order to leave that territory within a given period”].

<sup>22</sup> CJEU, Case C-329/11, *Alexandre Achughbabian v Préfet du Val-de-Marne*, Judgment of 6 December 2011, para. 50 [“Directive 2008/115 must be interpreted as:—precluding legislation of a Member State laying down criminal penalties for illegal stays, in so far as that legislation permits the imprisonment of a third-country national who, though staying illegally in the territory of the said Member State and not being willing to leave that territory voluntarily, has not been subject to the coercive measures referred to in Article 8 of that directive and has not, being placed in detention with a view to the preparation and carrying out of his removal, yet reached the end of the maximum term of that detention”].

<sup>23</sup> CJEU, Case C-290/14, *Skerdjan Celaj*, Judgment of 1 October 2015, paras. 25 and 33 [“Directive 2008/115 must be interpreted as not, in principle, precluding the possibility of Member States adopting legislation which lays down criminal law sanctions for the unlawful re-entry of a third-country national” and “Having regard to the foregoing considerations, the answer to the question asked is that Directive 2008/115 must be interpreted as not, in principle, precluding legislation of a Member State which provides for the imposition of a prison sentence on an illegally staying third-country national who, after having been returned to his country of origin in the context of an earlier return procedure, unlawfully re-enters the territory of that State in breach of an entry ban”].

<sup>24</sup> IACtHR, Request for Advisory Opinion on Migrant Children Before the Inter-American Court of Human Rights, available at: [http://www.corteidh.or.cr/solicitudoc/solicitud\\_eng.pdf](http://www.corteidh.or.cr/solicitudoc/solicitud_eng.pdf).

<sup>25</sup> *Report of the Special Rapporteur on the human rights of migrants*, Mr. Jorge Bustamante, “Protection of children in the context of migration”, A/HRC/11/7, 14 May 2009, para. 24 [“The lack of distinction between adult

distinct measures adapted to the needs and concerns of children is the Human Rights Committee's concluding observations regarding Canada. Here, the Committee only ordered the State to adapt the system regarding migrant detention in general, but did not make specific reference to the fact that the response regarding migrant children should be distinct from the one given to adult immigrants.<sup>26</sup> The Committee did not incorporate a child-centred approach in its analysis.

In a move to infuse a child-centred approach in migration laws, some pioneer countries in the Americas have included legal prohibitions on the detention of migrant children, as is the cases of Panama<sup>27</sup> and Venezuela.<sup>28</sup> Other countries, in which legislation does not contain special provisions, still do not resort to child detention in practice.<sup>29</sup> However, some countries still resort to child detention allowed by law or in practice on the grounds of irregular entry or stay within their territory, as well as under compassionate euphemisms, such as invoking the protection of the child. Children are also deprived of liberty in order to maintain family unity with one or both parents if held in immigration detention.<sup>30</sup>

Immigration detention policies and other practices affecting children have been under scrutiny for over two decades.<sup>31</sup> Such practices include the placement of children in immigrant detention

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and child migrants is therefore a major challenge that a number of States still have to overcome. National migration laws do not always include a child rights perspective and usually lack specific provisions on children. Additionally, most public policies on children do not yet include the specific needs and protection to be afforded to the child in the context of migration. The treatment of migrant children as adults may lead to harmful practices, for example, when irregular migration is criminalized (A/HRC/7/12), or when deportation and detention procedures do not comply with the protection that should be given to children in those circumstances". See also, University of Lanús—Center of Human Rights and Regional Office of UNICEF for Latin America and the Caribbean/TACRO, *Estudio sobre los estándares jurídicos básicos aplicables a niños y niñas migrantes en situación migratoria irregular y algunas líneas de acción para su protección* (Report on the Basic Legal Standards applicable to Migrant Children in Irregular Migratory Situation and some Guidelines for Their Protection), December 2009.

<sup>26</sup> Human Rights Committee, *Concluding observations on the sixth periodic report of Canada*, CCPR/C/CAN/CO/6, 13 August 2015, para. 12 ["The Committee is concerned that individuals who enter onto the territory of the State party irregularly may be detained for an unlimited period of time and that, under section 20.1 (1) of the Immigration and Refugee Protection Act, any migrant and asylum-seeker designated as an "irregular arrival" would be subject to mandatory detention until the asylum-seeker's status is established, and would not enjoy the same rights as those who arrive "regularly". [...] The State party should refrain from detaining irregular migrants for an indefinite period of time and should ensure that detention is used as a measure of last resort, that a reasonable time limit for detention is set, and that non-custodial measures and alternatives to detention are made available to persons in immigration detention"].

<sup>27</sup> Panamá, Migration Law No. 3, 2008, Article 93.

<sup>28</sup> Venezuela, Law on Aliens and Migration (Ley de Extranjería y Migración) No. 37.944, 2004, Article 46.

<sup>29</sup> For a description of this trend see Pablo Ceriani Cernadas and Luisa Feline Freier, "Migration policies and policymaking in Latin America and the Caribbean: lights and shadows in a region in transition", in David James Cantor, Luisa Feline Freier and Jean-Pierre Gauci (eds.), *A Liberal Tide? Immigration and Asylum Law and Policy in Latin America*, Institute of Latin American Studies, School of Advanced Study, University of London, 2015, pp. 21-22.

<sup>30</sup> For example, the CEDAW Committee has stated that: "As a general rule, detention of pregnant women and nursing mothers, who both have special needs, should be avoided, while children should not be detained with their mothers unless doing so is the only means of maintaining family unity and is determined to be in the best interest of the child." CEDAW Committee, *General Recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, CEDAW/C/GC/32, 14 November 2014, para. 49. However, as will be explained below, family unity should not be considered as a permissible justification for child detention.

<sup>31</sup> Committee on the Rights of the Child, *Concluding Observations: Canada*, CRC/C/15/Add.37, 20 June 1995, para. 13 ["The Committee recognizes the efforts made by Canada for many years in accepting a large number of refugees and immigrants. Nevertheless, the Committee regrets that the principles of non-discrimination, of the best interests of the child and of the respect for the views of the child have not always been given adequate weight by administrative bodies dealing with the situation of refugee or immigrant children. It is particularly worried by the resort by immigration officials to measures of deprivation of liberty of children for security or other related purposes and by the insufficient measures aimed at family reunification with a view

facilities as well as in other facilities where they are essentially deprived of liberty, most of the time under conditions that place them at risk of torture and ill-treatment. There is no controversy over the fact that the detention of persons in the context of migration impacts their well-being, including both physical and mental health.<sup>32</sup> These harmful practices provoke more adverse effects in children to the detriment of their emotional and physical development, which can even result

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to ensuring that it is dealt with in a positive, humane and expeditious manner”]; *Report of the Special Rapporteur on the human rights of migrants*, Ms. Gabriela Rodríguez Pizarro, “Human rights of migrants deprived of their liberty”, E/CN.4/2003/85, 30 December 2002, paras. 74-75 [“Governments should consider the possibility of progressively abolishing all forms of administrative detention. When this is not immediately possible, Governments should take measures to ensure respect for the human rights of migrants in the context of deprivation of liberty, including by: (a) Ensuring that the legislation does not allow for the detention of unaccompanied children and that detention of children is permitted only as a measure of last resort and only when it is in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realization of the rights enshrined in the Convention on the Rights of the Child, including access to education and health”]; Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 61 [“In application of article 37 of the Convention and the principle of the best interests of the child, unaccompanied or separated children should not, as a general rule, be detained. Detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention that requires detention to conform to the law of the relevant country and only to be used as a measure of last resort and for the shortest appropriate period of time. In consequence, all efforts, including acceleration of relevant processes, should be made to allow for the immediate release of unaccompanied or separated children from detention and their placement in other forms of appropriate accommodation”]; Committee on the Rights of the Child, *Concluding Observations: Mexico*, CRC/C/MEX/CO/3, 8 June 2006, para. 61(d) [“(d) Ensure that asylum-seeking children and children who have an irregular migratory status are not detained and have access to special reception and care arrangements...”]; *Report of the Special Rapporteur on the human rights of migrants*, Mr. François Crépeau, A/HRC/20/24, 2 April 2012, para. 72(h) [“(h) Ensuring that legislation does not allow for the detention of unaccompanied children and that detention of children is permitted only as a measure of last resort and only when it has been determined to be in the best interest of the child, for the shortest appropriate period of time and in conditions that ensure the realization of the rights enshrined in the Convention on the Rights of the Child. Children under administrative detention should be separated from adults, unless they can be housed with relatives in separate settings. Children should be provided with adequate food, bedding and medical assistance and granted access to education and to open air recreational activities. When migrant children are detained, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice should be strictly adhered to. The detention of children whose parents are detained should not be justified on the basis of maintaining the family unit: instead, alternatives to detention should be applied to the entire family”]; Committee on the Rights of the Child, *Concluding observations on the combined third and fourth periodic report of Canada*, CRC/C/CAN/CO/3-4, 6 December 2012, para. 74(a) [“...the Committee urges the State party to: (a) Reconsider its policy of detaining children who are asylum-seeking, refugees and/or irregular migrants; and ensure that detention is only used in exceptional circumstances, in keeping with the best interests of the child, and subject to judicial review”]; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *General Comment No. 2 on the rights of migrant workers in an irregular situation and members of their families*, CMW/C/GC/2, 28 August 2013, para. 44 [“Article 17, paragraph 17 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families “also raises the issue of family detention. As a general rule, children and families with children should not be detained and States parties should always give priority to alternatives to detention where children and families are concerned. When family detention is unavoidable, detention of children shall be used “only as a measure of last resort and for the shortest appropriate period of time”, in accordance with article 37, paragraph (b), of the Convention on the Rights of the Child. Moreover, the primary consideration in all actions concerning children shall be the best interest of the child standard, as laid down in article 3, paragraph 1, of the Convention on the Rights of the Child”].

<sup>32</sup> *Report of the Special Rapporteur on the human rights of migrants*, Mr. François Crépeau, A/HRC/20/24, 2 April 2012, para. 48; Janet Cleveland, “Psychological harm and the case for alternatives”, *Forced Migration Review*, Issue 44 (September 2013), pp.7-8; Carolyn Hamilton, Kirsten Anderson, Ruth Barnes, and Kamena Dorling, Children’s Legal Centre, University of Essex and Child Protection Section, UNICEF, “Administrative detention of children: A global report”, New York, 2011, pp. 59-98.

in death.<sup>33</sup> Regional tribunals, universal bodies and special mandates for the protection of human rights have taken action over the human rights abuses of immigrants, asylum-seekers and refugees by introducing limits on the power that States have to design immigration policies, as well as to dismantle inhuman practices in the context of migration. In this regard, practices in which the material conditions and regimes in place for the detention of migrant children proved contrary to the prohibition of cruel, inhuman or degrading treatment have been consistently outlawed.<sup>34</sup> In particular, specific appeals to avoid prison have been made.<sup>35</sup>

On the other side, when addressing the detention of migrants, asylum-seekers and refugee children *vis-à-vis* the obligations under the right to liberty, it is commonplace to find that decisions of international bodies for the protection of human rights embrace the last resort clause contained in Article 37(b) of the Convention on the Rights of the Child, as the adequate test to assess the conformity of such practices with human rights standards.<sup>36</sup> The last resort clause, even if imposing stringent conditions, allows States to employ child detention for immigration control, thus legitimizing such practices. A noticeable example of this point is the 2014 updated General Comment No. 35 of the UN Human Rights Committee which, by invoking the referred provision, indicated that:

Children should not be deprived of liberty, except as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention, and also taking into account the extreme vulnerability and need for care of unaccompanied minors.<sup>37</sup>

The fact that the prohibition of torture is a *jus cogens* norm and that the right to liberty is not absolute and has different regulations in international instruments<sup>38</sup> could explain the divergence

<sup>33</sup> See, for example, Mexico National Commission for Human Rights, Recommendation No. 22 /2015, *Sobre el caso de la muerte de la niña V1, persona en migración no acompañada de nacionalidad ecuatoriana, ocurrida en el albergue A1, en Ciudad Juárez, Chihuahua*, 27 July 2015. See also, IOM. *Fatal Journeys Volume 2: Identification and tracing of dead and missing migrants*, 2016.

<sup>34</sup> In particular, such an approach can be found in the case-law of the European Court of Human Rights. ECtHR, *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, App. No. 13178/03, Judgement of 12 October 2006; *Muskhadzhiyeva and Others v. Belgium*, App. No. 41442/07, Judgement of 19 January 2010; *Affaire Kanagaratnam et Autres c. Belgique*, App. No. 15297/09, Judgement of 13 December 2011.

<sup>35</sup> Report of the Special Rapporteur on the human rights of migrants, Mr. Jorge Bustamante, *Addendum, Mission to the United States of America*, A/HRC/7/12/Add.2, 5 March 2008, paras. 118 and 125 ["Children should be removed from jail-like detention centres and placed in home-like facilities [...] and "Families with children should not be held in prison-like facilities. All efforts should be made to release families with children from detention and place them in alternative accommodation suitable for families with children"]; UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, CCPR/C/GC/35, 16 December 2014, para. 18 ["Any necessary detention should take place in appropriate, sanitary, non-punitive facilities and should not take place in prisons"].

<sup>36</sup> Study of the Office of the United Nations High Commissioner for Human Rights on challenges and best practices in the implementation of the international framework for the protection of the rights of the child in the context of migration, A/HRC/15/29, 5 July 2010, para. 52 ["Where it is deemed to be absolutely necessary, children should only ever be detained as a measure of last resort, this detention must always be justified in law, and it must be for the shortest possible period of time"]. See also footnote 31.

<sup>37</sup> Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person)*, CCPR/C/GC/35, 16 December 2014, para. 18, citing 1050/2002, *D. and E. v. Australia*, para. 7.2; 794/1998, *Jalloh v. Netherlands*, paras. 8.2-8.3 and the Convention on the Rights of the Child, Articles 3(1) and 37(b).

<sup>38</sup> Article 9 of the International Covenant on Civil and Political Rights ["1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"]; Article 7 of the American Convention on Human Rights ["1. Every person has the right to personal liberty and security. 2. No one shall be deprived of his physical liberty except for the reasons and under the conditions established beforehand by the constitution of the State Party concerned or by a law established pursuant thereto. 3. No one shall be subject to arbitrary arrest or imprisonment."]; Article 5(1)(f) of the European Convention on human Rights ["1. Everyone has the right to liberty and security of person. No one shall be deprived of his

in the approaches. Nonetheless, all international instruments mandate against arbitrary detention, the latter being a non-derogable provision.<sup>39</sup>

A thorough look into contemporary international practice shows that the non-detention principle should be understood as a rule, that is to say, in absolute terms. In 2012, the Committee on the Rights of the Child, after holding a seminal discussion on “The Rights of All Children in the Context of International Migration,” advanced the idea that States should “expeditiously and completely cease the detention of children on the basis of their immigration status”, in the understanding that detention contravenes the principle of the best interests of the child under all circumstances.<sup>40</sup>

In 2014, the Inter-American Court of Human Rights, a regional tribunal in charge of applying and interpreting the American Convention on Human Rights and other treaties that concern the protection of human rights in the Americas issued its Advisory Opinion 21/2014.<sup>41</sup> The Court focused on the rights and guarantees of children in the context of migration and, thus, delimited State obligations in this specific field. A paramount principle that was defined in the Inter-American Court’s Advisory Opinion 21/2014 refers precisely to the non-detention of irregular migrant children. In this opinion, the Court declared unnecessary any detention of children for the purposes of controlling and/or deterring immigration, thus promoting the blanket ban on the detention of migrant, asylum-seeker and refugee children. The best interest of the child principle<sup>42</sup> had a central role in the Court’s conclusion that in the context of migration, a deprivation of liberty “can never be understood as a measure that responds to the child’s best interest.”<sup>43</sup>

The 2015 thematic report on children deprived of their liberty adopted by the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Juan E. Méndez, expressly acknowledged the value of the standards developed by the Inter-American Court. It also endorsed the non-deprivation of liberty of children for immigration control or deterrence on the basis that it surpasses the principle of necessity.<sup>44</sup> The Special Rapporteur thus called upon States

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liberty save in the following cases and in accordance with a procedure prescribed by law: (...) (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”]; Article 6 of the African Charter on Human and Peoples’ Rights [“Every individual shall have the right to liberty and to the security of his person. No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained”]; Article 37(b) of the Convention on the Rights of the Child [“(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time”].

<sup>39</sup> Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add.11, paras. 11 and 16; *Report of the Working Group on Arbitrary Detention*, A/HRC/22/44, 24 December 2012, paras. 42-51.

<sup>40</sup> Committee on the Rights of the Child, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration*, paras. 78-79.

<sup>41</sup> IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, available at: [http://www.corteidh.or.cr/docs/opiniones/seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/seriea_21_eng.pdf). A summary is also available at: [http://www.corteidh.or.cr/docs/opiniones/resumen\\_seriea\\_21\\_eng.pdf](http://www.corteidh.or.cr/docs/opiniones/resumen_seriea_21_eng.pdf).

<sup>42</sup> In the context of mobility, this principle implies that any administrative or judicial action or decision on entry, stay and removal of children, as well as regarding the detention, expulsion or deportation of their parents associated with their own immigration status, should assess, determine, consider and protect primarily the best interest of the child concerned. IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 70.

<sup>43</sup> IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 154.

<sup>44</sup> *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment of punishment*, Mr. Juan E. Méndez, A/HRC/28/68, 5 March 2015, para. 80 and the associated recommendations.

to, “expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status.”<sup>45</sup>

In sum, even if a consensus arises regarding the fact that migrant, asylum-seeker and refugee children should not be detained as it contravenes the best interest principle, the fundamental question is whether the call to end child detention allows for a last resort analysis, in which case detention will be an exceptional measure, or implies plainly and simply a blanket ban on the grounds that it will always be arbitrary. In order to examine the extent and implications of the principle of non-detention for immigration control of migrant, asylum-seeker and refugee children, the Advisory Opinion 21/2014 of the Inter-American Court of Human Rights will be addressed next.

#### IV. Advisory Opinion 21/2014: evolving interpretations from the Americas

The Inter-American Court of Human Rights is the regional tribunal for the protection of human rights in the Americas. Among its functions is to issue advisory opinions, through which it seeks to clarify the meaning, purpose and reason of international rules on the protection of human rights in the continent.<sup>46</sup> But, this is not the only purpose of the interpretative endeavour of the Court, it professes above all to assist and facilitate OAS Member States to effectively fulfil their international obligations in the field, including the development of public policies on human rights.<sup>47</sup> The advisory opinions indeed constitute interpretations that help to strengthen the system of protection of human rights.<sup>48</sup>

As is usually highlighted in the Court’s jurisprudence, the broad scope of its advisory function is unique in contemporary international law.<sup>49</sup> It encompasses a comprehensive *locus standi*. Therefore, not only State parties can trigger the advisory jurisdiction, but also all OAS Member States. The proceedings are multilateral and non-litigious, in that all interested States can participate. Thus, many OAS Member States may have legitimate interests in the outcome of the Court procedure.<sup>50</sup>

Advisory Opinion 21/2014 responds to a request made by the founding members of MERCOSUR (the Southern Common Market). Specifically, the States of Argentina, Brazil, Paraguay and Uruguay jointly presented the request under Article 64(1) of the American Convention<sup>51</sup> in 2011. The basis for this request was a diagnosis which showed that where there was a lack of coordination and harmonization between immigration laws and practices protecting the rights of children, a severe infringement of the rights of migrant children occurred.

<sup>45</sup> Id. at para. 80.

<sup>46</sup> IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 29.

<sup>47</sup> Id. at para. 29.

<sup>48</sup> Id.

<sup>49</sup> IACtHR, “*Other Treaties*” *Subject to the Advisory Jurisdiction of the Court* (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, paras.14-17, and *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 23.

<sup>50</sup> IACtHR, *Reports of the Inter-American Commission on Human Rights* (Art. 51 American Convention on Human Rights). Advisory Opinion OC-15/97 of November 14, 1997. Series A No.15, para. 26.

<sup>51</sup> It provides that: “The member states of the Organization may consult the Court regarding the interpretation of this Convention or of other treaties concerning the protection of human rights in the American states. Within their spheres of competence, the organs listed in Chapter X of the Charter of the Organization of American States, as amended by the Protocol of Buenos Aires, may in like manner consult the Court.”

The requesting States presented a consensus document in which they demanded the opinion of the Court on nine topics.<sup>52</sup> The nine questions covered almost the entire spectrum of possible situations and circumstances in which State action takes place during the migration process. The only situation or group that remained uncovered was that of children returned to their countries of origin. The agreed standards proposed by the MERCOSUR countries allowed the States to settle on a starting point in the discussion, which sought to move towards the inclusion of a child-centred approach in migration laws, policies and practices.

With regard to the interpretative scope of the Court's advisory function, it is worth recalling that it is not limited to Inter-American treaties. Illustrative of this point is the Court's Advisory Opinion 16/1999 which concerned the interpretation of the Vienna Convention on Consular Relations in conjunction with the American Convention. In this opinion, the Court found that the inter-State dimension of the Vienna Convention was intertwined with the protection of fundamental rights of individuals envisaged in some of its provisions.<sup>53</sup> In this vein, the Court developed international law by concluding that "Article 36 of the Vienna Convention on Consular Relations concerns the protection of the rights of a national of the sending State and is part of the body of international human rights law."<sup>54</sup> Additionally, the Court interpreted the right to consular assistance as forming part of due process guarantees.<sup>55</sup> This example shows how the Court's advisory function under Article 64(1) includes the interpretation of other treaties concerning the protection of human rights in the Americas "regardless of what the principal purpose of that treaty might be."<sup>56</sup>

Such a broad jurisdiction *ratione materiae* favours a constructive dialogue between regional and universal treaties. In Advisory Opinion 21/2014, it is clear that the Court prioritized the coherent interpretation of international law in the fields of Human Rights law, the comprehensive protection framework set forth in the Convention on the Rights of the Child and International Refugee law, in order to avoid fragmentation and advance satisfactory legal interpretations. Although the Court centred its interpretative function on the American Convention and Declaration, it also provided an articulated interpretation with universal treaties, such as the 1951 Refugee Convention and its 1967 Protocol, as well as with the guiding criteria which emerged from the respective monitoring bodies, in order to set standards with universal vocation.<sup>57</sup>

The ruling of the Court was delivered following an extensive participatory process of various States of the Americas, international organizations such as UNHCR, OHCHR, UNICEF and IOM,

<sup>52</sup> These topics were: 1. Proceedings to identify the needs for international protection and potential situations of risk for the rights of migrant children; 2. System of due process guarantees; 3. The non-detention of children. Standards for the application of precautionary measures in a migratory proceeding; 4. Measures of protection of rights that do not entail restrictions on freedom; 5. State obligations in the case of custody of children based on migratory reasons; 6. Due process guarantees before measures that entail restrictions on the personal freedom of children based on migratory reasons; 7. The principle of *non-refoulement* in relation to migrant children; 8. Procedures of protection for the recognition of the condition of refugees; 9. Right to a family life of the children when removal of the parents is ordered.

<sup>53</sup> IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, para. 76. See also, Antônio Augusto Cançado Trindade, "The Humanization of Consular Law: The Impact of Advisory Opinion No. 16 (1999) of the Inter-American Court of Human Rights on International Case-law and Practice", *Chinese Journal of International Law* (2007), Vol. 6, No. 1, pp. 1-16.

<sup>54</sup> IACtHR, *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC-16/99 of October 1, 1999. Series A No. 16, second operative paragraph.

<sup>55</sup> *Id.* at paras. 116-124.

<sup>56</sup> IACtHR, "Other Treaties" Subject to the Advisory Jurisdiction of the Court (Art. 64 American Convention on Human Rights), Advisory Opinion OC-1/82 of September 24, 1982. Series A No. 1, first operative paragraph.

<sup>57</sup> IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, paras. 58-59.



national human rights institutions, civil society and academic centres. By reviewing the approximately 40 written briefs and oral presentations during the public hearing held in Mexico City in 2013,<sup>58</sup> it is possible to verify the diversity of positions and contributions, ranging from the theoretical legal point of view to field experiences that show the harsh reality faced every day by children in the context of migration.

The Court held that “when designing, adopting and implementing their immigration policies for persons under the age of 18 years, the State must accord priority to a human rights-based approach, from a crosscut perspective that takes into consideration the rights of the child and, in particular, the protection and comprehensive development of the child,” which should prevail over any consideration of nationality or immigration status in order to ensure the full enjoyment of their rights.<sup>59</sup>

In fact, in the course of the proceedings of Advisory Opinion 21/2014 it became clear that one of the most important issues to be resolved was the question regarding the assessment of the possibility of the detention of children in the context of migration. During the hearing held in 2013, Judge Ferrer Mac-Gregor posed a specific question on this subject<sup>60</sup> and brought to the centre of the debate the issue of whether detention should be imposed as a last resort or should be banned outright. The position adopted by UNHCR and UNICEF was that the detention of migrant, asylum-seeker and refugee children should not continue. Both organizations maintained that Article 37(b) of the Convention on the Rights of the Child is applicable solely in the sphere of criminal matters. Therefore, departing from the principle of non-criminalization of migration, it derives that the last resort clause that governs criminal matters cannot be extrapolated to the administrative field of immigration control and management. The same stance had been adopted by UNICEF during the general discussion held by the Committee on the Rights of the Child in 2012.<sup>61</sup>

In this regard, a paramount rule that was defined in Advisory Opinion 21/2014 refers to the non-detention of children owing to their irregular immigration status. The Court found that although deprivation of liberty as a precautionary (not punitive) measure may seek a legitimate purpose and be appropriate to guarantee the appearance of children at immigration proceedings or to eventually enforce a deportation order, the detention of children based exclusively on migratory reasons goes beyond what is necessary to control migration. Moreover, measures that promote the care and well-being of the child should be favoured over the less severe measures considered alternatives to the deprivation of liberty.<sup>62</sup> In this vein, the Court highlighted that due consideration to the child’s developmental status should be assigned over their immigration status when defining

<sup>58</sup> IACtHR, *Escritos y documentos relacionados con el procedimiento de la Opinión Consultiva OC-21/14*, available at: <http://www.corteidh.or.cr/index.php/es/observaciones>.

<sup>59</sup> IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 68.

<sup>60</sup> He stated: “In several of the presentations it has been said or maintained the principle established in the Convention on the Rights of the Child, namely that the detention of children should be a measure of last resort and it was also expressed, especially remarked, by States [...] the approach consisting of the non-detention of children for immigration issues, so that family and community based solutions should be prioritized. Here especially, I ask the requesting States -if they deem suitable for their position-, if they could clarify whether that position is [...] an absolute principle or would entail nuances in specific cases or circumstances. If so, which would be these different circumstances? And also what role has the best interests of the child [...] for the balance that would have to be performed?” [non-official translation].

<sup>61</sup> Available at: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/WSDGD2012.aspx>

<sup>62</sup> IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, paras. 154-155.

the State's response and actions.<sup>63</sup> In other words, they should be treated first and foremost according to their consideration as children. The Court furthermore found that depriving a child of his liberty in the context of migration will never abide by the child's best interest.<sup>64</sup>

Due to the principle of the best interest of the child, the Inter-American Court went into delimiting the scope of the State's response, taking into account the particular situation of the child. In cases where children are unaccompanied or separated from their family, the Court found that a deprivation of liberty is inappropriate, because States are obligated to adopt, in a preferential way, measures of special protection based on the child's best interest.<sup>65</sup> In this regard, the Court highlighted the fact that any such measure must represent and offer an alternative that is different in material and qualitative terms to a deprivation of liberty in closed centres, giving priority to a community-based management that is adapted to the needs for comprehensive protection.<sup>66</sup> In this line of reasoning, such measures should not be conceptualized as alternatives from detention but, as already mentioned, measures that seek to promote the comprehensive development of the child in equal terms with nationals.

When children are accompanied, the need to keep the family together was found not to be a sufficient reason to legitimize or justify the exceptional admissibility of a measure of deprivation of liberty due to the prejudicial effects such measures have on the emotional development and physical well-being of children. Conversely, when the child's best interest requires keeping the family together, the Court was of the view that the imperative requirement not to deprive the child of his or her liberty extends to her or his parents. In such cases, authorities need to search for alternative measures to that of detention of the whole family, so as not to impose an excessive restraint on the rights of the child.<sup>67</sup>

The Court, however, acknowledged that in certain circumstances it is possible that States resort to measures such as housing children, either for a short period of time or for as long as necessary to resolve their immigration status. As a result, the Court established minimum conditions or requirements that must be met by places designed to accommodate child migrants, whether state or privately run, in order to ensure a comprehensive protection of their rights and allow for their holistic development.<sup>68</sup>

In sum, a distinct treatment is required not only with regard to the penal law but also *vis-à-vis* adults. So, it stems from the confluence of these two ideas that the State's response should be different in the case of migrant children not only from the principles that apply to detention in the context of juvenile justice, but also from the criteria governing detention of adult migrants in international human rights law.

Next, this article will explore whether the principle of non-detention implies a last resort analysis or a blanket ban.

<sup>63</sup> Id. at para. 68.

<sup>64</sup> Id. at para. 154.

<sup>65</sup> Id. at paras. 156-157.

<sup>66</sup> Id. at para. 180.

<sup>67</sup> Id. at para. 158.

<sup>68</sup> Id. at paras. 172-184.

## V. The principle of non-detention of children for immigration control or deterrence: a last resort analysis or a blanket ban?

As was previously explained, one of the arguments still prevalent is that States could resort to deprivation of liberty of children if used in an exceptional way, that is to say, as a last resort. So, the question rests as to whether or not the non-detention principle embraces the last resort clause contained in Article 37(b) of the Convention on the Rights of the Child, which establishes that:

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time[.]

The fundamental issue to explore thus relates to the interpretation of Article 37(b) of the Convention and whether its applicability is limited to matters which are essentially criminal. This is a central question to address because, even if a general principle of non-detention is made conditional, by including an exception clause to order detention of the child if deemed (absolutely) necessary, this exhortation melts away to a moral aspiration as the last resort clause essentially legitimizes the detention of children.

Assuming that Article 37(b) does not mention in express terms which kind of procedure it applies to, a look into the *travaux préparatoires* indicates that the draft clause specifying that detention should be used only as a measure of last resort and for the shortest period of time referred originally in an express manner to “detention awaiting trial.”<sup>69</sup> It was first introduced in the 1986 proposal by an informal working party composed of the delegations of Canada, Poland and Austria as well as interested NGOs. However, the wording of the article as it stands today draws from a Working Group formed in 1989 after it became clear that there was no consensus on diverse proposals on the issue. The working group subsequently decided to divide the proposed article into two parts, which later became Articles 37 and 40. The first part covered situations such as the prohibition of torture, the death penalty, life imprisonment and deprivation of liberty, whereas the second addressed the fair trial guarantees in the context of juvenile justice.<sup>70</sup> Both parts encompassed topics related to children who are accused of breaking the law.

The proposal regarding the second paragraph of the part that was finally adopted as Article 37 stated: “No child shall be deprived of his or her liberty unlawfully or arbitrarily. Deprivation of liberty shall be used only as a measure of last resort and for the shortest possible period of time.” It was based on international standards in force at the time, namely the International Covenant on Civil and Political Rights and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (“The Beijing Rules”).<sup>71</sup> The wording of the second limb generated an ample debate. The specific reference to “arrest, detention or imprisonment” was preferred over the general term “deprivation of liberty” in order to avoid the application of this rule to “educational and other types of deprivation of liberty applied to minors.”<sup>72</sup>

<sup>69</sup> The proposal stated: “Detention awaiting trial shall be used only as a measure of last resort, for the shortest possible period of time”. Sharon Detrick (comp. and ed.), *The United Nations Convention on the Rights of the Child: a guide to the travaux préparatoires*, Martinus Nijhoff Publishers, Dordrecht, 1992, pp. 462-463.

<sup>70</sup> Sharon Detrick (comp. and ed.), *The United Nations Convention on the Rights of the Child: a guide to the travaux préparatoires*, Martinus Nijhoff Publishers, Dordrecht, 1992, pp. 473-474.

<sup>71</sup> Adopted by General Assembly resolution 40/33 of 29 November 1985. In particular, with reference to Article 13(1) on “Detention pending trial,” which reads as follows: “Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time”.

<sup>72</sup> Sharon Detrick (comp. and ed.), *The United Nations Convention on the Rights of the Child: a guide to the travaux préparatoires*, Martinus Nijhoff Publishers, Dordrecht, 1992, p. 477.

From the above, it can be concluded that the drafters wished to include in the text specific reference to the different forms a deprivation of liberty can take in criminal proceedings. Moreover, even if the Beijing Rules referred specifically to detention pending trial, during the drafting process of the Convention on the Rights of the Child, it appears that the last resort test was also intended to apply to penalties and not only to precautionary measures. Lastly, through this provision the drafters did not wish to cover other situations that could fall under the broad concept of deprivation of liberty rather than the sphere of systems of juvenile justice.

This stance was defended by UNICEF during the 2012 discussion on “The Rights of All Children in the Context of International Migration” held by the Committee on the Rights of the Child, as well as during the proceedings before the Inter-American Court in Advisory Opinion 21/2014. Specifically, UNICEF held that:

In the case of children, detention should never be an option, since this would contradict the principle of the best interests of the child and the spirit of the entire CRC, which only permits detention as a last resort for the shortest period of time *in procedures that are criminal in nature* (CRC art. 37).<sup>73</sup>

Accordingly, in Advisory Opinion 21/2014 the Court concluded that the principle of *ultima ratio* that applies in regard to juvenile criminal justice is not applicable in the arena of immigration proceedings.<sup>74</sup> The reasoning of the Inter-American Court rested on the different procedural purposes between criminal and immigration proceedings and on the rationale that “the offenses concerning the entry or stay in one country may not, under any circumstances, have the same or similar consequences to those derived from the commission of a crime.”<sup>75</sup> Moreover, the Court recalled that the Committee on the Rights of the Child has emphasized that compliance with the requirements of paragraph (b) of Article 37 of the Convention shall proceed in cases where deprivation of liberty of unaccompanied and separated children outside their country of origin is exceptionally justified for reasons other than “on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.”<sup>76</sup>

This interpretation appropriately guarantees the rights of children. It does not, however, seek to withdraw children from all procedural guarantees, but to understand the possibility of restricting their right to personal liberty in a restrictive manner. Thus, the principle of last resort should only apply to juvenile justice and will not extend to other areas.

Additional arguments against detention in the case of asylum-seeker and refugee children are based on the fact that their situation is manifestly different from that of migrants so that the Convention on the Rights of the Child includes a special provision dealing with this status governed by international and national refugee law. In this regard, the Convention obliges States to provide appropriate protection and humanitarian assistance in the enjoyment of applicable rights to children in such situation.<sup>77</sup> Therefore, in the case of asylum-seekers and refugees, the specific

<sup>73</sup> United Nations Office of the High Commissioner for Human Rights, Committee on the Rights of the Child, Day of General Discussion “The rights of all children in the context of international migration,” available at: <http://www.ohchr.org/EN/HRBodies/CRC/Pages/WSDGD2012.aspx>.

<sup>74</sup> IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 150.

<sup>75</sup> *Id.*

<sup>76</sup> See IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, footnote 279, citing Committee on the Rights of the Child, *General Comment No. 6: Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, CRC/GC/2005/6, 1 September 2005, para. 61.

<sup>77</sup> Article 22 of the Convention on the Rights of the Child.

safeguards of Article 31 of the 1951 Refugee Convention<sup>78</sup> which provides for the non-penalization of refugees and asylum-seekers having entered or stayed irregularly if they present themselves without delay and show good cause for their illegal entry or stay, as well as the UNHCR guidelines apply.<sup>79</sup> In particular, taking into account that asylum-seeking children are forcibly displaced as a result of persecution, conflict, generalized violence, or human rights violations and may not, due to such circumstances, be in a position to comply with the legal formalities for entry, the UNHCR advances the view that “Overall an ethic of care –and not enforcement– needs to govern interactions with asylum-seeking children.”<sup>80</sup>

Having promoted the notion that that the last resort clause is inapplicable to the sphere of children immigration control, the prohibition of arbitrary detention provides the appropriate basis for scrutiny of any deprivation of liberty concerned in this context.<sup>81</sup> Thus, in defining the extent of the non-detention principle for immigration control or deterrence of children, the interpretation of the clause that prohibits arbitrary detention in connection with the principles of necessity and proportionality is at stake.<sup>82</sup> The degree of stringency of the principle of non-detention will vary depending on the rationale behind the interplay and the weight assigned to these principles in relation to a legitimate objective.

As explained above, the Inter-American Court and the Special Rapporteur on Torture focused on the analysis of the clause prohibiting arbitrary deprivation of liberty. Both found that a child’s detention based exclusively on migratory reasons exceeds the requirements of necessity in all circumstances. Additionally, both put forward the notion of a blanket prohibition on child detention thereby adapting the understanding of the right to liberty in the context of migration in light of children’s distinct needs and concerns. It is desired that in the upcoming relevant international discussions and documents this understanding of the principle of non-detention of migrant, asylum-seeker and refugee children as a rule not admitting any exception, is confirmed as a matter of contemporary international practice.

<sup>78</sup> Article 31 states that: “1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.”

<sup>79</sup> UNHCR Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, published in 2012.

<sup>80</sup> *Id.* at para. 52.

<sup>81</sup> Even in the European context, in which Article 5(1)(f) allows for the detention of an asylum-seeker or other immigrant prior to the State’s grant of authorisation to enter, the principle that detention of foreigners should not be arbitrary applies. See, Guide on Article 5—Right to Liberty and Security and ECtHR, *Case of Saadi V. The United Kingdom [GC]*, App. No. 13229/03, Judgement of 29 January 2008, paras. 73-74 [“73. (...) the Court considers that the principle that detention should not be arbitrary must apply to detention under the first limb of Article 5 § 1 (f) in the same manner as it applies to detention under the second limb (...). 74. To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that “the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country” (see *Amuur*, [...] § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued.”].

<sup>82</sup> Stephen Phillips, “Establishing arbitrariness”, *Forced Migration Review*, Issue 44 (September 2013), p. 9.

## VI. International acceptance and State practice towards implementing the non-detention principle as a blanket ban

Although many scholars have written about the impact of the judgments in contentious cases before the Inter-American Court as well as the implementation of measures of reparation at the State level, the academic exploration over the scope and effects of advisory opinions has been less extensive.<sup>83</sup>

In relation to the effects of the Court's advisory opinions, it has been affirmed that "while an advisory opinion does not have the binding character of a judgment in a contentious case, it does have undeniable legal effects."<sup>84</sup> Indeed, if the State does not act in conformity with the standards set forth in the advisory jurisdiction, a contentious case could subsequently come to the Court. Therefore, the Court has advanced the reasoning that the different organs of the State must carry out the corresponding control of conformity with the Convention under their respective scopes of action ("*control de convencionalidad*"),<sup>85</sup> based also on the considerations of the Court in exercise of its advisory jurisdiction.<sup>86</sup> The interpretation given to a provision of the American Convention through an advisory opinion should be employed by States to avoid possible human rights violations and achieve the effective respect and guarantee of human rights.<sup>87</sup> Therefore, the standards set forth by the Inter-American Court in its advisory jurisdiction are to be understood as binding inasmuch as they provide authoritative interpretations intended to guide State actions and decisions in matters relating to the protection of human rights. Moreover, such standards are also susceptible of enforcement through a future petition in the sphere of the contentious jurisdiction in cases of human rights violation. Such an understanding was also put forward by some OAS Member States after the release of Advisory Opinion 21/2014.

The MERCOSUR Institute for Public Policies in Human Rights (IPPDH), which was responsible for the drafting of the request of the advisory opinion, stressed that the document issued by the Court "is key to setting a minimum level of obligations of States of origin, transit and destination to ensure the protection of the rights of migrant children."<sup>88</sup>

<sup>83</sup> See, among others, Héctor Faúndez Ledesma, *El sistema interamericano de protección de los derechos humanos: aspectos institucionales y procesales*, 2da edición, IIDH, San José de Costa Rica, 1999, pp. 603-610; Pedro Nikken, "La función consultiva de la Corte Interamericana de Derechos Humanos", in Seminario *El Sistema interamericano de protección de los derechos humanos en el umbral del siglo XXI*, Corte IDH, 2003, pp. 161-184; Fabián Salvioli, *La competencia consultiva de la Corte Interamericana de Derechos Humanos: marco legal y desarrollo jurisprudencial*, in "Homenaje y Reconocimiento a Antônio Cançado Trindade", T. III, Ed. Sergio Fabris, Brasília, Brasil, 2004, pp. 417-472.

<sup>84</sup> IACtHR, *Reports of the Inter-American Commission on Human Rights (Art. 51 American Convention on Human Rights)*. Advisory Opinion OC-15/97 of November 14, 1997. Series A No.15, para. 26.

<sup>85</sup> For a systematization of the different theories and scholar writings on the "conventionality control", see Laurence Burgorgue-Larsen, *Chronicle of a fashionable theory in Latin America: Decoding the doctrinal discourse on conventionality control*, in Yves Haeck, Oswaldo Ruiz-Chiriboga, Clara Burbano Herrera (eds.), "The Inter-American Court of Human Rights: Theory and Practice, Present and Future", Intersentia, 2015, pp. 647-676.

<sup>86</sup> IACtHR, *Rights and guarantees of children in the context of migration and/or in need of international protection*. Advisory Opinion OC-21/14 of August 19, 2014. Series A No.21, para. 31.

<sup>87</sup> Id.

<sup>88</sup> IPPDH *Press release* "La Corte Interamericana de Derechos Humanos emitió la opinión consultiva sobre niñez migrante", 11 September 2014, [non-official translation], available at: <http://www.ippdh.mercosur.int/la-corte-interamericana-de-derechos-humanos-emiteo-la-opinion-consultiva-sobre-ninez-migrante/>

Moreover, the representatives of OAS Member States at the Permanent Council:

[W]elcomed the initiative of the MERCOSUR countries and described the document issued by the Court as “appropriate” given the challenges currently faced in this area. They reiterated the relevance, applicability and “vision” contained in the document. They also noted the importance of taking into account the contents of the Advisory Opinion for countries in the region to adopt their legislation in accordance with its terms.<sup>89</sup>

Several press releases by OAS Member States and organizations stressed the importance of the document issued by the Court. Brazil recognized that “the opinion c[ame] at a time when Brazil debates the review of its immigration legislation -replacing the current perspective, focusing on national security precepts, by one that focuses more on human rights.”<sup>90</sup> Costa Rica highlighted its active participation during the proceedings and stated that it “trusts that this Advisory Opinion offers guidance to all countries in the region and provide light where necessary on the right path to be taken in addressing the rights of children and adolescents who are involved in contemporary migration flows, both in the design, adoption, implementation and enforcement of immigration policies.”<sup>91</sup>

UNHCR celebrated the issuance of the Advisory Opinion. It highlighted, among the most significant contributions for international protection, the non-detention for immigration purposes of migrant children, asylum-seekers and refugees. It assured that “This binding document of the Inter-American Court complements and strengthens the efforts of States, the UNHCR itself and other specialized agencies as well as civil society, to advance a common regional agenda for the protection of refugees, asylum-seekers, stateless and internal displaced persons.”<sup>92</sup>

The International Detention Coalition (IDC) emphasized that “With this Advisory Opinion, the Court offers to civil organizations, scholars and human rights defenders a unique tool for the defense and construction of migration policies and practices that eradicate the detention of

<sup>89</sup> Press release E-427/14, “Advisory Opinion of the Inter-American Court on the rights and guarantees of migrant children”, 8 October 2014, available at: [http://www.oas.org/en/media\\_center/press\\_release.asp?sCodigo=E-427/14](http://www.oas.org/en/media_center/press_release.asp?sCodigo=E-427/14).

<sup>90</sup> Secretaria de Direitos Humanos, “Parecer da Corte Interamericana define responsabilidade de Estados em casos de crianças e adolescentes migrantes”, 16 September 2014, [non-official translation]. Available at: <http://www.sdh.gov.br/noticias/2014/setembro/parecer-da-corte-interamericana-de-direitos-humanos-define-responsabilidade-de-estados-em-casos-de-criancas-e-adolescentes-migrantes>.

<sup>91</sup> Ministerio de Relaciones Exteriores, “Costa Rica participó muy activamente sobre niños migrantes en Opinión Consultiva de la Corte Interamericana de Derechos Humanos”, 4004 CR Opinión Consultiva CIDH Niñez migrante, 11 September 2014, [non-official translation], available at: <http://www.rree.go.cr/index.php?sec=servicios%20al%20publico&cat=servicios%20de%20informacion&cont=593&noticia=1892>.

<sup>92</sup> UNHCR, “ACNUR celebra la Opinión Consultiva de la Corte Interamericana de Derechos Humanos sobre Niñez en el Contexto de la Migración y/o en Necesidad de Protección Internacional”, 17 September 2014, [non-official translation], available at: [http://www.acnur.org/noticias/noticia/acnur-celebra-la-opinion-consultiva-de-la-corte-interamericana-de-derechos-humanos-sobre-ninez-en-el-contexto-de-la-migracion-yo-en-necesidad-de-p/?sword\\_list%5B%5D=&no\\_cache=1](http://www.acnur.org/noticias/noticia/acnur-celebra-la-opinion-consultiva-de-la-corte-interamericana-de-derechos-humanos-sobre-ninez-en-el-contexto-de-la-migracion-yo-en-necesidad-de-p/?sword_list%5B%5D=&no_cache=1) See also, Executive Committee of the High Commissioner’s Programme. Note on international protection, EC/66/SC/CRP.10, 8 June 2015, para. 44 [“Consistent with international refugee and human rights law and standards, the detention of asylum-seekers should in principle be avoided. Instead, alternatives to detention that allow asylum-seekers to reside in the community, subject to certain conditions or restrictions while their status is being resolved, are an essential component of legal systems based on the rule of law. UNHCR welcomes a number of positive developments in this area, including: the 2014 Inter-American Court on Human Rights advisory opinion on children, which highlights that the detention of children for migratory purposes should be the exception rather than the rule...”].

children and adolescents in the context of migration and asylum and privilege the protection of their rights."<sup>93</sup>

The adoption of the Advisory Opinion 21/14 coincided, in turn, with the commemorative process of the 30<sup>o</sup> anniversary of the Cartagena Declaration on Refugees of 1984<sup>94</sup> ("*Cartagena+30*"). As a result, in December 2014 the Brazil Declaration and Plan of Action was adopted by acclamation of 28 countries and three territories in Latin America and the Caribbean.<sup>95</sup> In this document, the States:

*Recognize* that the deprivation of liberty of migrant children in an irregular situation, ordered solely for this reason, is arbitrary and that consequently we must make progress in adopting alternatives to detention, aimed at its prohibition, that promote their care and welfare with a view to their full protection in light of their particular vulnerabilities, taking into account Advisory Opinion 21/14 of the Inter-American Court of Human Rights, as appropriate.<sup>96</sup>

In terms of legislative implementation, Mexico took the lead. On 4 December 2014, Mexico enacted its "General Act on the Rights of Children and Adolescents" (*Ley General de los Derechos de Niñas, Niños y Adolescentes*), which included an entire chapter devoted to migrant children. In particular, the law provides that the irregular immigration status of a child or adolescent does not entail in itself the commission of a crime. It also mandates the adoption of special protection measures to ensure the rights of migrant children and adolescents in the context of human mobility.<sup>97</sup>

A year later, the complementary regulation (*Reglamento de la Ley General de los Derechos de Niñas, Niños y Adolescentes*) fixed in an express manner the non-detention rule in the following terms:

Article 111. At no time migrant children or adolescents, whether or not traveling in the company of an adult person shall be deprived of liberty in detention centres or any other immigration detention centre.

Both Brazil<sup>98</sup> and Ecuador<sup>99</sup> are in the process of reforming their immigration laws. In this context, it is expected that the new legislations provide adequate coordination between the immigration framework and the comprehensive protection systems for children. Additionally, the criteria

<sup>93</sup> International Detention Coalition (IDC), "Corte Interamericana pronuncia que la detención de niños, niñas y adolescentes por motivos migratorios siempre es arbitraria", 6 October 2014, [non-official translation], available at: <http://idcoalition.org/news/corte-interamericana-pronuncia-que-la-detencion-de-ninos-ninas-y-adolescentes-por-motivos-migratorios-siempre-es-arbitraria/>.

<sup>94</sup> *Cartagena Declaration on Refugees*, adopted by the "Colloquium on the International Protection of Refugees in Central America, Mexico and Panama: Legal and Humanitarian Problems," held in Cartagena, Colombia, from 19 to 22 November 1984.

<sup>95</sup> Antigua and Barbuda, Argentina, Bahamas, Barbados, Belize, Bolivia, Brazil, Cayman Islands, Chile, Colombia, Costa Rica, Cuba, Curaçao, El Salvador, Ecuador, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Lucia, Suriname, Trinidad and Tobago, Turks and Caicos, Uruguay and Venezuela. La Agencia de la ONU para los Refugiados, Brazil Declaration and Plan of Action, available at: <http://www.acnur.org/cartagena30/en/brazil-declaration-and-plan-of-action/>.

<sup>96</sup> La Agencia de la ONU para los Refugiados, Brazil Declaration and Plan of Action, available at: <http://www.acnur.org/t3/fileadmin/Documentos/BDL/2014/9865.pdf>.

<sup>97</sup> Secretaría de Gobernación, DECRETO por el que se expide la Ley General de los Derechos de Niñas, Niños y Adolescentes, y se reforman diversas disposiciones de la Ley General de Prestación de Servicios para la Atención, Cuidado y Desarrollo Integral Infantil, Chapter 19 "Children and Adolescents Migrants," available at: [http://www.dof.gob.mx/nota\\_detalle.php?codigo=5374143&fecha=04/12/2014](http://www.dof.gob.mx/nota_detalle.php?codigo=5374143&fecha=04/12/2014).

<sup>98</sup> See *Câmara dos Deputados, Projetos de Lei e Outras Proposições*, PL 2516/2015, available at: <http://www.camara.gov.br/proposicoesWeb/fichadetramitacao?idProposicao=1594910>.

<sup>99</sup> See Asamblea Nacional de la República del Ecuador, available at <http://leyes.asambleanacional.gob.ec/>.



developed by the Inter-American Court should be incorporated, especially the non-detention and the best interest of the child standards, both of which should be explicitly recognized in law.

## VII. Final remarks

As addressed in this article, the non-detention principle and other standards developed by the Inter-American Court in Advisory Opinion 21/2014 reflect the collective construction of the legal criteria. Indeed, the interpretative power of the Court was enriched by the contributions of all participants from different perspectives and expertise. This, in turn, furnished the document issued by the Court with ample legitimacy and generated the political will necessary to implement these standards.

This article has attempted to elaborate on the fact that immigration policies, laws and practices concerning children should mainstream an approach that avoids any inheritance from criminal law and enhances a child-centred perspective. By divorcing criminal law and immigration regulation, the Inter-American Court made a significant contribution to repudiating ideas related to the criminalization of migration. The consequences for infringing the requirements for entry or stay in a country cannot be equal or worse than the situation of children in conflict with the law, because the State's punitive power is the most intrusive sphere of the exercise of State power.

Therefore, the application of the last resort clause to immigration settings shows that the separation between immigration and criminal matters needs to be delved into deeper in order to overcome any reminiscence to the criminalization of migration, which results in understandings and practices that favour the detention of children on the basis of migration status. In fact, the last resort clause essentially legitimizes the detention of children.

In Advisory Opinion 21/2014, the Court was of the opinion that the last resort clause established in the Convention on the Rights of the Child, as a parameter for the viability of imprisonment in the case of breaking the law, remains inoperative in the field of immigration control due to the different nature and purposes of the proceedings.

Furthermore, as has been developed in this article, children deserve distinct treatment not only with respect to the requirements of the criminal justice system, but also in regard to adults. So, by merging these two points, the result is that State actions and decisions should necessarily be different in the case of migrant children.

The first argument towards solidifying the principle of non-detention for immigration purposes of children stems from one of the founding principles of the Convention of the Rights of the Child, i.e. the best interest of the child. The best interest argument, even if seminal in overcoming the legitimization of detention practices, can also potentially be used in a pernicious way due to its vagueness by providing plausible justifications of child detention on the grounds of their own protection or even on the basis of family unity. In this vein, it is imperative that international practice consolidates the view that detention will never be an option that responds to the best interest of the child. Additionally, a necessity and proportionality scrutiny provides the basis to affirm that any detention of children for the purposes of controlling and/or deterring immigration should be deemed unnecessary. Migrant, asylum-seeker and refugee persons under the age of 18 should be treated first and foremost as what they are: children.

Finally, what comes ahead is the harmonization of immigration laws that do not address in a distinct manner the situation of children in accordance with the framework for the comprehensive

protection of children, in order to avoid dissociation between both legal orders, so that the rights of children in the context of migration are effectively ensured without any discrimination or consideration of their migration status.

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# Children with Disabilities: Deprivation of Liberty in the Name of Care and Treatment

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## ABSTRACT

*In many countries, children with disabilities are often deprived of their liberty, separated from family environments, and confined to institutions or locked away in so-called health-care facilities in the name of care and treatment. The reasons for this isolation vary: stigma, lack of awareness and a dearth of support services for children and their families all play a role. Inside institutions in several countries, Human Rights Watch has documented that children with disabilities often face serious neglect and abuse, including beatings and psychological violence, sexual violence, involuntary and inappropriate medical treatment, use of abusive physical restraints, seclusion and sedation, denial of education and denial of regular contacts with families. These abuses can severely impede their physical, intellectual, emotional, and social development, and these harmful impacts are not limited to contexts in which the worst abuses take place. Global research has shown that children develop best with strong and supportive relationships in a safe and nurturing family-like environment. Children with disabilities are entitled to protection from violence, neglect, exploitation, and abuse, and have the right to be cared for by their parents or within family-like settings. Violence and neglect toward children living in institutions should end and governments should develop effective and accessible community services, including health care, child care support, inclusive education. When governments invest in community-based services and support, children with disabilities can live with their families and be a part of their communities instead of behind locked doors.*

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## Introduction

Estimates of the number of children living in institutions worldwide range from two million to eight million.<sup>1</sup> These figures are often reported as underestimates, due to a lack of data from many countries and the large percentage of unregistered institutions.

A disproportionate number of children who are placed in institutions have disabilities. Many are held in abusive conditions, separated from their families and their communities, deprived of education, and neglected. The exact number of children with disabilities in institutions worldwide is unknown. Human Rights Watch documented an overrepresentation of children with disabilities in institutions in India, Japan, Serbia, and Russia. For example, as of 2014, nearly 80 percent of children in institutions in Serbia had disabilities.<sup>2</sup> In Russia, too often children with disabilities are placed in institutions shortly after birth, where they may be tied to beds, denied health care and adequate nutrition, and receive little or no meaningful attention or education. Human Rights Watch has found similar abusive practices against children and adults with disabilities in Croatia, Ghana, Greece, India, Indonesia, and Japan.

In this article, we focus on the confinement of children with disabilities to institutions, social care centers, psychiatric hospitals, and informal traditional healing centers in which children may be detained on the basis of their disability and with no other options for care. From the start, it is worth noting that the United Nations Convention on the Rights of Persons with Disabilities (CRPD) provides for an absolute ban on deprivation of liberty on the basis of disability in Article 14(1)(b).

The institutionalization of children with disabilities can amount to deprivation of liberty.<sup>3</sup> In many institutions, rooms and buildings where children live are routinely locked, children are not allowed to move freely without permission, caretakers exercise complete and effective control over a child's care and movements, sometimes even denying their family members permission to visit. In many cases, there are no periodic reviews of a child's placement in an institution. No child should be confined to an institution because of his or her disability. Instead, the government should provide the necessary and adequate support and services in the community so that all children can live with their families or in alternative family care, such as foster care and adoption.

In this article, we discuss the placement of children with disabilities in institutions and the subsequent abuses they often experience, drawing from Human Rights Watch research from 2013 to 2016. In line with international instruments, the term "child" as used in this report refers to a person under age 18.

<sup>1</sup> UNICEF, "Progress for Children: A Report Card on Child Protection Number 8," 2009; Pinheiro, P., *World Report on Violence against Children*, (New York, UNICEF, 2006).

<sup>2</sup> Republic Institute for Social Protection, *Children in Social Welfare 2014* [In Serbian: Deca u sistemu socijalne zaštite], Belgrade, July 2015. p. 39. (Available in Serbian at): <http://www.zavodsz.gov.rs/PDF/izvestaj2015/DECA%20U%20SISTEMU%20SOCIJALNE%20ZASTITE.pdf> (accessed September 1, 2016).

<sup>3</sup> The UN Special Rapporteur on Torture has said that "deprivation of liberty" encompass "any form of detention, imprisonment, institutionalization or custody of a person in a public or private institution which that person is not permitted to leave at will ... This category of persons includes ... those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty." UN General Assembly, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (A/68/295), August 9, 2013, para 27.

## Background

It is often assumed that children with disabilities live in institutions because they need “specialized care” or because there is no one to take care of them. However, for almost 100 years, observational studies have documented stunted physical, intellectual, emotional, and social development among children separated from family environments and placed in institutions.<sup>4</sup> Regardless of an institution’s label, size, and location, institutional care is defined by certain characteristics that are harmful to children. Among these are: separation from families and the wider community; confinement to groups homogeneous in age and disability; de-personalization; overcrowding; instability of caregiver relationships; lack of caregiver responsiveness; repetitive, fixed, daily timetables for sleep, eating, and hygiene routines not tailored to children’s needs and preferences; and sometimes, insufficient material resources.<sup>5</sup>

Evidence has shown that institutionalization of babies harms their early brain development, can result in developmental delays and permanent disability, and may have long-lasting effects on their social and emotional behavior.<sup>6</sup> Other studies show that children who were moved from an institution into family-based environment demonstrated signs of improvement in their intellectual functioning and attachment patterns, reduced signs of emotional withdrawal, and reduced prevalence of mental health conditions.<sup>7</sup>

Institutional care for children is also often characterized by physical, psychological, and sexual violence by staff and other children.<sup>8</sup> Violence that children may experience in institutions is often long-term and can lead to severe developmental delays, various disabilities, irreversible psychological harm, and increased rates of suicide and criminal activity.<sup>9</sup> Institutionalization also results in segregation of children with disabilities from their families and communities—sometimes for their entire lives. They are separated from their parents and siblings and not provided with opportunities to form attachments.

<sup>4</sup> Berens, A. and Nelson, C., “The science of early adversity: is there a role for large institutions in the care of vulnerable children?” *The Lancet* (2015); UNICEF, “Violence against Children in Care and Justice Institutions,” undated, <http://www.unicef.org/violencestudy/5.%20World%20Report%20on%20Violence%20against%20Children.pdf> (accessed September 15, 2016).

<sup>5</sup> Marinus H. van Ijzendoorn et. al, “Children in Institutional Care: Delayed Development and Resilience,” *Monographs of the Society for Research in Child Development*, vol. 76, issue 4 (2001). Megan M. Julian and Robert B. McCall, “The Development of Children within Alternative Residential Care Environments”, 2009.

<sup>6</sup> Mulheir Georgette, “Deinstitutionalisation: a human rights priority for children with disabilities,” September 2012, [http://www.equalrightstrust.org/ertdocumentbank/err9\\_mulheir.pdf](http://www.equalrightstrust.org/ertdocumentbank/err9_mulheir.pdf) (accessed April 30, 2016); Browne Kevin, “The risk of harm to young children in institutional care,” 2009, [www.crin.org/en/docs/The\\_Risk\\_of\\_Harm.pdf](http://www.crin.org/en/docs/The_Risk_of_Harm.pdf) (accessed April 30, 2016).

<sup>7</sup> Johnson R, Browne K, Hamilton-Giachritsis C., “Young children in institutional care at risk of harm,” [https://www.crin.org/en/docs/The\\_Risk\\_of\\_Harm.pdf](https://www.crin.org/en/docs/The_Risk_of_Harm.pdf) (accessed September 15, 2016); Nelson C, et al., “Cognitive recovery in socially deprived young children: the Bucharest early intervention project.” [http://www.bucharestearlyinterventionproject.org/Nelson\\_et\\_al\\_combined\\_2007\\_.pdf](http://www.bucharestearlyinterventionproject.org/Nelson_et_al_combined_2007_.pdf) (accessed May 17, 2016); Bos, K. et al., “Psychiatric outcomes in young children with a history of institutionalization,” 2011, [http://www.bucharestearlyinterventionproject.org/Bos\\_et\\_al\\_2010\\_.pdf](http://www.bucharestearlyinterventionproject.org/Bos_et_al_2010_.pdf) (accessed May 17, 2016).

<sup>8</sup> UNICEF, “Violence against Children in Care and Justice Institutions,” undated, <http://www.unicef.org/violencestudy/5.%20World%20Report%20on%20Violence%20against%20Children.pdf>.

<sup>9</sup> Paulo Sergio Pinheiro, Independent Consultant, “World Report on Violence against Children,” United Nations Secretary-General’s Study on Violence against Children, 2006, <http://www.unicef.org/violencestudy/reports.html> (accessed September 15, 2016); Berens, A., Nelson, C., “The science of early adversity: is there a role for large institutions in the care of vulnerable children?”, *The Lancet*, 2015. UNICEF, “Violence against Children in Care and Justice Institutions,” undated, <http://www.unicef.org/violencestudy/5.%20World%20Report%20on%20Violence%20against%20Children.pdf>.



Some institutions might have adequate resources and dedicated staff, but they cannot replace a family. Institutions cannot provide the attention and affection a child would receive from their own parents and families, or from foster parents in the community.<sup>10</sup> As one social worker in Serbia said, “I’ve worked in an institution for 20 years but never developed much caring for children. After all, it was group work. We couldn’t develop love like that [of parents and foster parents].”<sup>11</sup>

The vast majority of children with disabilities in institutions have a living parent and could live with their families given the right support services.<sup>12</sup> However, due to a lack of community-based health-care, support services, and adequate information, as well as poverty, stigma, discrimination, social exclusion, and neglect by authorities and social services, parents in many countries are often pressured or feel they have no choice but to place their child with a disability in an institution.<sup>13</sup>

## The Path to Institutionalization

Children with disabilities are placed in institutions for a variety of reasons. Often, parents are encouraged and advised to do so by professionals who claim that institutions will provide the most effective care. In other cases, there is a lack of accessible community services to support children with disabilities and their families and to allow families to care for these children at home.

Human Rights Watch documented how medical staff in Serbia often advise parents to place their child with a disability in institutions.<sup>14</sup> Jasmina Cuković, mother of Julija, a 4-year-old girl born with Apert syndrome, a rare genetic condition characterized by premature fusion of certain skull bones and webbing of the hands and feet, told Human Rights Watch that medical doctors and nurses tried to convince her and her husband to leave Julija in the maternity ward and to have her placed in an institution. “One doctor told us that ‘it will be a torment for you and you don’t know if you will receive anything back.’ Medical nurses would tell us ‘this is best for you and for her. It is better for her to be with children that are like her.’”<sup>15</sup> After Julija was born, doctors and nurses did not bring her to her mother. Jasmina and her husband told Human Rights Watch that, despite repeated inquiries, they were not given any information about their daughter’s health and well-being.

A social worker who works in one Serbian institution said that children born with serious health problems or disabilities in Serbia are often denied the opportunity to bond with their parents upon birth: “In the maternity wards, the practice is that parents do not make physical contact with infants [with disabilities].”<sup>16</sup> The social worker said that such a practice significantly hinders the establishment of an emotional connection and affectionate relationship between parents and an infant with

<sup>10</sup> UNICEF, “Promoting the rights of children with disabilities,” UNICEF Innocenti Digest 13, New York, 2009.

<sup>11</sup> Human Rights Watch interview with Spomenka Savic, social worker, Serbia, November 19, 2015.

<sup>12</sup> In 2003, data from 33 European countries suggested that 96% of institutionalized children had one or both living parents. Browne KD, Hamilton-Giacritsis CE, Johnson R, Chou S. *Young children in institutional care in Europe*. *Early Childhood Matters* 2005; 105; 15-18. See also: Human Rights Watch, *‘It Is My Dream To Leave This Place’: Children with Disabilities in Serbian Institutions*, June 8, 2016, <https://www.hrw.org/news/2016/06/08/serbia-children-disabilities-neglected>.

<sup>13</sup> Human Rights Watch, *‘It Is My Dream To Leave This Place’: Children with Disabilities in Serbian Institutions; Human Rights Watch, Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages*, September 15, 2014, <https://www.hrw.org/report/2014/09/15/abandoned-state/violence-neglect-and-isolation-children-disabilities-russian>.

<sup>14</sup> Human Rights Watch, *‘It Is My Dream To Leave This Place’: Children with Disabilities in Serbian Institutions*, supra note 11, p. 33.

<sup>15</sup> *Ibid*, p. 34.

<sup>16</sup> *Ibid*.

disabilities. The social worker also confirmed that professional staff in some hospitals instead may be quick to encourage parents to give up on their child with a disability:

*Adequate professional advice and therapeutic and emotional support to parents is lacking. No information is provided on possible sources of support and instead, in the majority of cases, doctors provide parents with ready-made advice that it is easier and more practical or convenient for the child and for the parents to place the child in an institution.<sup>17</sup>*

Human Rights Watch documented a similar pattern in Russia, where doctors and nurses may pressure parents of newborns with disabilities to relinquish custody on the basis that children will be unable to develop and form relationships, that parents will be unable to care for them, or that the children will die.<sup>18</sup>

Parents may also lack the health, social, and economic support to be able to provide the needed care and assistance to their child. For example, one of the key reasons for placing children with developmental disabilities in institutions in India, Russia and Serbia is the lack of community-based health-care.<sup>19</sup>

Another reason is that parents often decide to place their child in an institution as a means for them to get an education as there are no inclusive schools or day-care facilities in their communities. Ana, a single mother of a 12-year-old girl with physical and intellectual disabilities who lives five days a week in an institution and spends weekends at home, told Human Rights Watch:

*Not one single day-care center wanted to accept her. They explained they found her too hyper-active. I've spent a year and half begging for an alternative where my daughter could spend her time while I was at work and I did not succeed. Three years ago, with no other option available, I placed her in an institution. Now, she can also access education with other children in the institution.<sup>20</sup>*

Human Rights Watch research has found how children who were deemed to be “severely disabled” were left behind in deinstitutionalization efforts in Serbia with government officials claiming their needs cannot be answered in a community setting.<sup>21</sup> The practice of keeping children with high support needs in institutions instead of to a family-based environment is discriminatory against children with multiple disabilities. This practice could also lead to significant numbers of children with high support needs spending the rest of their lives in institutions.

## Consequences of Confinement

In many countries, children with disabilities are confined to institutions, isolated and segregated from their communities, and at risk of torture, abuse, and neglect. Human Rights Watch has documented some of the most egregious human rights violations against children inside of institutions and in other closed settings. These include beatings and the use of abusive physical restraints in

<sup>17</sup> Ibid.

<sup>18</sup> Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages*, p. 66

<sup>19</sup> Human Rights Watch, *'It Is My Dream To Leave This Place': Children with Disabilities in Serbian Institutions*, p. 39; Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages*, p. 70. Human Rights Watch, *'Treated Worse Than Animals': Abuses against Women and Girls with Psychosocial or Intellectual Disabilities in Institutions in India*, p. 38.

<sup>20</sup> Human Rights Watch, *'It Is My Dream To Leave This Place': Children with Disabilities in Serbian Institution*, pp. 38-39.

<sup>21</sup> Human Rights Watch, *'It Is My Dream To Leave This Place': Children with Disabilities in Serbian Institutions*, p. 23.

Russia, sexual violence against girls with disabilities in India, the use of caged beds in Greece, inappropriate use of psychotropic medication in Serbia, and the shackling of children with disabilities in Ghana and Indonesia.

### *Physical and psychological abuse*

Human Rights Watch research on children with disabilities living in state institutions in Russia and India documented that staff in some institutions used physical or psychological violence, or both, including as punishment for behaviors directly related to their disabilities.<sup>22</sup> Such physical punishments included beatings; pouring cold water over children's heads; the use of physical restraints, including binding children to cribs or wheelchairs; and forced psychiatric hospitalization. Human Rights Watch also documented psychological violence in the form of forced isolation; threats of death, beatings, or psychiatric hospitalization; and humiliation and insults, including calling children "vegetables."<sup>23</sup>

One young woman with a developmental disability who lived in a specialized state institution in Russia from 1998 to 2011 told Human Rights Watch that staff beat her on several occasions:

*The staff used to hit me and drag me by the hair. They gave me pills to calm me down. They hit me when they came to work and found me roughhousing with the other kids.... When they got drunk, they would hit the other children and me often. I remember one incident, when a staff member was drunk. She asked me where the key to her office was. When I told her I did not know, she dragged me into a room and beat me up.<sup>24</sup>*

Human Rights Watch research on women and girls with disabilities living in institutions in India found that staff frequently used verbal and physical violence. Physical violence included hitting girls with sticks and punching them. Many girls also stated that staff swore at them, using severe and humiliating language.<sup>25</sup>

In Serbia, Human Rights Watch also observed that some institution staff used derogatory language when speaking to children and young people with disabilities, and made statements to the effect that the children have no potential to learn or go to school, or that "no one wants them" in their presence. While Human Rights Watch did not document the most severe forms of physical or psychological violence against children in institutions in Serbia or India, the conditions observed in several institutions and the absence of effective safeguards—including no confidential complaint mechanism for people with disabilities in institutions and a lack of independent and periodic monitoring—create a risk that such abuses could occur with impunity despite, in the case of Serbia, a 2012 rulebook prohibiting all forms of violence by staff working in institutions.<sup>26</sup> None of the children or young people interviewed by Human Rights Watch in India, Russia, Serbia had recourse to systems through which they could safely report violence without fear of retaliation.

<sup>22</sup> Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages*, p. 27; Human Rights Watch, *Treated Worse Than Animals*, December 2014, <https://www.hrw.org/report/2014/12/03/treated-worse-animals/abuses-against-women-and-girls-psychosocial-or-intellectual>, p. 62.

<sup>23</sup> Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages*, p. 40.

<sup>24</sup> *Ibid.*, p. 30.

<sup>25</sup> Human Rights Watch, *Treated Worse Than Animals*, p. 10.

<sup>26</sup> Human Rights Watch, *'It Is My Dream To Leave This Place': Children with Disabilities in Serbian Institutions*, p. 55, Human Rights Watch, *Treated Worse Than Animals*, p. 24, 73.

In Ghana, children in prayer camps<sup>27</sup> were subjected to the same regime of fasting as adults and were chained in the same conditions. Solomon, 9, who lived in Edumfa Prayer Camp and was often chained in the same room with about 20 other males told Human Rights Watch “I have been fasting for 21 days.... I feel pains in my stomach, my head, and my whole body.”

### *Risk of sexual violence against children with disabilities*

While there is a dearth of disaggregated data on violence against children with disabilities, global trends suggest that they are likely to be at greater risk of violence. An meta-analysis of existing studies indicate that children with disabilities are 3.7 times more likely than children to be victims of any sort of violence, 3.6 times more likely to be victims of physical violence, and 2.9 times more likely to be victims of sexual violence. Children with psychosocial or intellectual disabilities are particularly vulnerable to violence and experience 4.6 times greater risk of sexual violence as children without disabilities.<sup>28</sup>

Human Rights Watch research in government and privately run psychiatric hospitals and institutions in India and Indonesia found that girls with disabilities, particularly psychosocial or intellectual disabilities, are at a heightened risk of violence, including sexual violence. Closed institutional settings further isolate children with disabilities, making violence and abuses against them difficult to discover and report. Many of these institutions restrict freedom and mobility to such an extent that they are like prisons. In fact, the management of such institutions and psychiatric hospitals in many countries even refer to their residents as “inmates.”

A lack of accessible information on health, sex education, and support services contributes to the cycle of violence.<sup>29</sup> In some cases, girls with disabilities may be considered asexual or unlikely to be considered sexually attractive, thereby leaving them out of sex education and reproductive health outreach programs. In Indonesia, in seven of the state-run mental hospitals, social care institutions, and private faith healing centers visited by Human Rights Watch, male staff would enter and leave women’s and girls’ wards, or sections at will or were directly responsible for the women’s and

<sup>27</sup> In Ghana, prayer camps are privately owned Christian religious institutions with roots in the evangelical or pentecostal denominations established for purposes of prayer, counseling, and spiritual healing, and are involved in various charitable activities. The camps are run by prophets, many of them self-proclaimed. Some of these camps have units where persons with mental disabilities are admitted, and the prophets seek to heal persons with mental disabilities with prayer and traditional methods such as the application of various herbs. The prophets, or pastors, and staff at these camps have virtually no mental health care training. Human Rights Watch has not been able to ascertain the number of prayer camps in Ghana, but there is a general belief in the country that there are several hundred such camps, operating with virtually no government oversight. Human Rights Watch, *‘Like a Death Sentence:’ Abuses against Persons with Mental Disabilities in Ghana*, March 2, 2012, <https://www.hrw.org/report/2012/10/02/death-sentence/abuses-against-persons-mental-disabilities-ghana>

<sup>28</sup> Jones, Lisa et al., “Prevalence and risk of violence against children with disabilities: a systematic review and meta-analysis of observational studies”, *The Lancet*, Volume 380, Issue 9845, 899–907, 2012, [http://www.thelancet.com/journals/lancet/article/PIIS0140-6736\(12\)60692-8/abstract](http://www.thelancet.com/journals/lancet/article/PIIS0140-6736(12)60692-8/abstract) World Health Organization, “Violence against adults and children with disabilities,” undated, <http://www.who.int/disabilities/violence/en/> (accessed January 6, 2014); Department for International Development, *Disability, Poverty and Development*, February 2000, [http://www.handicap-international.fr/bibliographie-handicap/4PolitiqueHandicap/hand\\_pauvrete/DFID\\_disability.pdf](http://www.handicap-international.fr/bibliographie-handicap/4PolitiqueHandicap/hand_pauvrete/DFID_disability.pdf) (accessed January 5, 2014), p. 3. The WHO has drawn attention to some limitations in the data; “this meta analysis uses data from every pertinent study that has been conducted on the subject (21 studies for prevalence and 10 studies for risk). While it is the best data available on the subject, the available studies do have methodological weaknesses and gaps exist in the types of disability and violence they address. Robust studies are absent for most regions in the world, particularly low-income and middle-income countries.”

<sup>29</sup> Sexuality education is not an integral part of the curriculum in mainstream Indian public schools although it was introduced in a limited way under ‘life skills’ training in some states.

girls' section, including at night, putting girls at increased risk of sexual violence. In traditional or religious healing centers, girls are chained next to men and boys, leaving them no option to run away if they encounter abuse.<sup>30</sup> Similarly in India, Human Rights Watch found three instances in which only male staff were appointed to female wards at night.<sup>31</sup>

Human Rights Watch research in Indonesia found that in order to prevent girls with disabilities from pregnancy as a result of sexual violence, staff in institutions gave them birth control, often without their consent or knowledge. When asked, staff members sometimes give residents a basic explanation of what the injection is for, but they sometimes falsely claim it is an injection of vitamins, if they sense the resident will resist or refuse. Some female residents who previously used contraception agreed to receive it from the institution staff. In other cases, staff forcibly administered the contraceptive injection. If female residents refused, staff locked them in a seclusion room as punishment. Human Rights Watch documented similarly involuntary and invasive medical interventions for young women with disabilities to prevent or terminate pregnancy and for cancer screening in Serbia. While physical and verbal abuse is common in the institutions and mental hospitals Human Rights Watch visited in many countries, sexual violence more often remains hidden as victims are less likely to talk about it.

Girls with psychosocial or intellectual disabilities are furthermore often restrained or institutionalized for unique gender-specific reasons, such as fear of sexual violence. For example, Human Rights Watch research in India and Indonesia found that families often keep girls with disabilities chained, locked at home, or in the custody of an institution, rather than using non-abusive means to ensure the girls do not wander away from home and potentially become targets for sexual violence.<sup>32</sup>

Girls with disabilities face barriers to reporting and getting criminal complaints registered and investigated in cases of sexual violence.<sup>33</sup> The problem is often compounded for girls with psychosocial or intellectual disabilities, because the police are not convinced that the person is telling the truth or can identify the attacker. Girls with psychosocial or intellectual disabilities are also confronted with a lack of awareness and prejudice on the part of medical and legal professionals, who often do not believe the girls' accounts, particularly reports of sexual violence.

### *Neglect*

Children with disabilities in institutions often experience neglect, including lack of adequate nutrition, inadequate health-care, lack of access to rehabilitation services, insufficient access to education and play, and lack of individualized attention. For example, in Russia, Human Rights Watch researchers met children with disabilities in institutions who appeared to be significantly

<sup>30</sup> Healing centers are generally run by traditional or faith healers who practice "healing" techniques including chaining, Quranic recitation, night baths, herbal concoctions and rubbing the body with stones. Often an extension of the faith healer's house or situated within the compound, these rudimentary centers primarily cater to people with psychosocial disabilities who are believed to be possessed by evil spirits or the devil, have sinned, displayed immoral behavior, or are thought to have lack of faith. Typically people in these centers have been forcibly placed there by their families or by the local police. Human Rights Watch, *'Living in Hell: Abuses against People with Psychosocial Disabilities in Indonesia*, March 21 2016, <https://www.hrw.org/report/2016/03/21/living-hell/abuses-against-people-psychosocial-disabilities-indonesia>, p. 58.

<sup>31</sup> Human Rights Watch, *Treated Worse Than Animals*, pp. 66.

<sup>32</sup> Human Rights Watch, *Treated Worse Than Animals*, pp. 69-70.

<sup>33</sup> Human Rights Watch, *Breaking the Silence: Child Sex Abuse in India*, February 2013, <http://www.hrw.org/sites/default/files/reports/india0113ForUpload.pdf>, p. 4; Human Rights Watch, *Broken System: Dysfunction, Abuse, and Impunity in the Indian Police*, August 2009, <http://www.hrw.org/sites/default/files/reports/india0809web.pdf>, p. 9.

physically underdeveloped for their ages.<sup>34</sup> Many had protruding ribs and were unable to walk or crawl, despite the absence of physical or developmental disabilities that may have otherwise hindered them from being able to do so.<sup>35</sup> Children could not develop fully because of a lack of adequate nutrition and water, and of knowledge on the part of institution staff about appropriate feeding methods for children.<sup>36</sup>

In southern Greece, children with disabilities living in the Children Care Center of Lechaina were kept in wooden cage beds because of a shortage of staff to supervise them. Children with chronic diseases and disabilities did not receive adequate health-care, and most children did not have access to education.<sup>37</sup> Following visits to the center, the Inspection Body for Health Services and Welfare issued reports and recommendations in 2007 and 2009 stating that the care center did not employ the required qualified personnel, despite the need for continued surveillance of the patients. The Inspection Body also found deprivation of care, psychological support, and physiotherapy, and that the residents appeared not to receive regular medical or rehabilitation services.<sup>38</sup>

In Serbia, a lack of individualized attention for children with disabilities from caregivers proved to be a significant problem in residential institutions, in many cases leading to neglect.<sup>39</sup> For example, in one institution visited, in the so-called “ward for the most severely disabled,” there were only four caregivers and one nurse for 64 children and adults with disabilities per shift. Other than taking care of basic needs such as bathing, diaper changes, and feeding, there was little time for individual care or interaction with the children.

Staff in another institution in Serbia explained that the primary role of the scarce caregivers is to provide nursing and physical care. In the “ward for the most severely disabled” in the same institution, Human Rights Watch found most babies and children lying on their backs, staring at the ceiling or wall, with no stimulation or interaction. In one of the rooms, Human Rights Watch found a 15-year-old boy with untreated hydrocephalus, lying motionless on a bed on his back. The vast majority of children living in wards “for the most severely disabled” in institutions across Serbia were not toilet trained and could not eat by themselves, being fed by nasogastric tubes instead. Institution staff recognized the lack of individual attention they could give children with disabilities. Ana Tomašević, director of Stamnica Institutions in Serbia, told Human Rights Watch that “all of them need affection and attention, but they cannot receive it here.”<sup>40</sup>

Overcrowded conditions, coupled with a shortage of staff, contribute to children’s neglect. For example, as of November 2014, Asha Kiran, a government-run institution in Delhi, India, housed 891 people, close to three times its capacity. One member of the child welfare committee at the institution told Human Rights: “We send children to Asha Kiran with a very heavy heart because we know whatever skills and socialization—shaking hands, basic conversation and tasks—they

<sup>34</sup> Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages*, p. 48.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*, p. 49.

<sup>37</sup> Human Rights Watch, *Dispatches: Greece—No Excuse for Caging Children*, November 18, 2014 <https://www.hrw.org/news/2014/11/18/dispatches-greece-no-excuse-caging-children>.

<sup>38</sup> European Disability Forum and Human Rights Watch, *Open Letter to Mr. Loverdos, Greek Minister of Health Regarding the living and care conditions at the Children’s Care Center of Lechaina*, June 14, 2011, [https://www.hrw.org/news/2011/06/14/open-letter-mr-loverdos-greek-minister-health#\\_edn1](https://www.hrw.org/news/2011/06/14/open-letter-mr-loverdos-greek-minister-health#_edn1).

<sup>39</sup> Human Rights Watch, *‘It Is My Dream To Leave This Place’: Children with Disabilities in Serbian Institutions*, p. 52.

<sup>40</sup> *Ibid.*, p. 53.

have learned here will go [away] in a couple of weeks.”<sup>41</sup> An expert on institutions for people with intellectual disabilities in India added, “Seeing the state that children are in is absolutely shocking. Places shouldn’t be like Asha Kiran.”<sup>42</sup>

Research has shown that the absence of a one-to-one relationship with a primary caregiver is a major cause of harm to a child’s development, and of attachment disorders.<sup>43</sup> The Special Rapporteur on Torture, in his 2015 report, noted that:

*“One of the most egregious forms of abuse in health and social care settings is unique to children. Numerous studies have documented that a child’s healthy development depends on the child’s ability to form emotional attachments to a consistent care-giver . . . Unfortunately, this fundamental need for reconnection is consistently not met in many institutions, leading to self-abuse.”<sup>44</sup>*

### ***Involuntary and Inappropriate Medical Treatment***

Children with disabilities living in institutions are often forced to take medication or given inappropriate medical treatment. Human Rights Watch found that girls with psychosocial or intellectual disabilities living in institutions in India are forced to take medication.<sup>45</sup> The institution staff openly told Human Rights Watch that they hold girls down or forcibly open their mouths to coerce them to take medication. If that fails, they sometimes force-feed girls food and drinks, such as bananas or tea, laced with medicines. Human Rights Watch found similar abuses in Ghana and Indonesia, where children are forced to take medication and alternative “treatments” such as concoctions of “magical” herbs.<sup>46</sup> “If they don’t take their medicine, we mix the medicine with water, banana, tea, or sugar,” a nurse in Indonesia said. “If they still refuse to take it, the doctor gives them an injection.”

Human Rights Watch documented the cases of 11 girls between the ages of 14 and 17 who were receiving Electroconvulsive Therapy (ECT) in India. Human Rights Watch also documented the use of ECT on children in Indonesia, including in its unmodified form (without anesthesia, muscle relaxants, and oxygenation). Psychiatric hospitals in India do not make provision for taking the wishes of the child into account, or for a child’s evolving capacities. This means that even if a child explicitly refuses to undergo ECT, the treating psychiatrist can still forcibly administer ECT as long as the institution has the consent of the child’s guardian and the hospital’s medical board. This falls short of India’s obligations under the United Nations Convention on the Rights of the Child (CRC) and the CRPD, which provide for taking into consideration the evolving capacities of a child to participate in decision-making.<sup>47</sup>

<sup>41</sup> Human Rights Watch, *Treated Worse Than Animals*, p. 52. Also see: The Hindu, “Halfway homes set to open in city”, August 8, 2016, <http://www.thehindu.com/news/cities/Delhi/Halfway-homes-set-to-open-in-city/article14558426.ece> (accessed December 15, 2016).

<sup>42</sup> *Ibid.*, p. 49.

<sup>43</sup> Inge Bretherton, “The Origins of Attachment Theory: John Bowlby and Mary Ainsworth,” 1992, [http://www.psychology.sunysb.edu/attachment/online/inge\\_origins.pdf](http://www.psychology.sunysb.edu/attachment/online/inge_origins.pdf) (accessed September 15, 2016).

<sup>44</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (A/HRC/28/68), March 5, 2015, para. 56.

<sup>45</sup> Human Rights Watch, *Treated Worse Than Animals*, p. 62.

<sup>46</sup> Human Rights Watch, ‘*Living in Hell: Abuses against People with Psychosocial Disabilities in Indonesia*, March 21 2016, <https://www.hrw.org/report/2016/03/21/living-hell/abuses-against-people-psychosocial-disabilities-indonesia>, p. 47. Human Rights Watch, ‘*Like a Death Sentence: Abuses against Persons with Mental Disabilities in Ghana*, p. 56.

<sup>47</sup> Convention on the Rights of the Child (CRC), adopted November 20, 1989, G.A. Res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force September 2, 1990, art. 5,

The World Health Organization Resource Book on Mental Health, Human Rights and Legislation states that ECT should only be administered in its modified form, , with informed consent, and that “there are no indications for the use of ECT on minors [defined as , anyone below the age of 18], and hence this should be prohibited through legislation.”<sup>48</sup>

The UN Special Rapporteur on Torture warned against involuntary treatment of persons with disabilities who “are particularly affected by forced medical interventions, and continue to be exposed to unwarranted non-consensual medical practices.”<sup>49</sup> The Special Rapporteur called a form of ill-treatment in health and social care detention settings “inappropriate medical care, including the use of psychoactive medication in children.”<sup>50</sup>

In Serbia, Human Rights Watch documented that staff administer several kinds of medications, including psychotropic medications, to children with disabilities in institutions and small group homes, apparently as a means of dealing with behavioral issues, and without oversight or review to ensure that treatment is necessary and administered in line with the rights of children with disabilities to the highest attainable standards of health.<sup>51</sup>

Similarly, Human Rights Watch documented that children with intellectual disabilities in psychiatric hospitals in Ghana are given medication, even in cases when they do not need it. One nurse informed that:

*while no one on current admission has a psychiatric condition, some of them receive psychotropic drugs because they are so restless. We don't have access to alternative services that would stimulate these children. In any case, we lack the necessary skills to handle children with intellectual disabilities since we [were] train[ed] to deal with psychotic adult cases.”<sup>52</sup>*

In Russia, Human Rights Watch documented that staff in some state children’s institutions send children with disabilities to psychiatric hospitals as a form of punishment for “bad” behavior or for being too “active,” namely for running indoors, roughhousing with other children, or trying to leave their rooms or go outdoors.

One young woman with a developmental disability, aged 19, who grew up in a specialized state institution in Western Russia described her experience in a psychiatric hospital:

*If you misbehave, then they give you pills to put you to sleep or they take you to Bogdanova. Bogdanova is a psychiatric hospital where there are bars on the windows. Staff there tie kids' hands together and give them pills and injections . . . I felt very badly when I was there.”<sup>53</sup>*

A young man who grew up in a state institution exclusively for children with disabilities in northwest Russia said that he had been sent to a psychiatric hospital as punishment for being too “active.” He told Human Rights Watch that it was too painful to recount his treatment there. “It’s

14. Convention on the Rights of Persons with Disabilities (CRPD), adopted December 13, 2006, G.A. Res. 61/106, annex I, U.N. GAOR Supp. (No. 49) of 65, U.N. Doc. A/61/49 (2006), entered into force May 3, 2008, art. 3.

<sup>48</sup> World Health Organization, “Resource Book on Mental Health, Human Rights and Legislation,” 2005, [http://www.who.int/mental\\_health/policy/resource\\_book\\_MHLeg.pdf](http://www.who.int/mental_health/policy/resource_book_MHLeg.pdf)

<sup>49</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (A/HRC/28/68), March 5, 2015, para 53.

<sup>50</sup> Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (A/HRC/28/68), March 5, 2015, para 57.

<sup>51</sup> Human Rights Watch, *‘It Is My Dream To Leave This Place’: Children with Disabilities in Serbian Institutions*, p. 58.

<sup>52</sup> Human Rights Watch, *‘Like a Death Sentence’: Abuses against Persons with Mental Disabilities in Ghana*.

<sup>53</sup> Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages*, p. 37.



something I never want to talk about," he said. He also described an incident involving another boy who was sent to a psychiatric hospital, apparently as punishment for running around his bedroom, contrary to the institution's rules, explaining that when he came back from the hospital, the boy was "drowsy, and he slept for days."<sup>54</sup>

According to the American Academy of Child and Adolescent Psychiatry, the use of psychotropic medications in children and adolescents may lead to adverse effects on neurological development, personality, and character, as well as weight gain or movement disorder.<sup>55</sup> Alternative interventions to medications are especially important when there are serious side effects.

While international law recognizes that children can be given treatment on the consent of a parent or a guardian, Article 12 of the CRC also highlights the right of the child to be heard,<sup>56</sup> and "to express their views and to have such views seriously taken into account, based on age and maturity."<sup>57</sup> The United Nations Committee on the Rights of the Child, in its General Comment on the right of the child to the enjoyment of the highest attainable standard of health, stated that Article 12 covers children's own views on all aspects of their health, "including, for example, what services are needed, how and where they are best provided, [...]."<sup>58</sup>

The Committee on the Rights of the Child further noted that children who are particularly vulnerable to discrimination are also often less able to exercise their autonomy to decision-making on their health issues.<sup>59</sup> The Committee recommended development and implementation of supportive policies so that "children, parents and health workers have adequate rights-based guidance on consent, assent and confidentiality."<sup>60</sup>

Finally, the Committee warned against over-medication and institutionalization of children with psychosocial disabilities, urging governments "to undertake an approach based on public health and psychosocial support to address mental ill-health among children and adolescents and to invest in primary care approaches that facilitate the early detection and treatment of children's psychosocial, emotional and mental problems."<sup>61</sup>

### *Use of Restraints and Seclusion*

Children with disabilities living in institutions are often subjected to solitary confinement and prolonged use of restraints. Human Rights Watch documented that staff in many institutions in India, Indonesia, Greece, Russia, and Serbia frequently use physical and chemical restraints on children and confine children to cribs or caged beds.

<sup>54</sup> Ibid.

<sup>55</sup> American Academy of Child and Adolescent Psychiatry, "Guide for Community Child Serving Agencies on psychotropic medications for children and adolescents," February 2012, [http://www.aacap.org/app\\_themes/aacap/docs/press/guide\\_for\\_community\\_child\\_serving\\_agencies\\_on\\_psychotropic\\_medications\\_for\\_children\\_and\\_adolescents\\_2012.pdf](http://www.aacap.org/app_themes/aacap/docs/press/guide_for_community_child_serving_agencies_on_psychotropic_medications_for_children_and_adolescents_2012.pdf) (accessed May 16, 2016).

<sup>56</sup> Convention on the Rights of the Child, Article 12.

<sup>57</sup> See General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), para 19. See also general comment No. 12 (2009) on the right of the child to be heard, *Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 41 (A/65/41)*,

<sup>58</sup> See General Comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), para 19.

<sup>59</sup> Ibid., para 21.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid., para 38.

In Russia, Human Rights Watch found children with disabilities whose heads, arms, or torsos were bound by rags or clothing to cribs, wheelchairs or furniture in several institutions.<sup>62</sup> The consequences can be dire. In April 2014, a 7-year-old boy with a developmental disability died, apparently by choking on his own vomit, after a health worker in a state institution used cloth diapers to tie him to his bed.<sup>63</sup> Many children with disabilities are also confined to cribs nearly all day, every day, in so-called “lying-down” rooms in Russia or “wards for the most severely disabled” in Serbia. Rooms typically had 4 to 17 cribs. Staff provide these children with minimal time outdoors and do not provide opportunities for them to get up and walk or move around in wheelchairs.

In Greece, children with disabilities in one institution were tied to their beds or kept in wooden cage beds, apparently due to staff shortages.<sup>64</sup> There have also been alarming reports of deaths and allegations of abuse in care centers in Greece.<sup>65</sup> Human Rights Watch also documented the practice of shackling children as young as 5—together with adults—in so-called prayer camps (or spiritual healing centers) in Ghana. Children with real or perceived psychosocial disabilities, mostly girls, were tied to a tree or wooden post with a heavy metal chain, denied food, water, and shelter, and separated from their families.<sup>66</sup>

Children with disabilities living in some institutions are also often given powerful sedatives, a form of chemical restraint to control or punish behavior that staff deem undesirable. For example, institution staff in Russia stated that they typically administer sedatives to prevent children from banging their heads against crib railings or walls, or to prevent them from disrupting institution routines.<sup>67</sup> The situation is similar in Serbia, where institution staff, including medical staff, told Human Rights Watch that psychiatric drugs are in many cases prescribed to prevent children from harming themselves, behaving aggressively towards others, or to control children’s behavior.

### *Denial of Education*

Children and young people with disabilities living in institutions often have little or no access to education. Children who do receive education attend specialized schools or classrooms only for children with disabilities. Some children receive education within their institutions.

Up to 60 percent of children with disabilities who live in Serbian institutions are not enrolled in school. “We put the television on or they spend their time in the workshop [drawing or learning life skills],” a caregiver in an institution explained when describing how children spend their days.<sup>68</sup> Human Rights Watch researchers visited five institutions in Serbia during school hours and found

<sup>62</sup> Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages*, p. 31.

<sup>63</sup> Human Rights Watch, *Dispatches: A Russian Orphan Dies While Tied to Bed*, May 2, 2014, <https://www.hrw.org/news/2014/05/02/dispatches-russian-orphan-dies-while-tied-bed> p. 32.

<sup>64</sup> Human Rights Watch, *Dispatches: Greece—No Excuse for Caging Children*, <https://www.hrw.org/news/2014/11/18/dispatches-greece-no-excuse-caging-children>

<sup>65</sup> The Greek Ombudsman, “Summary of Findings: Functioning Conditions of the Social Care Center for Children with Disabilities, “Children’s Care Center of Lechaina,” March 2011, <http://www.synigoros.gr/resources/docs/kepeplechaina2011.pdf> (accessed September 15, 2016); Human Rights Watch, *Open Letter to Mr. Loverdos, Greek Minister of Health: Regarding the Living and Care Conditions at the Children’s Center of Lechaina*, June 14, 2011, <https://www.hrw.org/news/2011/06/14/open-letter-mr-loverdod-greek-minister-health>.

<sup>66</sup> Human Rights Watch met Victoria, a 10-year-old girl, who was shoeless and covered with dirt when researchers found her chained to a tree at Nyakumasi Prayer Camp in Ghana. Human Rights Watch, *‘Like a Death Sentence’: Abuses against Persons with Mental Disabilities in Ghana*.

<sup>67</sup> Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages*, p. 35.

<sup>68</sup> Human Rights Watch, *‘It Is My Dream To Leave This Place’: Children with Disabilities in Serbian Institutions*.

a large number of primary and secondary school age children in the institution, rather than at school. In most cases, institution staff claimed that the children's health was too fragile for them to be in school.<sup>69</sup> However, some institution staff recognized the exclusion of children with disabilities from education as problematic. "Not all children go to school every day," one staff member said. "For example, there is this one boy who goes only once per week. It doesn't make any sense to me, but that's what the school decided."

The higher support needs that a child with a disability living in an institution has, the lower the likelihood that he or she will be included in the education system. For example, in Serbia, staff in institutions often told Human Rights Watch that only children "with better prospects" will be included in schools and preschools. "Those deemed able to go to school are in school. First, we included the best children. We can't include them all."<sup>70</sup> The situation is similar in Russia, where many children with disabilities living in state institutions receive little or no education. It is particularly rare for children in "lying-down" rooms of specialized state children's institutions to receive any form of education and, until recently, many of these children had been deemed "uneducatable."<sup>71</sup>

In three residential institutions visited in India, girls with psychosocial or intellectual disabilities were likewise not given adequate access to education.<sup>72</sup> Some girls with psychosocial or intellectual disabilities in two institutions attended non-formal classes within the institution or attend a local school. However, the curriculum in the schools is not adapted to their needs and the children do not get specialized attention, limiting their learning.<sup>73</sup> In Japan, Human Rights Watch documented that children with disabilities living in institutions go to special schools exclusively for children with disabilities, depriving them of the opportunity to study with peers from their own communities.<sup>74</sup> Other children are placed in so-called short-term therapeutic institutions, which in many cases they cannot leave, not even for school.

The UN Special Rapporteur on Torture has stated that denying children deprived of their liberty an education creates a risk of abuse and ill-treatment.<sup>75</sup> Segregating children with disabilities in separate schools leads to greater marginalization within the community, a situation that people with disability face generally, thus entrenching discrimination.<sup>76</sup> Maiko W. lived in an institution in Japan and was sent to an elementary school and junior high school for children with disabilities, followed by a mainstream high school. He said:

<sup>69</sup> Ibid., p. 70.

<sup>70</sup> Ibid., p. 68.

<sup>71</sup> Amendments to the Law on Education in 2013 eliminated the possibility of a child being diagnosed as "uneducable." Human Rights Watch, *Left Out? Obstacles to Education for People with Disabilities in Russia*, September 1, 2015, <https://www.hrw.org/report/2015/09/01/left-out/obstacles-education-people-disabilities-russia>; Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages*, p. 55.

<sup>72</sup> Human Rights Watch, *Treated Worse Than Animals*, pp. 55-59.

<sup>73</sup> Ibid., p. 53.

<sup>74</sup> Human Rights Watch, *Without Dreams: Children in Alternative Care in Japan*, May 1, 2014, <https://www.hrw.org/report/2014/05/01/without-dreams/children-alternative-care-japan>.

<sup>75</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (A/HRC/28/68), March 5, 2015, para 49.

<sup>76</sup> United Nations Human Rights Council, "The Right to Education of persons with disabilities: Report by the UN Special Rapporteur on the Right to Education Vernor Muñoz," February 19, 2007, A/HRC/4/29, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G07/108/92/PDF/G0710892.pdf?OpenElement> (accessed June 17, 2011).

*When I went to high school, it was the first time that I was living in the community. I realized there is so much information that I didn't know. Certain values, certain ways of living, I just didn't know. If we were integrated into the community, the exchange of ideas would be much better.<sup>77</sup>*

### ***Denial of Regular Contact with Families***

In his 2015 report, the Special Rapporteur on Torture noted that “children deprived of their liberty are often not allowed to maintain regular contact with their families and friends.”<sup>78</sup> As of December 2014, 10,896 people with disabilities lived in institutions in Serbia<sup>79</sup>—most of them having entered the institution as children.<sup>80</sup> Few had contact with their families.

The CRC requires States to protect the rights of children separated from one or both parents to maintain regular contact with parents.<sup>81</sup> But in Russia, Human Rights Watch documented that staff in some institutions for children with disabilities either actively deny children’s contact with relatives or fail to take measures to facilitate such contact. Staff at two institutions in Russia reported that they do not attempt to contact children’s parents and discourage visits, claiming that children tend to be “spoiled” by special treatment by their parents, and return from family visits prone to misbehavior. In St. Petersburg, a children’s rights activist, Alexander D., said that “some doctors [at specialized state institutions] tell parents not to visit because their presence upsets children.”

Karina M., the mother of a 19-year-old man with a developmental disability who has spent his life in institutions in northwest Russia, said that institution staff sometimes prevented her from spending time with her son outside the grounds of the State orphanage where he lived, under the rationale that he would bring infections back into the institution.

Family separation is a problem for all children in institutions, but it is especially detrimental for infants (children under 2). In Japan, as of 2013, about 3,000 infants lived in infant care institutions. In fact, the vast majority of infants who require alternative care in Japan end up in institutions.<sup>82</sup> International standards set out that alternative care for young children under age 3 should be, almost without exception, in family-based settings, and many child development specialists suggest that infants are at risk for attachment disorder, developmental delays, and neural atrophy when in institutional care. One care worker in a Tokyo institution told Human Rights Watch that the infants housed there have no one to hold them when they cry at night, because of a shortage of staff.<sup>83</sup>

<sup>77</sup> Human Rights Watch, *Without Dreams: Children in Alternative Care in Japan*.

<sup>78</sup> UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez (A/HRC/28/68), March 5, 2015, para 49.

<sup>79</sup> Republic Institute for Social Protection, “Adults in the system of social protection [In Serbian: Odrasli u sistemu socijalne zaštite],” July 2015, p. 37, (Available in Serbian at): <http://www.zavodsz.gov.rs/PDF/izvestaj2015/PUNOLETNI%20KORISNICI%20U%20SISTEMU%20SOCIJALNE%20ZASTITE.pdf> (accessed January 13, 2016).

<sup>80</sup> Human Rights Watch, ‘It Is My Dream To Leave This Place’: *Children with Disabilities in Serbian Institutions*, p. 25.

<sup>81</sup> Convention on the Rights of the Child, art. 9(3). An exception to this obligation is if such contact lies contrary to a child’s best interests.

<sup>82</sup> Human Rights Watch, *Without Dreams: Children in Alternative Care in Japan*, p. 28.

<sup>83</sup> *Ibid.*

## What Should be Done Instead

All children, including children with disabilities, have the right to be cared for and raised by their parents and not to be separated from their parents, except when such separation is necessary for their best interests.<sup>84</sup> For example, not all families are safe, nurturing, and protective, and there are times when alternative family care or short-term state care for children may be necessary. However, in cases where the immediate family is unable to care for a child with disability, the CRPD requires governments to “undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.”<sup>85</sup> The CRPD also states that “[i]n no case shall a child be separated from parents on the basis of a disability of either the child or both of the parents.”

Research has shown that placement of a child with a disability in segregated institutions rather than in an inclusive community is rarely, if ever, in their best interest. Most often parents, siblings, or other relatives, and in some cases foster and adopted families, provide children with the attention and support they need.

The Committee on the Rights of the Child reinforced this notion, articulating that children with disabilities “are best cared for and nurtured within their own family environment.”<sup>86</sup> The Committee has called on State parties to establish programs to deinstitutionalize children with disabilities and return them to their biological or extended families or place them in foster care, and to provide children’s families with the systematic support they may need to include children into their homes.<sup>87</sup>

Furthermore, article 25 of the CRC states: “when a child has been placed for the purposes of care or treatment, she/he has a right to a periodic review of treatment provided and all other circumstances relevant to the child’s placement.” Research by Human Rights Watch in Croatia, Ghana, Indonesia, Russia, and Serbia suggest that such reviews rarely take place.

The United Nations Guidelines for the Alternative Care of Children state that to meet the emotional, social, and other needs of each child living without parental care, States should take all necessary legislative, policy, and financial measures to provide for adequate alternative care options that grant priority to “family-and community-based solutions.”<sup>88</sup>

Young children, especially those under age 3, should receive care in family-based settings, except in emergency cases or to prevent the separation of siblings, when residential care should be for a limited duration and “with planned family reintegration or other appropriate long-term care solution as its outcome.”<sup>89</sup>

So, what needs to be done to assure that children with disabilities are not locked up in institutions, but able to live in the community?

<sup>84</sup> *Ibid.*, art. 23 (4).

<sup>85</sup> Convention on the Rights of Persons with Disabilities, article 23, para 5.

<sup>86</sup> Convention on the Rights of the Child. General Comment No. 9: The rights of children with disabilities. Geneva: United Nations Committee on the Rights of the Child; 2006; General Comment No. 7: Implementing child rights in early childhood. Geneva: United Nations Committee on the Rights of the Child; 2006.

<sup>87</sup> Convention on the Rights of the Child. General Comment No. 9: The rights of children with disabilities. Geneva: United Nations Committee on the Rights of the Child; 2006; para 49.

<sup>88</sup> UNICEF, “Guidelines for the Alternative Care of Children,” undated, [http://www.unicef.org/protection/alternative\\_care\\_Guidelines-English.pdf](http://www.unicef.org/protection/alternative_care_Guidelines-English.pdf) (accessed February 29, 2016), para. 53.

<sup>89</sup> *Ibid.*, para 22.

1. **Prevent abuse.** Governments around the world should take immediate steps to end abuse against children living in institutions and hold those responsible for treatment of children to account. Isolation, psychological and physical abuse, sexual violence, inappropriate psychiatric treatments (including the inappropriate use of psychotropic medications as a means of dealing with behavioral issues), and discrimination against children with disabilities in institutions must end. This can be achieved through training and sensitization of health workers, mental health professionals and staff in institutions on the rights and needs of children with disabilities and the development of confidential, accessible and effective mechanisms for children with disabilities in state institutions to report abuse without risk of repercussions. This includes informing children in an accessible manner about their rights and ways in which to file complaints and receive psychosocial support and legal assistance. States should ensure children's complaints are reviewed and addressed promptly and impartially.
2. **Prevent separation.** Governments should develop services in the community to prevent family separation. Services should include free local health-care and quality, inclusive schools, community day-care centers for children under school age, neonatal and postnatal services, family support services, financial assistance to families of children with disabilities, and parenting counseling, among others. Services should be flexible and respond to the individualized needs of children. Funding community care and support for children with disabilities in some European countries has been shown to be more cost-effective in the long term than funding large-scale institutions.<sup>90</sup> In Serbia, Human Rights Watch identified how existence of a family outreach service for children who are at risk of separation could help prevent separation.<sup>91</sup>
3. **Reunite families.** The majority of children with disabilities in institutions have at least one living parent. Reasons for separation include poverty, lack of access to health-care, access to education, and undue pressure by health-care professionals on parents to place their child with a disability in an institution. Adequate community-based services should be put in place as a priority so children can return to live with their birth families. Developing an individual plan for each child's exit from an institution, including a plan on community-based support and services, could help facilitate the reunion.
4. **Provide alternative care.** Where it is not in their best interests to return to their birth families, including in cases of abuse and neglect or when parents do not want to care for their child, children should be provided with an opportunity to live in a family-like environment with relatives, foster families, or adoptive parents. These potential caregivers should be carefully screened, trained, and monitored to ensure that the placement is protective and in the best interest of the child. Agencies responsible for foster care should work on strengthening and working with birth families so that they can meet their child's needs and facilitate reunification.
5. **Leave no one behind.** The right to live in a family-like setting applies to all children with disabilities. No matter how high their support needs are, every child, without exception, has the

<sup>90</sup> Costa M. De-institutionalization and quality alternative care for children in Europe: Lessons learned and the way forward. Eurochild Working Paper. 2006, [http://www.eurochild.org/fileadmin/public/05\\_Library/Thematic\\_priorities/06\\_Children\\_in\\_Alternative\\_Care/Eurochild/DI\\_Lessons\\_Learned\\_web\\_use.pdf](http://www.eurochild.org/fileadmin/public/05_Library/Thematic_priorities/06_Children_in_Alternative_Care/Eurochild/DI_Lessons_Learned_web_use.pdf); Berens, A., Nelson, C., "The science of early adversity: is there a role for large institutions in the care of vulnerable children?" *The Lancet*, 2015.

<sup>91</sup> The Family Outreach Service in Serbia, developed by UNICEF in cooperation with the government and financed by the Novak Djokovic Foundation, provides support to families where there is a risk of separation of children from their families, including families for children with disabilities.

right to live in the community. The development of services and support for children with disabilities and their families need to take into account children who require intensive support or may be at risk of remaining in institutions indefinitely. For example, states could institute a benefit for children who require intensive support—such as 24-hour personal care—to enable a parent to work. A parent who stays home and provides care for a child that requires intensive support should be able to be recognized as a caregiver of the child.

## Conclusion

Children should not be isolated from their families or communities or denied the chance to learn and be with other children because they have a disability. Children with disabilities need to be included in communities and schools and not confined—in the name of “care,” “treatment,” or “rehabilitation”—to institutions where in reality they are at risk of irreversibly stunted physical, intellectual, emotional, and social development. This will require a change in how governments invest their resources, which should be used to promote community-based services and support, instead of large-scale institutions. It will also require a change in attitudes to view children with disabilities as any other child, possessing the same rights and requiring the same amount of affection, inclusion and support.

# A Mandate to End Placement of Children in Institutions and Orphanages: The duty of governments and donors to prevent segregation and torture

ERIC ROSENTHAL\*

## ABSTRACT

*UN Special Rapporteur on Torture Juan Méndez brings overdue attention to children detained in institutions and the need to protect them against torture or ill-treatment. The Méndez Report establishes that the obligation to prevent torture requires governments to stop the unnecessary institutional placement of any child. There are 8-10 million children detained in orphanages and other institutions around the world. Research demonstrates that raising children in a congregate setting is inherently dangerous, leading to psychological damage, developmental delays, and an increased risk of violence, abuse, and exploitation. The vast majority of children in orphanages are not orphans—80 to 98% have a living parent. The reason for most orphanage placement is the lack of protection and support for families who live in poverty as well as the lack of assistance for children with disabilities to remain at home. UNICEF has called for an end to institutionalization worldwide, and European regional branches of UNICEF and WHO have called for a moratorium on new placements of young children. Despite this, governments and international donors continue to support orphanages, and the institutionalization of children continues to grow. The implications of the Méndez report are clear: governments and donors who support the institutionalization of children are perpetuating an increased risk of torture.*

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*The Méndez Report calls for the placement of children in institutions to be limited to the last resort. This is consistent with current interpretations of the Convention on the Rights of the Child (CRC). In addition, Méndez calls for limiting placement to the shortest time possible in the least restrictive manner. These protections go beyond interpretations of the CRC in General Comment #9 of the CRC Committee. Since models of family care exist for all children—and most placement can be avoided by protecting families—Méndez’s recommendation would bring an end to long-term placement of children. Méndez’s recommendations are informed by the UN Convention on the Rights of Persons with Disabilities (CRPD), which protects the right of children to grow up in a family environment. To implement this right, the CRPD Committee has called for an end to the placement of children in institutions. General Comment #9 should be updated to harmonize it with the requirements of both CAT and the CRPD.*

*Immediate attention is also needed to protect the millions of children now placed in institutions. The protection against torture and ill-treatment is universal, without exception, and does not permit delays in implementation. The lack of funding is not an excuse for leaving children at continued risk. The Méndez Report demonstrates why urgent action is needed to create the community services and family support systems necessary to ensure that all children live and grow up in a family. A moratorium on new admissions is the most effective way to fulfill the mandate of the Méndez Report—combined with immediate action to integrate institutionalized children back into families.\*\**

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## Introduction

In March 2015, the United Nations (UN) Special Rapporteur on Torture Juan E. Méndez presented his thematic report on “torture and ill-treatment of children deprived of their liberty” to the UN Human Rights Council.<sup>1</sup> The Méndez Report demonstrates how the prohibition of torture under international law protects children from abuse and improper placement in any form of public or private institution.<sup>2</sup> The Méndez Report notes the “heightened risk” of violence and abuse<sup>3</sup> as well as the dangers to mental health and development inherent in placing children in institutions.<sup>4</sup> The Special Rapporteur on Torture calls on governments to recognize that “[t]he unique vulnerability of children deprived of their liberty requires higher standards and broader safeguards for the prevention of torture and ill-treatment.” While much of the Méndez Report focuses on the need to protect rights within institutions, the report also calls on all States “[t]o ensure that deprivation of liberty is used only as a measure of last resort...”<sup>5</sup> The Méndez Report goes on to recognize that, even when detention is used as a last resort, it must be limited to:

the *shortest possible period of time*, only if it is in the best interests of the child, and limited to exceptional cases. Failure to recognize or apply these safeguards increases the risk of children being subject to torture or other ill-treatment, and implicates State responsibility. Therefore, States should, to the greatest extent possible, and always using the *least restrictive means necessary*, adopt alternatives to detention that fulfill the *best interest* of the child, and the obligation to prevent torture or other ill-treatment of children, together with their rights to liberty and family life, through legislation, policies and practices that allow children to remain with family members or guardians in a non-custodial, community-based context.<sup>6</sup>

Limiting institutionalization to a measure of “last resort” appears in a number of international instruments<sup>7</sup>—including General Comment #9 of the UN Committee on the Rights of the Child (concerning children with disabilities).<sup>8</sup> But the Méndez Report adds new limitations on the time of detention and requires the least restrictive means necessary. For the millions of children who are placed in orphanages and other institutions around the world, these protections can be of life-saving importance. Méndez’s recommendations strengthen the protection of all children separated, or at-risk of separation, from their families as established under international law. These rights are now protected by Article 20 of the Convention on the Rights of the Child (CRC), which governs

<sup>1</sup> UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* Juan E. Méndez, UN Doc. A/HRC/28/68 (March 5, 2015), (hereinafter, the “Méndez 2015 Report” or “Report on Children in Detention”).

<sup>2</sup> *Id.* at para.21.

<sup>3</sup> *Id.* at para. 16 “Children deprived of their liberty are at a heightened risk of violence, abuse, and acts of torture or cruel, inhuman or degrading treatment or punishment.”

<sup>4</sup> *Id.*, at paras. 16-17.

<sup>5</sup> *Id.*, at para. 85 (a).

<sup>6</sup> *Id.*, at para. 72. [emphasis added]

<sup>7</sup> *See, e.g.* “The placement of a juvenile in an institution shall always be the disposition of the last resort and for the minimum necessary period,” United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereinafter the “Beijing Rules”), GA Res. 40/33 UN Doc. A/40/53 (Nov. 29, 1985), section 19.1. The Beijing Rules only apply to juvenile justice detention and would not apply to placement for health or social reasons.

<sup>8</sup> UN Committee on the Rights of the Child, General Comment No. 9 (2006): The rights of children with disabilities, February 27, 2007, CRC/C/GC/9, para.47 [hereinafter “General Comment No. 9”].

the placement of children “temporarily or permanently deprived” of their family environment and guarantees them “special protection and assistance provided by the State.”<sup>9</sup>

The Méndez Report brings an overdue examination of the obligation of governments to protect children from torture or ill-treatment, as established by the anti-torture framework of the UN Convention Against Torture (CAT).<sup>10</sup> In addition, Méndez’s recommendations are informed by the new UN Convention on the Rights of Persons with Disabilities (CRPD).<sup>11</sup> The CRPD protects the right of children to grow up in the community with a family.<sup>12</sup> The UN Committee on the Rights of Persons with Disabilities has recently interpreted that right to call for an end to the institutional placement of children. This interpretation of the CRPD has major implications for children’s rights and for institutional placement around the world. The implementation of Méndez’s recommendations would go a long way to protecting the right to a family as guaranteed by the CRPD.

By bringing to bear the requirements of CAT and CRPD, the Méndez Report points toward updates needed in international law and practice. The recommendations of a UN Special Rapporteur are themselves non-binding “soft law,” but they can become binding when incorporated into the decisions of international human rights bodies.<sup>13</sup> The Special Rapporteur can help “establish very precise norms and rules of interpretation regarding their activities, which lead to a widening of the protection granted to torture victims.”<sup>14</sup> The Special Rapporteur is well-placed to help international actors develop practices that will promote and protect human rights.

Part I of this article describes the scope of the Méndez Report. The recommendations apply to the detention of children in any institution—whether criminal, custodial, medical, or otherwise. Part I also describes the implications of the Méndez Report for international donors and development agencies—and the need for governments to regulate international aid.

Part II describes the breadth of the global problem. The vast majority of children are placed in orphanages because of poverty or disability. Such placement could be prevented if families received legal protections and support. Drawing on scientific research and human rights reporting, Part II describes why institutions are inherently dangerous and lead to increased disability. Part II also describes the inconsistent international response to evidence about the dangers of institu-

<sup>9</sup> UN General Assembly, Convention on the Rights of the Child, G.A. Res. 44/25, UN GAOR, 44<sup>th</sup> Sess., Supp. No.49, at 166, UN Doc.A/44/25 (1989). Entered into force September 2, 1990 [hereinafter “CRC”].

<sup>10</sup> UN General Assembly, Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, GA Res. 39/46, UN. Doc. A/RES/29/46 (June 26, 1987) [hereinafter “CAT”].

<sup>11</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities, GA Res. 61/106, UN Doc. A/RES/61/106 (Jan. 24, 2007) [hereinafter “CRPD”].

<sup>12</sup> *Id.*, Article 19, recognizes the “right of all persons with disabilities to live in the community, with choices equal to others...”. CRPD, Article 23, recognizes the right of children to grow up with a family and not be separated on the basis of disability. The failure of governments to create community-based supports and family protections puts all children at risk, whether or not they have a disability. Thus, as this article will describe, the protections established by the CRPD have implications for *all* children, whether or not they have a disability. See note 127 and accompanying analysis.

<sup>13</sup> Dinah L. Shelton, *Soft Law in HANDBOOK OF INTERNATIONAL LAW* (Routledge Press, 2008), 6. The standards and recommendations of the Special Rapporteur on Torture often become enforceable law when used by international and regional enforcement bodies, Association for the Prevention of Torture (APT) & Ctr. for Justice & Int’l Law (CEJIL), *TORTURE IN INTERNATIONAL LAW: A GUIDE TO JURISPRUDENCE* (hereinafter, “APT & CEJIL, 2008”) at 3.

<sup>14</sup> Sylvie Bukhari-de Pontual, *Assessment of the Effectiveness of UN Mechanisms for the Prevention and Fight Against Torture*, 322 in *A WORLD OF TORTURE: ACAT-FRANCE 2011 Report* (Action by Christians for the Abolition of Torture, 2011). The role of the Special Rapporteur was originally created in 1985 by the UN Commission on Human Rights, and its mandate has been extended under the UN Human Rights Council. The mandate of the United Nations to the UN Special Rapporteur on Torture is described at: Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment <http://www.ohchr.org/EN/Issues/Torture/SRTorture/Pages/SRTortureIndex.aspx> (last visited Nov. 16, 2016).

tions. In the 2013 State of the World's Children report, for example, the United Nations Children's Fund (UNICEF) called for an end to institutionalization of children throughout the world. Some branches of UNICEF and the World Health Organization (WHO) have called for a moratorium on new placements of children in institutions. Despite this, donors and international charities continue to support orphanages on a large scale, resulting in increases in the orphanage population in parts of the developing world.<sup>15</sup>

Part III examines the legal foundations for the duty to prevent torture and to promote community integration under CAT and the CRPD. The duty to prevent torture goes well beyond stopping practices that actually constitute ill-treatment or torture. The Méndez Report makes clear that implementing this obligation entails creating programs to support families so that they do not need to place their children in institutions. The duty to prevent torture is consistent with the requirements of the CRPD, which protect the right of children to grow up in the community in a family environment.

Part IV examines the standard for detention or placement of children established by UN Special Rapporteur on Torture Juan Méndez (referred to hereinafter as the "Torture Standard"). This section examines the exact requirements of the Torture Standard and why it is stronger than the protections established by the UN Committee on the Rights of the Child in General Comment #9. General Comment #9 limits the institutional placement of children to the last resort, and only when it is in the best interest of the child. But General Comment #9 places no time limitation or requirement that placement be in the least restrictive environment. By adding a time limitation, the Torture Standard effectively bars long-term placement of children in institutions.

While short-term in-patient care may be needed for medical or mental health reasons, long-term placement in an institution can be brought to an end.<sup>16</sup> Many countries have phased out long-term institutional care for children and more are doing so.<sup>17</sup> Part III also describes how the Torture Standard strengthens the influential UN "Guidelines for the Alternative Care of Children."<sup>18</sup> The

<sup>15</sup> For a description of the worldwide problem, see e.g. Eric Rosenthal and Laurie Ahern, *Segregation of children worldwide: the human rights imperative to end institutionalization*, 12 JOURNAL OF PUBLIC MENTAL HEALTH 193, 197 (2013); Laurie Ahern, *Orphanages are no place for children*, THE WASHINGTON POST, (August 9, 2013) [https://www.washingtonpost.com/opinions/orphanages-are-no-place-for-children/2013/08/09/6d502fb0-fadd-11e2-a369-d1954abcb7e3\\_story.html?tid=a\\_inl&utm\\_term=.36be4696d04f](https://www.washingtonpost.com/opinions/orphanages-are-no-place-for-children/2013/08/09/6d502fb0-fadd-11e2-a369-d1954abcb7e3_story.html?tid=a_inl&utm_term=.36be4696d04f) (last visited Nov. 16, 2016); Laurie Ahern, *Donors Need to Support Vulnerable Families Not Rebuild Nepalese Orphanages*, THE HUFFINGTON POST, May 22, 2016, [http://www.huffingtonpost.com/laurie-ahern/donors-need-to-support-vulnerable-families\\_b\\_7422618.html](http://www.huffingtonpost.com/laurie-ahern/donors-need-to-support-vulnerable-families_b_7422618.html) (last visited Nov. 16, 2016); Laurie Ahern, *Ukraine Orphanages Feeder for Child Trafficking*, THE HUFFINGTON POST (June 2, 2016), [http://www.huffingtonpost.com/laurie-ahern/ukraine-orphanages-feeder\\_b\\_7344882.html](http://www.huffingtonpost.com/laurie-ahern/ukraine-orphanages-feeder_b_7344882.html) (last visited Nov. 16, 2016). For further discussion of international support for orphanages, see notes 48 to 50 *infra* and accompanying text.

<sup>16</sup> Child Welfare Information Gateway, *Children's Bureau/ACYF, DETERMINING THE BEST INTERESTS OF THE CHILD*, (Child Welfare Information Gateway, 2012), 2-5. See further discussion in Section IV-B *infra*.

<sup>17</sup> Nigel Cantwell, Jennifer Davidson, Susan Elsley, Ian Mulligan, and Neill Quinn, *MOVING FORWARD: IMPLEMENTING THE 'GUIDELINES FOR THE ALTERNATIVE CARE OF CHILDREN 43* (Centre for Excellence for Looked After Children in Scotland, 2012) [hereinafter *Implementing the Guidelines*]. See also Ministry for Foreign Affairs Sweden, *CHILDREN IN INSTITUTIONS: INTERNATIONAL DEVELOPMENT COOPERATION*, 2001, available at <http://www.government.se/contentassets/42b806a7f8b046468116e4f1245428b5/children-in-institutions> (last visited Nov. 16, 2016); Kerryn Pollock, *Children's homes and fostering—Foster care and family homes*, THE ARA—THE ENCYCLOPEDIA OF NEW ZEALAND, <http://www.TeAra.govt.nz/en/childrens-homes-and-fostering/page-4> (last visited Nov. 16, 2016).

<sup>18</sup> UN General Assembly, *Guidelines for the Alternative Care of Children*, GA Res 64/142, UN Doc. A/RES/64/142, (February 24, 2010), para. 22 (hereinafter "Guidelines for Alternative Care" or "the Guidelines").

Guidelines now require that governments plan for the elimination of institutions—but they do not stop long-term placements in institutions or “residential care.”<sup>19</sup>

Part V describes the evolution of protections against torture or ill-treatment in the context of mental health and social care. International law prohibits torture as well as “cruel, inhuman or degrading treatment or punishment” (referred to collectively as “torture or ill-treatment”). The definition of torture is narrower than the protection against ill-treatment, requiring a showing of intent and purpose. But the prohibition of both torture and ill-treatment is universal and without exception. Whether a practice constitutes torture or ill-treatment, financial limitations of governments or social service agencies cannot be used to justify any delay in allowing such human rights violations to persist.

Despite the powerful obligation on governments to prohibit and prevent torture, the international human rights community has been hesitant to identify practices as torture in the context of health or social care. In addition to broad deference to medical authority, there has long been an assumption that practices cannot constitute ill-treatment or torture if they are well-meaning or intended to be in the best interest of the child, patient, or person with a disability. The recent adoption of the CRPD has provided an opportunity to re-examine the application of the torture protection in the context of health care. Recent UN Special Rapporteurs on Torture Juan Méndez and Manfred Nowak have examined the implications of the CRPD in identifying discriminatory actions that may lead to ill-treatment or torture. As Méndez and Nowak have now recognized, government-sanctioned practices that cause severe emotional or physical pain or suffering may constitute torture or ill-treatment *even if* these practices are done for the purpose of treatment or protection. This is true whether or not the family, caregiver or guardian claims to be acting in the “best interest” of the ward or patient. This analysis demonstrates why a narrow reliance on a best interest standard is not adequate to protect children from ill-treatment or torture.

Drawing on the important insights of reports by Nowak and Méndez, Part V describes how the protection against torture or ill-treatment can and must be enforced to protect children subject to detention in institutions. If a family member or social service authority acts in the so-called best interest of a child to subject them to unnecessary pain and suffering of institutional placement, it may be prohibited by the obligation to prevent torture.

Part VI describes the many challenges faced by governments in protecting against ill-treatment or torture for children who are already placed in institutions. By taking action to protect children in institutions, governments are likely to funnel new resources and support to segregated care in these facilities. Tragically, orphanage populations may increase as a result of these new investments. The Méndez Report does not resolve the dilemma facing governments seeking to protect children within institutions. Enforcement of the Mendez recommendations, however, would largely avoid this risk by limiting new placements in institutions. This analysis underscores the urgency of establishing a no-admission policy and rapidly working toward the elimination of institutions.

<sup>19</sup> The Guidelines state that “[r]emoval of a child from the care of a family should be seen as a measure of last resort and should be, whenever possible, temporary and for the **shortest possible duration.**” (para.13) [emphasis added]. This limitation is very important. But as drafted, the limitation on time applies only to removal from the family and not to placement itself. Once family ties have been broken or no longer exist, the Guidelines do not limit the time of placement in an institution or in residential care. Overall, social services must be reformed and governments must move toward “progressive elimination” of institutions (para. 22) in a “timely manner” (para. 23). Under the Guidelines, children may be placed in long-term residential care facilities indefinitely. Residential placement is accepted as a necessary “complement” to family-based care (para. 22). For further concerns about the Guidelines, see text accompanying notes 127 to 129 *infra*.

Part VII describes the obligation to enforce the protection against ill-treatment or torture under international law. Immediate steps must be taken to bring new placements in orphanages to an end. Since the vast majority of children placed in so-called “orphanages” actually have some living family, preventing placements can usually be accomplished by providing services and protections for families. The obligation to prevent torture also requires urgent efforts to close institutions and find new community placements for children who are now detained.

The implications of the Méndez Report are powerful: governments are subjecting children to an unjustifiable risk of ill-treatment or torture until such time as they eliminate institutions. International donors or charities that support institutions or orphanage placement are perpetuating this problem. The protection against torture creates new avenues for legal enforcement, as well as redress and reparations for victims. Governments are obliged to redress abuses through actions that will support return to a family and reintegration into society. The Méndez Report provides guidance to governments and international development agencies on ways to address the urgent concerns of millions of children who are now detained in institutions—or who are at risk of such detention.

In a world of burgeoning migration and refugee flows and tightening borders, the Méndez Report on Children in Detention is also a major contribution because it directs special attention to the dangers of detaining children based on their immigration status.<sup>20</sup> The Méndez report calls for an immediate end to the practice of immigration detention.<sup>21</sup> The same legal grounds that allowed the Special Rapporteur on Torture to call for an end to placement of children in immigration detention can and should also apply to all other children. This article argues that the duty to protect against torture and segregation provides a legal mandate to end all institutionalization of children.

### I. Scope of the Méndez Report

The Méndez Report applies the Torture Standard to placement in institutions of every kind. This article focuses on the significance of the Méndez Report for all kinds of institutions outside the criminal justice system. The term “institution” as used in this article, as in the Méndez Report, includes orphanages, psychiatric facilities, nursing homes, or any other form of residential care or custodial facilities.<sup>22</sup> Some international standards, including the UN Guidelines for the Alternative Care of Children (Guidelines for Alternative Care) distinguish between “institutions” (which must

<sup>20</sup> See, e.g. Georgetown Law Human Rights Institute Fact-Finding Project, *THE COST OF STEMMING THE TIDE: HOW IMMIGRATION ENFORCEMENT PRACTICES IN SOUTHERN MEXICO LIMIT MIGRANT CHILDREN’S ACCESS TO INTERNATIONAL PROTECTION* (2015), [http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF\\_English.pdf](http://www.law.georgetown.edu/academics/centers-institutes/human-rights-institute/fact-finding/upload/HRI-Fact-Finding-Report-Stemming-the-Tide-Web-PDF_English.pdf) (describing the human rights impact of children in immigration detention in Mexico); International Detention Coalition, *DIGNITY WITHOUT EXCEPTION: ALTERNATIVES TO IMMIGRATION DETENTION IN MEXICO* (2013), 120-142, <http://idcoalition.org/publication/view/dignity-without-exception/>; International Detention Coalition, *CAPTURED CHILDHOOD: INTRODUCING A NEW MODEL TO ENSURE THE RIGHTS AND LIBERTY OF REFUGEE, ASYLUM SEEKER AND IRREGULAR MIGRANT CHILDREN AFFECTED BY IMMIGRATION DETENTION* (2012), <http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>; Human Rights Watch, *LEFT TO SURVIVE: SYSTEMATIC FAILURE TO PROTECT UNACCOMPANIED MIGRANT CHILDREN IN GREECE* (2008) <https://www.hrw.org/report/2008/12/22/left-survive/systematic-failure-protect-unaccompanied-migrant-children-greece>; UNICEF, *Administrative Detention of Children: A Global Report* (2012) [http://www.unicef.org/protection/Administrative\\_detention\\_discussion\\_paper\\_April2011.pdf](http://www.unicef.org/protection/Administrative_detention_discussion_paper_April2011.pdf)

<sup>21</sup> Méndez 2015 Report, *supra* note 2, para. 80.

<sup>22</sup> As described by the research literature in section II-B of this report, all children need to grow up with a family. Thus, this article refers to institutions as any placement where a child is not with his or her own family or a substitute family. An organization dedicated to the closure of all institutions, Lumos, has defined an institution as “any residential facility in which:

be eliminated over time) and “residential care” (smaller facilities that are considered acceptable).<sup>23</sup> Unless otherwise noted, the term “institution” in this article refers broadly to any residential placement other than family-based care.

This article employs the common term “orphanage” interchangeably with “institution” because these terms are popularly used—whether accurate or not.<sup>24</sup> In practice, the term “orphanage” is usually a misnomer because the vast majority of children in these facilities have at least one living parent—not to mention extended family.<sup>25</sup> This article uses this common terminology because the article is meant to address policies and practices of governments and donors who support facilities they think of as orphanages.

### *A. Application to orphanages and other institutions*

Custodial facilities commonly known as “orphanages” or “institutions” are not usually thought of as “places of detention,” but they should be recognized as such under international law, and fall under the scope of the Méndez Report. The Méndez Report states that its findings and recommendations apply broadly to “any form of detention or imprisonment or the placement of a child in a public or private custodial setting where the child is not permitted to leave at will by order of any judicial, administrative or other authority.”<sup>26</sup> The UN Special Rapporteur refers explicitly to health care institutions and other non-penal facilities in his report.<sup>27</sup> This is consistent with the require-

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- Children are separated from their families, isolated from the broader community and or compelled to live together;
  - Children (and their families) do not have sufficient control over their lives and decisions which affect their them;
  - The requirements of the organization itself tend to take precedence over the children’s individualized needs.

Other terms used to refer to children’s institutions include: orphanages, baby homes, residential schools, residential health facilities, children’s homes and homes for persons with disabilities that house both adults and children (e.g. social care homes).” Lumos, *IN OUR LIFETIME: HOW DONORS CAN END THE INSTITUTIONALIZATION OF CHILDREN 12* (2015), *citing* a similar analysis in European Commission, Report of the Ad Hoc Expert Group on the Transition from Institution to Community-Care 9 (August 12, 2009). It is important to note that what would be considered an institution for a child is not the same as for an adult, for whom independence and autonomy are greater factors in their mental health. Efforts to define traditional long-stay institutions for adults focus on the “rigidity of routine, such as fixed timetables for working, eating and activity, irrespective of individuals’ personal preference or needs.” Camilla Parker, *FORGOTTEN EUROPEANS FORGOTTEN RIGHTS: THE HUMAN RIGHTS OF PERSONS PLACED IN INSTITUTIONS*, (United Nations Office of the High Commissioner for Human Rights, Regional Office for Europe, 2010) 10 [hereinafter, “Forgotten Europeans”].

<sup>23</sup> Guidelines for Alternative Care, *supra* note 19, at para. 28(b). Residential care is defined as “any non-family-based group setting, such as places of safety for emergency car, transit centers in emergency situations, and all other short and long-term residential care facilities including group homes.” Some mental health experts have challenged the significance between large institutions and smaller long-term residential care facilities. See n.61 *infra* and accompanying text.

<sup>24</sup> Other organizations also use the terms inter-changeably. See, e.g. definition cited in note 23 *supra*.

<sup>25</sup> As described below, however, the term “orphanage” is almost always a misnomer (see n.51 *infra* and accompanying text). Estimates are that 80-98% of children in orphanages have at least one living parent.

<sup>26</sup> *Id.* at para. 21. The United Nations Rules for the Protection of Juveniles Deprived of Their Liberty (the “Havana Rules”), GA Res. 45/113, UN Doc. A/RES/45/113 (April 2, 1991), <http://www.refworld.org/docid/3b00f18628.html>, use the same definition of detention but do not explicitly extend them to social care, medical or custodial settings as does the Méndez 2015 report (Havana Rules, para.11(b)). This is consistent with the position of the Committee on the Rights of the Child which states in General Comment 10 that: “the rights of a child deprived of his/her liberty, as recognized in CRC, apply with respect to children in conflict with the law, and to children placed in institutions for the purposes of care, protection or treatment, including mental health, educational, drug treatment, child protection or immigration institutions.” UN Committee on the Rights of the Child, General Comment No. 10: Children’s Rights in Juvenile Justice, note 1, U.N. Doc. CRC/C/GC/10 (Apr. 25, 2007), <http://www.refworld.org/docid/4670fca12.html>.

<sup>27</sup> Méndez 2015 Report, *supra* note 2, paras. 50-51.



ments of the Guidelines for Alternative Care, which require that all placements in out-of-home care be made by “a judicial, administrative or other adequate and recognized procedure.”<sup>28</sup>

In practice, some public and many private institutions and orphanages operate off the public record or without official government regulation.<sup>29</sup> When this happens, operators of facilities for children effectively become formal or informal guardians for children that reside within them. Children are not allowed to exercise choice about their place of residence.<sup>30</sup> There is international precedent for treating non-penal social institutions as places of detention even if a government authority does not formally regulate placement.<sup>31</sup> The European Court has found that placement of an adult in a social care home for his own protection constitutes detention under the European Convention on Human Rights.<sup>32</sup> More broadly, governments are required under CAT to regulate all places of detention, including privately operated facilities, and take all actions necessary to protect against torture or ill-treatment.<sup>33</sup>

While the Méndez Report uses the term “detention,” the term “placement” is used in many laws and social policies regarding children in non-penal institutions. This article will use the term “placement” to emphasize that the Méndez Report and the protections against torture apply in the context of health care, social care, and to detention in all non-penal facilities.

### *B. Obligation to regulate international donors*

The duty to protect people from torture requires governments to regulate behavior in the private sphere that would cause severe pain and suffering amounting to torture or ill-treatment.<sup>34</sup> Governments in recipient countries must, therefore, regulate international funding—including private charities—for institutions or residential facilities that put children at-risk of torture or

<sup>28</sup> Guidelines for Alternative Care, *supra* note 19, at para. 56.

<sup>29</sup> See Disability Rights International, ABANDONED AND DISAPPEARED: MEXICO’S SEGREGATION AND ABUSE OF CHILDREN AND ADULTS WITH DISABILITIES (2010), <http://www.driadvocacy.org/wp-content/uploads/Abandoned-Disappeared-web.pdf> (dedicated to Ilse Michel Martinez, a girl who disappeared from an orphanage) [hereinafter DRI Mexico (2010)]; Mental Disability Rights International, HIDDEN SUFFERING: ROMANIA’S SEGREGATION AND ABUSE OF INFANTS AND CHILDREN WITH DISABILITIES (2006), [http://www.driadvocacy.org/wp-content/uploads/romania-May-9-final\\_with-photos.pdf](http://www.driadvocacy.org/wp-content/uploads/romania-May-9-final_with-photos.pdf) (includes findings from institutions off the public record) [hereinafter “DRI Romania Report”].

<sup>30</sup> Under the Guidelines for the Alternative Care, governments are under an obligation to ensure that a mechanism is in place to make decisions “[i]n situations where the child’s parents are absent or are incapable of making day-to-day decisions in the best interest of the child.” Guidelines for Alternative Care, *supra* note 20, para.100. The denial of choice and autonomy are the hallmarks of what constitutes “institutional culture.” European Commission Ad Hoc Expert Group on the Transition from Institutional to Community Care (2009), *supra* note 23 at 9.

<sup>31</sup> There is precedent under international law recognizing that placement in an institution is a form of detention whether or not there is any actual legal process — and whether or not the individual expresses any objection to institutional placement. See *H.L. v. United Kingdom*, Application no. 45508/99, Eur. Ct. H.R. (2004) (the European Court of Human Rights ruled that “informal” placement in an institution without due process of a non-verbal man with autism constitutes a form of detention under the European Convention on Human Rights. The absence of procedural safeguards in this case was found to violate his right to liberty and security under article 5(1) of the ECHR).

<sup>32</sup> *Stanev v. Bulgaria* Application no. 36760/06 Eur. Ct. H.R. (2012).

<sup>33</sup> The Committee Against Torture has stated in General Comment 2 that: “Where State authorities or others acting in their official capacity committed, new or have reasonable grounds to believe that acts of torture or ill-treatment had been committed by non-state officials or private actors and failed to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors in accordance with the Convention, the State bears responsibility to provide redress to victims.” UN Committee Against Torture (CAT), General Comment No. 2: Implementation of Article 2 by States Parties, 24 January 2008, UN Doc. CAT/C/GC/2 (hereinafter, “General Comment No.2”): <http://www.refworld.org/docid/47ac78ce2.html>.

<sup>34</sup> UN Human Rights Committee, *CCPR General Comment No. 20: Article 7 (Prohibition of Torture or cruel, inhuman, or degrading treatment or punishment)*, U.N. Doc HRI/GEN/1/Rev.1 (Mar.10, 1992), paras. 11 & 28.

ill-treatment. To the extent that international law requires governments to protect their own citizens from improper detention, the same standard applies to programs within their jurisdiction that are funded from abroad.

The duty to regulate international development aid also applies to donor countries. The CRPD includes an innovative provision in article 32 that commits governments to advance the “purposes and objectives of the convention” through international assistance and cooperation.<sup>35</sup> The European Union, which has adopted policies to include people with disabilities into its foreign assistance, has observed that the CRPD carries with it extra-territorial obligations:

The Convention recognizes that human rights being universal and inalienable, their protection must extend beyond jurisdiction of States Parties and include disabled people in third countries. Legal basis for including a disability perspective in all international cooperation initiatives is thus provided.<sup>36</sup>

Thus, international donors must ensure that government or private funding does not subject children to a risk of torture abroad that would similarly be impermissible in their own countries.

To the extent that placement in orphanages constitutes an impermissible risk of torture, or if torture takes place against a child within an institution, the extra-territorial obligations on governments are implicated. The protection against torture is recognized as a form of customary international law that applies in every country whether or not they have ratified relevant international treaties.<sup>37</sup> The Convention Against Torture (CAT) requires governments not only to prohibit acts of torture, but also to criminalize and prosecute such behavior by public or private actors.<sup>38</sup> There is universal jurisdiction to prosecute torture, and the Committee Against Torture has recognized that governments can bring to trial anyone in their territory who has committed torture abroad.<sup>39</sup>

## II. Global context of institutionalization

To evaluate the meaning and the challenges of implementing the recommendations in the UN Special Rapporteur on Torture’s Report on Children in Detention, it is essential to understand the context of children placed in these places of detention and the reasons such placement is so dangerous.

<sup>35</sup> These obligations go beyond a requirement to contribute toward economic and social rights but also include cooperation that impacts on “all rights including civil and political rights.” Office of the High Commission on Human Rights, *Thematic study on the role of international cooperation in support of national efforts for the realization of the rights of persons with disabilities*, U.N. Doc. A/HRC/16/38, December 20, 2010, para. 5. See also European Commission, Directorate-General for External Policies, *Implementation of the UN Convention on the Rights of Persons with Disabilities in the EU External Relations*, (2013) (describing the obligations on the EU imposed by CRPD article 32 to protect disability rights as part of its international assistance projects).

<sup>36</sup> *Id.* at 7.

<sup>37</sup> APT & CEJIL (2008), *supra* note 14, at 6.

<sup>38</sup> CAT, articles 4 and 7. See discussion in APT and CEJIL (2008), *supra* note 14, at 18 (summarizing the Committee Against Torture’s rulings on the extra-territorial application of these provisions).

<sup>39</sup> *Id.* at 21.

### A. Breadth of institutional placement

The placement of children in orphanages and other institutions is widespread.<sup>40</sup> The United Nations has estimated that there are 8 million children in orphanages around the world.<sup>41</sup> According to Save the Children “[t]he actual figure is likely to be much higher, due to the proliferation of unregistered institutions and the lack of data on vulnerable children.”<sup>42</sup> In addition to the population of orphanages, Disability Rights International (DRI) has found children detained in adult institutions, psychiatric facilities, hospitals, maternity wards, infant “feeding centers,” nursing homes, residential schools, vocational schools, convents, monasteries, emergency relocation facilities, and other specialized programs for children with disabilities—often uncounted, unregulated, or operated entirely off the public record.<sup>43</sup> Some estimates place the number of children in institutions around the world at 10 million or more.<sup>44</sup>

While many countries have phased out institutions for children,<sup>45</sup> the number of children in orphanages is on the rise in many parts of the world.<sup>46</sup> The populations of institutions are increasing particularly rapidly in countries that receive extensive foreign assistance and charity donations to orphanages.<sup>47</sup> In recent years, the practice of volunteering in orphanages has become a billion dollar business, resulting in a major new infusion of funding into these facilities.<sup>48</sup> While many

<sup>40</sup> For the definition of what constitutes an institution, see notes 23 to 25 *supra*. The legal scope of “children in detention” and the definitions used by the Guidelines for Alternative Care are analyzed further in sections II and IV below.

<sup>41</sup> UN Secretary-General, Rights of the Child: Note by the Secretary-General, U.N. Doc A/61/299 (Aug. 29, 2006), para. 55.

<sup>42</sup> Save the Children, KEEPING CHILDREN OUT OF HARMFUL INSTITUTIONS: WHY WE SHOULD BE INVESTING IN FAMILY-BASED CARE (2009) 3-4.

<sup>43</sup> In Romania, for example, the government adopted a no-new-admission policy for children 0-3 as part of the country’s effort to gain accession to the European Union. DRI found infants in an institution off the public record, see *supra* note 30, DRI Romania Report. In Mexico, DRI also found children in institutions off the public record. In addition, there were a number of cases where children disappeared from institutions and were later found to have been trafficked. National authorities told DRI investigators that they had no idea how many children were in public or private institutions throughout the country, characterizing their own system as “a black hole.” DRI Mexico (2010), *supra* note 30, at 23. See also DRI reports on Uruguay (1995), Hungary (1997), Russia (1999), Mexico (2000, 2010, 2013, and 2015), Kosovo (2002), Peru (2004), Turkey (2005), Argentina (2007), Serbia (2008), Vietnam (2009), United States (2011), Guatemala (precautionary measures petition 2013), Republic of Georgia (2013), Ukraine (2015). Mental Disability Rights International (MDRI) changed its name to Disability Rights International (DRI) in 2010. All DRI reports (including those published as MDRI) are posted at [www.DRIadvocacy.org](http://www.DRIadvocacy.org).

<sup>44</sup> See Foreign Ministry of Sweden (2011), *supra* note 18; STUCK (Both Ends Burning, 2012) (documentary exploring the impact of international adoption) available at <https://bothendsburning.org/stuck-documentary-explores-international-adoption-photos>

<sup>45</sup> Implementing the Guidelines, *supra* note 18.

<sup>46</sup> Better Care Network and Every Child, ENABLING REFORM: WHY SUPPORTING CHILDREN WITH DISABILITIES MUST BE AT THE HEART OF SUCCESSFUL CHILD CARE REFORM, 12 (2012). In some countries of Central and Eastern Europe and the former Soviet Union, where the overall population is going down, the rate of institutionalization is going up. As of 2005, following the Cold War, some researchers found that the absolute number of children in institutions had gone down slightly, but the rate of institutionalization of children in Central and Eastern Europe had gone up by 3%. Richard Carter, FAMILY MATTERS: A STUDY OF INSTITUTIONAL CHILDCARE IN CENTRAL AND EASTERN EUROPE AND THE FORMER SOVIET UNION 1 (Every Child, 2005). International funding for reform has declined in recent years, and some observers have warned that even small moves toward community integration in Central and Eastern Europe may not be sustainable. Lucia Correll, Dana Buzducea, and Tim Correll, THE JOB THAT REMAINS: AN OVERVIEW OF USAID CHILD WELFARE REFORM EFFORTS IN EUROPE AND EURASIA (2009).

<sup>47</sup> Corinna Csaky, KEEPING CHILDREN OUT OF HARMFUL INSTITUTIONS: WHY WE SHOULD BE INVESTING IN FAMILY-BASED CARE, 4 (Save the Children, 2009).

<sup>48</sup> See Jacob Kushner, *The Voluntourist’s Dilemma*, THE NEW YORK TIMES MAGAZINE, (March 22, 2016), <http://www.nytimes.com/2016/03/22/magazine/the-voluntourists-dilemma.html> (last visited October 5, 2016). “A 2008 study surveyed 300 organizations that market to would-be voluntourists and estimated that 1.6

countries have a long tradition of placing children with and without disabilities in institutions, international assistance from charities and development organizations appears to be one of the major drivers toward increased institutionalization of children.<sup>49</sup>

Perhaps the greatest misunderstanding about orphanages is that they mainly house orphans. Estimates vary, but Every Child has estimated that in Europe 90-99% of children in orphanages have at least one living parent.<sup>50</sup> Others have estimated that more than 80% of children in orphanages worldwide have a living parent.<sup>51</sup> Almost every child has some extended family. The majority of children are placed in orphanages because of poverty<sup>52</sup> or disability.<sup>53</sup> In societies without supportive services to help families keep their children with disabilities, DRI has observed that many parents feel they have no choice but to place a child in an orphanage or other residential institution.<sup>54</sup> Prejudices and discrimination against adults with disabilities also plays into orphanage placement, as mothers with disabilities are systematically deprived of their parental rights in many countries.

### *B. Inherent dangers of institutionalization*

At the outset of the report on Children in Detention, Méndez notes the “heightened risk of violence, abuse and acts of torture, cruel, inhuman or degrading treatment or punishment” for children in institutions.<sup>55</sup> It is important to understand that protections against torture for children in detention are not just needed for the old, run-down, under-staffed, or mismanaged facilities, as he recognizes that the dangers are inherent to institutionalization itself:

A number of studies have shown that, *regardless of conditions* in which children are held, detention has a profound and negative impact on child health and development. Even very short periods of detention can undermine the child’s psychological and physical well-being and compromise cognitive development.<sup>56</sup>

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million people volunteer on vacation, spending around \$2 billion annually.”; “Research in South Africa and elsewhere has found that “orphan tourism” — in which visitors volunteer as caregivers for children whose parents died or otherwise can’t support them — has become so popular that some orphanages operate more like opportunistic businesses than charities, intentionally subjecting children to poor conditions in order to entice unsuspecting volunteers to donate more money.” See also, Laurie Ahern, *supra* note 16.

<sup>49</sup> *Id.*

<sup>50</sup> Carter (2005), *supra* note 47, at 19.

<sup>51</sup> Lumos (2015) *supra* note 25, at 17.

<sup>52</sup> Studies from different parts of the world consistently find that poverty is a major factor in forcing children into institutions, even though rates vary. Some studies from Europe have shown that 90% of placements in orphanages could be attributed to poverty and homelessness. Studies from Rwanda and Malawi have found that poverty, combined with death of one parent, contributed to 40% of orphanage placements. Faith in Action Initiative, CHILDREN, ORPHANAGES, AND FAMILIES: A SUMMARY OF RESEARCH TO HELP GUIDE FAITH-BASED ACTION 6 (2014).

<sup>53</sup> “Some children are placed in institutions precisely because their primary caregivers—in most cases parents—have died, have relinquished or abandoned them, or have had their responsibility for them withdrawn. Most are there, however, for other reasons, such as the need for special care, the temporary inability of parents to cope, instances of domestic violence or neglect, or loss of contact with parents and family in armed conflict or other emergency situations. Ironically, it is often simply through the very fact of their placement that the role and presence of these children’s ‘primary caregivers’ may be jeopardised or, at worst, definitively terminated.” UNICEF, *Children in Institutions: The Beginning of the End?* (2003), v.

<sup>54</sup> Eric Rosenthal & Laurie Ahern “Perspective: Children in Institutions” in UNICEF, STATE OF THE WORLD’S CHILDREN (2013) at 46 [hereinafter “UNICEF: State of the World’s Children (2013)”].

<sup>55</sup> Méndez 2015 Report, *supra* note 2, at para. 16.

<sup>56</sup> *Id.* *supra* note 2, at para. 33 (emphasis added).

The impact of depriving children of their liberty may be invisible because of the psychological damage it causes. Chief among such adverse psychological impact, Méndez notes “higher rates of suicide and self-harm, mental disorder, and developmental problems.”<sup>57</sup>

Méndez’s approach is supported by the findings of extensive empirical research. Longitudinal studies of children raised in congregate care show that, especially in early years, institutionalization can be psychologically damaging.<sup>58</sup> Basic human psychology is that children learn to form emotional attachments at an early age. Unless they have family members or consistent caregivers to whom they can form emotional attachments early on, they lose the ability to do so later in life.

Research and experience since the adoption of the CRC have greatly strengthened what has been known for decades: that all children, especially at younger ages, need to grow up with a family.<sup>59</sup> Researchers have called into question the difference between large and small institutions, noting that even placement in small residential facilities can cause emotional and developmental dangers.<sup>60</sup> While group homes were once considered the most appropriate alternative to institutional placement, new models of care for children emphasize the importance of family placement.<sup>61</sup>

While much attention is focused on the risk of attachment disorder in the newborn to three age-range, new research is increasingly showing that attachment disorder and other psychological dangers of institutions also impact children in middle childhood and adolescents.<sup>62</sup> Research shows cognitive deficiencies and developmental delays that can be linked to longer stays in institutions.<sup>63</sup> The absence of parental figures results in over-reliance on peers as children grow into adolescence, resulting in unhealthy and abusive future relationships.<sup>64</sup> The invisible psychological toll on children who grow up in orphanages can be seen in the high levels of suicide among children and young adults who “graduate” from these facilities. These are among the dangers children face when they are released into society without the support network that they would have from growing up with a family.

The European Office of the UN High Commissioner on Human Rights drew from research in Russia showing that “one in three children who leave residential care becomes homeless; one in five ends up with a criminal record; and in some cases as many as one in ten commits suicide.”<sup>65</sup>

<sup>57</sup> *Id.*

<sup>58</sup> See Better Care Network, GLOBAL FACTS ABOUT ORPHANAGES (2009) 6-7 (summarizing extensive research on the psychological dangers of orphanages).

<sup>59</sup> “During the first few years of a child’s life, when he or she is most dependent on adults for the realization of rights, the relationship between the right to a family and the rights to life, integral development, and personal integrity, is a particularly strong one.” Inter-American Commission on Human Rights, *The right of Boys and Girls to Have a Family, Alternative Care. Ending Institutionalization in the Americas*, OEA/Ser.L/V/II, Doc. 54/13, 17 (Oct. 17, 2013) para. 57.

<sup>60</sup> Mary Dozier, Joan Kaufman, Roger Kobak, Thomas G. O’Connor, Abraham Sagi-Schwartz, Stephen Scott, Carole Shaffer, Judith Smetana, Marinus H. van IJzendoorn, and Carles H. Zeanah, *Consensus Statement on Group Care for Children and Adolescents: A Statement of Policy of the American Orthopsychiatric Association*, 84 *American Journal of Orthopsychiatry* 219, 220 (2014).

<sup>61</sup> See discussion in Arlene Kanter, “The right to live in the community for people with disabilities under Article 19,” 64, *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW* 65-75, (2015) (describing the concept of a “home” and development of community care); see also notes 152 to 155 *supra* and accompanying text.

<sup>62</sup> “Researchers have long been aware of the importance to infants and young children of a healthy, secure attachment to at least one adult. Attachment is also critical to healthy development as children enter middle childhood and adolescence. Furthermore, benefits of secure attachments extend into adulthood...” Dozier, *et. al.* (2014), *supra* note 61, at 220.

<sup>63</sup> J Williamson and A Greenberg, *FAMILIES NOT ORPHANAGES: A BETTER CARE NETWORK WORKING PAPER* (2010) at 6.

<sup>64</sup> Dozier, *et. al.* (2015), *supra* note 61, at 220.

<sup>65</sup> United Nations Office of the High Commissioner on Human Rights, Regional Office for Europe, *The Rights of Vulnerable Children Under the Age of Three: Ending their Placement in Institutional Care*, 19 (2011) (hereinafter

Another study found that girls who grow up in institutions are ten times more likely than girls who grow up with a family to be victims of sexual exploitation and trafficking.<sup>66</sup> DRI has documented the trafficking of girls for sex and forced labor within and from orphanages in Mexico, Guatemala, and Ukraine.<sup>67</sup> DRI has also found that women and girls are widely sterilized—at times explicitly as a way for institutions to cover up sexual abuse within institutions.<sup>68</sup>

The most striking finding from studies of children raised in congregate care is that, even when the worst institutions are compared to the cleanest and most well-staffed facilities, these dangers persist.<sup>69</sup> Summarizing the research, Dr. Danius Puras, who has since become the United Nations Special Rapporteur on the Right to Health, found that:

...the improvement of conditions and hygiene does not solve the basic problem of the harmful effects of institutional care, especially in the cases of children below three or even children younger than five to eight years. While some factors can be significantly improved (e.g. feeding practice and physical conditions which appear to have reduced mortality rates in Bulgarian “orphanages”), other *key factors are intrinsic to institutional care*, not only to “bad” or poorly equipped institutions. It is not just a question of adequate nutrition and healing, or the absence of open violence and physical neglect.<sup>70</sup>

The importance of families and emotional bonding are so essential, says Dr. Puras, that they are “preconditions for the development of healthy attachment and trust in relations with other people in later stages of life. They cannot be secured in the institutional culture, despite all efforts to invest financial and human resources in those facilities.”<sup>71</sup> In its 2013 annual “State of the World’s Children” report for 2013, UNICEF finds that institutions are a “poor substitute for a nurturing home even if they are well run, responsive to children’s needs, and subject to inspection.”<sup>72</sup>

### *C. Mixed international response*

Citing the dangers of institutionalization, the main recommendation of the 2013 UNICEF State of the World’s Children report, with reference to this population, is to “end institutionalization.”<sup>73</sup> UNICEF published a “Perspective” in the same report by this author and Laurie Ahern, President of DRI, calling for a worldwide moratorium on all new placements in institutions.<sup>74</sup> In what has come to be known as the “Bucharest Declaration,” the World Health Organization’s European Office in 2010 called for an end to placements in institutions,<sup>75</sup> as did the European Commissioner

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“Europe Regional Office of the OHCHR (2011)”.

<sup>66</sup> Georgette Mulheir, *Deinstitutionalization: a human rights priority for children with disabilities*, 9 EQUAL RIGHTS REVIEW 120 (2012).

<sup>67</sup> Laurie Ahern, *supra* note 16. Disability Rights International reports on Mexico, Guatemala, and Ukraine are posted on the web at [www.DRIadvocacy.org](http://www.DRIadvocacy.org).

<sup>68</sup> Disability Rights International, *TWICE VIOLATED: ABUSE AND DENIAL OF SEXUAL AND REPRODUCTIVE RIGHTS OF WOMEN WITH PSYCHOSOCIAL DISABILITIES IN MEXICO* (2015).

<sup>69</sup> Save the Children, *THE RISK OF HARM TO YOUNG CHILDREN IN INSTITUTIONAL CARE*, (2009) 13 (“In terms of emotional attachments, even apparently ‘good quality’ institutional care can have a detrimental effect on children’s ability to form relationships throughout life”); *See also* European Regional Office of the OHCHR (2011), *supra* note 66 at 19.

<sup>70</sup> *Id.* (emphasis added).

<sup>71</sup> *Id.* (emphasis added).

<sup>72</sup> UNICEF: State of the World’s Children (2013), *supra* note 55, at 80.

<sup>73</sup> *Id.* at 80.

<sup>74</sup> *Id.* at 46. The legal and policy arguments for a moratorium on new placements in institutions is set forth in Eric Rosenthal and Laurie Ahern (2013), *supra* note 16, at 193-200.

<sup>75</sup> World Health Organization Regional Office for Europe, “European Declaration on the Health of Children and Young People with Intellectual Disabilities and their Families” [hereinafter “Bucharest Declaration”],

for Human Rights.<sup>76</sup> UNICEF has supported “starting with a moratorium on new admissions” as one of its top recommendations for ending the institutionalization of children.<sup>77</sup> But UNICEF’s State of the World’s Children Report backed off slightly from this position — saying that a world-wide moratorium should be considered as strategy to end institutionalization.<sup>78</sup>

International experience has shown that it is important not only to phase down institutions, but to close them entirely. As Save the Children has pointed out, “[t]he very existence of institutions encourages families to place their children into care and draws funding away from services that could support children to thrive within families and communities.”<sup>79</sup>

There is an enormous disparity between public perception that orphanages are humane places for children who have no place to go and research findings that they are both dangerous and inappropriate placements for children. Many well-meaning charities, faith-based donors and international development agencies support orphanages at the same time as UNICEF is calling for their closure.<sup>80</sup> One of the greatest challenges to the implementation of these positions by UNICEF, WHO, and the European Commissioner for Human Rights is that “many States do not yet believe that a full-scale move toward deinstitutionalization is justified.”<sup>81</sup>

### III. Obligations of governments

International law creates a duty on governments to prevent both torture and segregation. While these are two separate obligations, the Méndez Report shows that these rights are closely inter-dependent.

#### A. Duty to prevent torture

As defined by article 1 of the Convention Against Torture (CAT), torture is:

[A]ny act by which severe pain and suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him ... or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, which such pain or suffering is inflicted by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>82</sup>

For a practice to constitute torture, it must meet each of CAT’s four elements (1) severe mental or physical pain (2) intentionally inflicted (3) for a purpose (4) by an act or omission under gov-

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Para. 5, in *BETTER HEALTH, BETTER LIVES: CHILDREN AND YOUNG PEOPLE WITH INTELLECTUAL DISABILITIES AND THEIR FAMILIES*, EUR/51298/17/6 (2010).

<sup>76</sup> The European Commissioner for Human Rights went even further calling for no new institutional admissions of either children or adults with disabilities. European Commissioner on Human Rights, *THE RIGHT OF PEOPLE WITH DISABILITIES TO LIVE INDEPENDENTLY AND BE INCLUDED IN THE COMMUNITY*, CommDH/IssuePaper (Council of Europe, 2012), 21.

<sup>77</sup> A moratorium on new placements is the 4<sup>th</sup> of UNICEF’s top 9 recommendations for children in the Executive Summary of the 2013 State of the World’s Children Report. Recommendation #4 is: “End the institutionalization of children with disabilities, starting with a moratorium on new admissions. This should be accompanied by the promotion of and increased support for family based care and community-based rehabilitation.” UNICEF, *State of the World’s Children 2013: Executive Summary*, [http://www.unicef.org/sowc2013/files/SOWC2013\\_Exec\\_Summary\\_ENG\\_Lo\\_Res\\_24\\_Apr\\_2013.pdf](http://www.unicef.org/sowc2013/files/SOWC2013_Exec_Summary_ENG_Lo_Res_24_Apr_2013.pdf) (last visited Oct. 5, 2016).

<sup>78</sup> *Id.* at 23.

<sup>79</sup> Csaky, *supra* note 48, at 2.

<sup>80</sup> *Id.* at 4.

<sup>81</sup> *Implementing the Guidelines* (2012), *supra* note 18, at 43.

<sup>82</sup> CAT, *supra* note 11.

ernment authority. Where a practice does not rise to the level of torture—but nevertheless inflicts severe pain or suffering—it may still constitute “cruel, inhuman or degrading treatment or punishment” under article 16 of CAT. Together, these practices are all prohibited under article 3 of the International Covenant on Civil and Political Rights (ICCPR) and other conventions, are often referred to as “ill-treatment or torture.”

While the protection against torture has long been applied to situations of juvenile justice and conditions within institutions (including medical and psychiatric facilities, as well as institutions for children),<sup>83</sup> Méndez’s call to restrict placement to prevent torture brings a new focus to the prevention of torture. The Special Rapporteur on Torture has emphasized that the international legal prohibition against torture and ill-treatment is universal, absolute, and non-derogable.<sup>84</sup> The protection is so fundamental that the Convention Against Torture (CAT) was adopted “to make more effective the struggle against torture”<sup>85</sup> by creating a framework to support its prevention and enforcement.<sup>86</sup>

One of the core roles of the Special Rapporteur is to make recommendations to governments on policies and practices that they should take to prevent torture. Article 2(1) of CAT requires governments to take preventative measures—beyond banning torture itself—to ensure that people are protected.<sup>87</sup> Governments must not only ban torture, they must adopt policies and programs necessary for its prevention.<sup>88</sup> While the prohibition of torture or ill-treatment only applies to governments, General Comment 2 makes clear that governments are responsible for regulating and protecting rights in all “contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm.”<sup>89</sup>

As the Independent Expert to the UN Committee Against Torture, Felice Gaer, has pointed out:

[P]reventative measures are not limited to items enumerated in the Convention or even the General Comment, [and] the Committee [Against Torture] calls on States to reevaluate preventative measures for their effectiveness and to revise and replace them as needed. Thus, as technology evolves, new methods of prevention may be discovered...<sup>90</sup>

Much as new technology is taken into consideration in developing safeguards to prevent torture, so must new research and findings about the impact of orphanages and congregate care on

<sup>83</sup> See Eric Rosenthal et al., *International Human Rights Advocacy under the ‘Principles for the Protection of Persons with Mental Illness*, 16 (3-4) INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 257, 273 (1993) (reviewing early protections for institutionalized children and adults with disabilities).

<sup>84</sup> The universal protection against torture derives from customary law and a broad array of human rights conventions, such as the International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Mar. 23, 1976), Article 7; American Convention on Human Rights, art. 5(2), July 18, 1978, 1144 U.N.T.S. 123 [American Convention], European Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention].

<sup>85</sup> CAT, *supra* note 12.

<sup>86</sup> Manfred Nowak and Elizabeth McArthur, New York City: Oxford University Press, *The United Nations Convention Against Torture, A Commentary*, 25 (2008).

<sup>87</sup> A framework for implementing that right and preventing torture established by the Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, June 26, 1987, 1465 U.N.T.S. 85 (hereinafter “CAT”); International Covenant on Civil and Political Rights, art.7, Mar. 23, 1976 S. Exec. Doc. No. E, 95-2, 999 U.N.T.S. 171 (hereinafter “ICCPR”); Organization of American States, American Convention on Human Rights, “Pact of San Jose”, Costa Rica, 22 November 1969, Art. 5(2) (hereinafter, the “American Convention”); the Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos 11 and 14, 4 November 1950, ETS 5, Article 3 (the “European Convention”).

<sup>88</sup> General Comment No.2, *supra* note 34.

<sup>89</sup> *Id.* at para. 15.

<sup>90</sup> Felice D. Gaer, *Opening Remarks: General Comment No. 2*, 11 New York City Law Review 187, 197(2008).



children. New understandings of disability rights and measures needed to protect against discrimination should also be taken into consideration.

The Méndez Report does not say that detention of a child, *per se*, can constitute torture or ill-treatment. But the Special Rapporteur's earlier reports support this conclusion. In his earlier report on torture in the context of health care, Special Rapporteur on Torture Juan Méndez notes the CRPD prohibition of detention on the basis of disability.<sup>91</sup> In this context, the Special Rapporteur says that the emotional pain and suffering caused by "segregation from family and community" could rise to the level of ill-treatment or torture.<sup>92</sup> To assess whether segregation meets the requisite severity to rise to the level of torture or ill-treatment, "such factors as fear and anxiety produced by indefinite detention" should be taken into account.<sup>93</sup> The trauma of separation from parents and extended family, compounded with the lack of understanding about his or her future, could certainly cause a child severe suffering as well as long-term emotional damage.

The European Court of Human Rights (ECHR) has not yet adopted the same analysis as the UN Special Rapporteur on Torture. But the Court appears to be moving in this direction. The ECHR has accepted that poor conditions within institutions may violate Article 3 of the European Convention that bans torture and ill-treatment.<sup>94</sup> But, in a case decided before the entry into force of the CRPD, the European Court also ruled that the "unavoidable level of suffering inherent in detention" does not factor into the analysis.<sup>95</sup> In *Stanev v. Bulgaria*, the Court considered the case of Rusi Stanev, a 48 year-old man diagnosed with schizophrenia and placed under guardianship (he was at least 57 when the European Court issued its decision on his case). The guardian, who he had never met, placed him in the remote Pastra social care home, in theory, to advance his care. Mr. Stanev was kept for more than eight years in "dirty, decaying" and "unhygienic" conditions without adequate food or running water.<sup>96</sup> Detainees were only allowed access to an indoor bathroom once a week,<sup>97</sup> and temperatures were so cold that people were forced to sleep in their coats.<sup>98</sup> BBC journalists who visited the facility reported that one in ten residents died each year due to the poor conditions.<sup>99</sup> The Court found that Mr. Stanev was not dangerous, and he alleged that he had not received any mental health treatment at the facility in years (indeed, there was none on offer, other than medications).<sup>100</sup> The European Court found that, after more than eight years, "[t]his period is sufficiently lengthy for him to have felt the full adverse effects of the restrictions imposed on him."<sup>101</sup> The

<sup>91</sup> UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* Juan E. Méndez, UN Doc. A/HRC/22/53 (Feb. 1, 2013), para. 68 (Hereinafter "Torture in Healthcare Report"). See also, *Torture in Healthcare Settings: Reflections on the Special Rapporteur on Torture's 2013 Thematic Report*, Center for Human Rights and Humanitarian Law, Washington College of Law, American University (2013), which reproduces the Special Rapporteur's report [hereinafter "Torture in Healthcare Settings (2013)"].

<sup>92</sup> *Id.* at para. 69.

<sup>93</sup> *Id.*

<sup>94</sup> See Peter Bartlett, Oliver Lewis, and Oliver Thorold, *Insite Institutions: Institutional Standards and Institutional Controls*, in *MENTAL DISABILITY AND THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2007) 75-109 (reviewing European case law in this area).

<sup>95</sup> *Stanev v. Bulgaria*, *supra* note 33, para. 204.

<sup>96</sup> *Id.* at paras. 74-79. See Oliver Lewis, *Stanev v. Bulgaria: On the Pathway to Freedom*, 19 HUMAN RIGHTS BRIEF 2-7 (2012) (analyzing the findings and significance of the European Court's decision in the case).

<sup>97</sup> *Id.* at para. 23.

<sup>98</sup> *Id.* at para. 21.

<sup>99</sup> Karen Allen, *Mental health travesty in Bulgaria*, BBC NEWS, December 16, 2002, <http://news.bbc.co.uk/2/hi/health/2579865.stm> (last visited Nov. 11, 2016).

<sup>100</sup> *Stanev v. Bulgaria*, *supra* note 33, at para. 204.

<sup>101</sup> *Id.* at para. 129.

Court's decision turned on Mr. Stanev's improper detention, which was found to be unrelated to his mental health condition.<sup>102</sup>

The court ruled that, due to poor conditions of confinement, Mr. Stanev had been subject to "degrading" treatment.<sup>103</sup> "Degrading" treatment is prohibited under all circumstances under Article 3 of the European Convention, as it is under Article 7 of the ICCPR prohibiting "torture or ... cruel, inhuman, or degrading treatment or punishment." Despite the enormous danger and tremendous suffering over close to ten years to which he was subject, the Court did not find that the suffering rose to the level of what could be considered torture, however, noting that "there is no suggestion that the national authorities deliberately intended to inflict degrading treatment."<sup>104</sup> The court also noted that "it cannot be said that deprivation of liberty in itself raises an issue under Article 3."<sup>105</sup> To be considered a possible violation of the protection against torture or ill-treatment, the European Court said that the "suffering and humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment."<sup>106</sup>

The protection against torture under Article 1 of CAT specifically excludes "pain or suffering arising from, inherent in or incidental to lawful sanctions."<sup>107</sup> The legal doctrine applied by the European Court make sense in the context of the suffering inherent in criminal commitment. It is highly problematic, however, to apply this doctrine to children or people with disabilities who are detained in institutions simply because social service systems are unable to provide the care they need in the community. An earlier Special Rapporteur on Torture, Nigel Rodley, has argued that the doctrine "must necessarily refer to those sanctions widely accepted as legitimate by the international community."<sup>108</sup>

Mr. Stanev was illegally detained and did not need or receive treatment. It is not clear why he should or would "inevitably" be subject to *any* suffering or humiliation. In view of the right to community integration under the CRPD, it is difficult to contend that such detention could be considered "legitimate." In light of the CRPD, however, the European Court does appear to be increasingly open to claims that the emotional pain caused by separation should be taken into consideration for a person with a disability. In the case of *Z.H. v. Hungary*, the "isolation and helplessness" associated with detention were factors taken into consideration by the European Court.<sup>109</sup> A similar analysis could also be extended to children placed in institutions.

<sup>102</sup> *Id.* at para. 190.

<sup>103</sup> *Id.* at para. 212.

<sup>104</sup> *Id.* at para. 211.

<sup>105</sup> *Id.* at para. 140.

<sup>106</sup> *Id.* at para. 141.

<sup>107</sup> See Nowak & McArthur, *supra* note 87, at 79-84 (describing the difficulty of defining what pain and suffering can be excluded under a lawful sanction).

<sup>108</sup> United Nations Economic and Social Council, Question of the Human Rights of all Persons Subjected to any form of Detention or Imprisonment in particular: Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment: Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1995/37 B, UN Doc., E/CN.4/1997/7, 10 January 1997, Para. 8.

<sup>109</sup> In a later case, the European Court considered the detention of a deaf man with an intellectual disability who was charged with a crime. This man used a form of sign language that only his mother could understand, and he was not allowed access to her. As a result, he could not understand the nature or extent of his detention, and he could not complain about alleged abuse by other detainees. In this case, the European Court cited the UN Special Rapporteur on Torture's analysis of CRPD as well as the obligation to provide reasonable accommodation to a person with a disability. The Court found that "the inevitable feeling of isolation and helplessness flowing from the applicant's disabilities, coupled with the presumable lack of comprehension of his own situation and that of the prison order, must have caused the applicant to experience anguish and inferiority attaining the threshold of inhuman and degrading treatment, especially in the face of the fact that

The final and sad outcome of Mr. Stanev's personal situation demonstrates the limitations of the approach taken by the European Court. Bulgaria's laws on detention and access to justice were ruled to be in violation of the European Convention. Ten years after his initial detention, Mr. Stanev was awarded 15,000 Euros in damages.<sup>110</sup> But the European Court ordered no changes to the services provided by Bulgaria's mental health system. According to activists in Bulgaria, Mr. Stanev could not work and had no place to go following the ruling, and after he spent his damage award, he ended up back in another Bulgarian social care facility.<sup>111</sup> Conditions may be cleaner and nicer, but Mr. Stanev was again segregated from society. The funds used by Bulgaria to pay for Mr. Stanev's life-time of shelter could just as well have been used to pay for housing and living expenses in the community.

In contrast with the approach taken by the European Court, the Special Rapporteur's analysis in the 2013 Torture in Health Care Report recognizes that detention on the basis of disability is inherently discriminatory.<sup>112</sup> If the detention of children also fails to meet the standard set forth in the Méndez Report, it would follow that the pain caused by segregation and family separation for a child could constitute ill-treatment or torture. Explicit recognition that improper detention of children constitutes ill-treatment or torture would be a powerful development in the international legal framework on torture and ill-treatment, and it is the logical extension of the Special Rapporteur's Torture in Healthcare Report. A further clarification of this matter by the Special Rapporteur on Torture or other human rights bodies would be helpful. Indeed, an analysis of this kind by an authoritative source like the Special Rapporteur on Torture, the CRPD Committee, or the CRC Committee, could have a powerful impact on future decisions of regional human rights mechanisms.

It is important to recognize that the Méndez Report *does not* rely on a finding that segregation itself constitutes ill-treatment or torture (except, perhaps, in the case of immigration detention). The Special Rapporteur instead finds that the *increased risk* of torture or ill-treatment from institutional placement is sufficient to require governments to establish safeguards and prevent unnecessary commitment. The creation of community-based services to allow children with and without disabilities to live with family and in the community, as called for by the Méndez Report, must be seen as an essential "safeguard" against ill-treatment or torture. As recognized by the CRPD, the right to live with a family has value in and of itself. The services that help children stay with their families, however, also protect children against the risk of torture in an institution. The Méndez Report states that:

Alternatives to detention must be given priority in order to prevent torture and the ill-treatment of children. This includes access to counseling, probation and community services, including mediation services and restorative justice.<sup>113</sup>

The report gives further details, calling on governments "to provide for a variety of non-custodial, community-based alternative measures to the deprivation of liberty."<sup>114</sup> This is consistent with

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he had been severed from the only person (his mother) with whom he could effectively communicate." Case of Z.H. v. Hungary, Application No. 28973/11, Eur. Ct. of H.R. (2012), para. 32.

<sup>110</sup> *Id.* at para. 266.

<sup>111</sup> Interview by the author with Kapka Panayotova, Executive Director, Center for Independent Living, Bulgaria (October 8, 2016). DRI has not been able to directly corroborate this report.

<sup>112</sup> Torture in Healthcare Settings Report (2013), *supra* note 92, at para. 68.

<sup>113</sup> Méndez 2015 Report, *supra* note 2, para. 21.

<sup>114</sup> *Id.* at para. 84(c).

the 2013 *Torture in Health Care Report*, which states that “community living, with support, is no longer a favourable policy development but an internationally recognized right.”<sup>115</sup>

### ***B. Duty to protect against segregation***

The right to community integration applies to both children and adults and has been broadly recognized as essential to the protection of a number of overlapping areas of rights, including the protection against discrimination and the right to health. The UN Special Rapporteur on the Right to Health, Paul Hunt, has stated, for example:

Deriving from the right to health and other human rights, the right to community integration has general application to all persons with mental disabilities. Community integration better supports their dignity, autonomy, equality, and participation in society. It helps prevent institutionalization, which can render persons with mental disabilities vulnerable to human rights abuses and damage their health on account of the mental burdens of segregation.<sup>116</sup>

For children, this right to community integration is closely related to—but distinct from—the right to grow up with a family. Both the ICCPR<sup>117</sup> and the International Covenant on Economic, Social, and Cultural Rights (ICESCR) require governments to protect the family. The ICESCR states that “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group of society.”<sup>118</sup> Article 9(1) of the Convention on the Rights of the Child (CRC) requires governments to ensure that “a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine ... that such separation is necessary for the best interest of the child.”

The CRC does not explicitly protect the right of a child to grow up with a family, but it does require governments to create services that allow for “the fullest possible” social integration. Article 23 of the CRC includes one of the first direct references to children with disabilities in international treaty law by recognizing that “a mentally or physically disabled child should enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child’s active participation in the community.” It goes on to describe the range of services governments must provide for children with disabilities “in a manner conducive to the child’s achieving the fullest possible social integration and individual development.”<sup>119</sup> Cutting edge as this provision was at the time, concerns have been raised by disability experts about its emphasis on “special care” and its medicalized approach to community integration.<sup>120</sup>

The CRC has been enormously influential in protecting the rights of children in institutions. The United Nations General Assembly adopted the “Guidelines for Alternative Care” to “[a]ssist and encourage governments to better implement their responsibilities and obligations” to children.<sup>121</sup>

<sup>115</sup> *Torture in Healthcare Settings Report* (2013), *supra* note 92, at para. 68.

<sup>116</sup> UN Human Rights Council, *Report of the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, U.N. Doc. A/61/338 (Sept. 13, 2006), para. 85.

<sup>117</sup> ICCPR, art. 23(1).

<sup>118</sup> UN General Assembly, International Covenant on Economic, Social, and Cultural rights, GA Res. 2200A (XXI), U.N. Doc. A/6316 (Jan. 3, 1976) (ICESCR), art.10(1).

<sup>119</sup> CRC, art. 23(3).

<sup>120</sup> Rosemary Kayess and Phillip French, *Out of Darkness into Light? Introducing the Convention on the Rights of Persons with Disabilities*, 8 HUMAN RIGHTS LAW REVIEW 13, (2008).

<sup>121</sup> Guidelines for Alternative Care, *supra* note 19, preamble.

The Guidelines are in some ways more progressive than the language of the CRC itself, which includes some language about institutions that may now be outdated. Article 20 of the CRC concerns the rights of children “in whose own best interests cannot be allowed to remain” in their family and deserve “special protection and assistance.” These children should be placed in “alternative care” which “could include, *inter alia*, foster placement, *kafalah* of Islamic law, adoption or if necessary placement in suitable institutions for the care of children.”<sup>122</sup> As the European Office of the OHCHR stated:

...the wording ‘in suitable institutions’ needs clearer interpretation to avoid misuse as a justification for institutional care. The CRC was drafted during the 1980s, when the issue of institutionalization was not perceived as one of the most serious concerns. The then-Communist countries of Eastern and Central Europe, where institutional placement of children was part of the ideology governing child-protection systems, were among its active drafters. Therefore, it is understandable that an elastic definition of ‘suitable institutions’ might have represented the lowest common denominator in that geopolitical situation....**Today, more than two decades after the adoption of the CRC, it is appropriate to raise the question of whether institutional care can be a “suitable option” for children at all, especially for children under three years of age; whether any exceptions are acceptable; and whether it is time to seriously consider its elimination.**<sup>123</sup> [emphasis in the original]

The new UN Convention on the Rights of Persons with Disabilities (CRPD) is a major step forward in the protection of the right to community integration—and the right of *all* children to grow up with a family. While the CRPD does not create new rights, in many ways it creates more effective protections than previously existed under international law.<sup>124</sup>

The CRPD describes the way society must be adapted to allow for the full inclusion of people with disabilities, and creates what has been called a new “social order,” with implications that extend more broadly, beyond the population that the CRPD was created to protect.<sup>125</sup> One of the most important and cutting edge protections of the CRPD is found in Article 19, which recognizes the “equal right of all persons with disabilities to live in the community, with choices equal to others.” As the European Regional Office of the UN High Commissioner for Human Rights has described it:

Although the CRPD is specific to persons with disabilities, Article 19 is founded on the rights that apply to everyone. It emphasizes the importance of developing good-quality and sustainable alternatives to institutional care.<sup>126</sup>

In the most practical terms, the Article 19 is directly relevant to non-disabled children who may be at risk of placement in an institution because their parents have a disability or are perceived to

<sup>122</sup> UN General Assembly, Convention on the Rights of the Child, GA Res 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989), art. 20(3).

<sup>123</sup> Europe Regional Office of the OHCHR (2011), *supra* note 66, at 10-11.

<sup>124</sup> See Kayess & French, *supra* note 121 (assessing the new contributions of the CPRD).

<sup>125</sup> See Arlene Kanter, “Moving beyond the CRPD: will it make a difference,” *THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW* 300 (2015). CRPD will impact larger society, according to Kanter, “by affirming that all people, regardless of their labels, impairments, limitations, challenges, or abilities are entitled to equality, dignity, and autonomy, as well as the support they may need to exercise their rights and to live their lives.” *Id.*, 302.

<sup>126</sup> Forgotten Europeans, *supra* note 23, at 7.

be unable to take care of them. Thus, all children, not just children with disabilities, are protected by the right to community integration under the CRPD.

CRPD Article 23 protects the right to grow up with a family, and this provision of the CRPD is more explicit in its application to children with and without disabilities. Article 23(4) requires governments to “ensure that a child shall not be separated from his or her parents against their will” and “[i]n no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.” All children may be at risk of separation from their family and segregation from society when there is discrimination against their parents.

CRPD article 23(5) establishes the most important protection of the right to grow up in a family, stating that governments shall “where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.” Article 23(5) never mentions the possibility of placing a child in an institution or in any form of residential care.

CRPD Article 23(5) provides stronger protections for the right of a child to grow up in a family than do UN Guidelines for Alternative Care. The Guidelines guarantee that children under age three should grow up with a family, but they do not provide similar protections for children of older ages.<sup>127</sup>

While the UN Guidelines for Alternative Care take a strong stand on the elimination of institutions, they state that residential care facilities “complement” family-based care—implying that residential care is not only acceptable, but necessary. Indeed, the Guidelines allow for the creation of new residential facilities as long as they are part of a strategy for “deinstitutionalization.”<sup>128</sup> The Guidelines do not limit the size of a residential facility and they leave ambiguous the difference between residential care and institutions. The Guidelines mention that group homes are one form of residential care, but they clearly suggest that other forms of residential care are acceptable. This appears to justify small institutions. Even if a small institution is called a “group home,” research shows that group homes can effectively become institutions.<sup>129</sup>

The CRPD does not specifically prohibit placement in residential care, but where the child’s family is not available, governments must make every effort to place a child in another family setting. As described in Part IV below, “every effort” should now be interpreted in light of the Torture Standard.

The protections established in the CRPD, which entered into force in 2009, are so new that their full implications are still being discovered. In 2017, the UN Committee on the Rights of Persons with Disabilities is expected to adopt a new General Comment helping to guide States in understanding the meaning and requirements of the right to community integration.<sup>130</sup>

<sup>127</sup> Guidelines for Alternative Care, *supra* note 19 at para. 21.

<sup>128</sup> *Id.* at para. 22.

<sup>129</sup> James Conroy and Valerie Bradley, THE PENNHURST LONGITUDINAL STUDY: A REPORT OF FIVE YEARS OF RESEARCH AND ANALYSIS, OFFICE OF THE ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, (US Department of Health and Human Services, 1985), <https://aspe.hhs.gov/pdf-report/pennhurst-longitudinal-study-combined-report-five-years-research-and-analysis> (last visited Oct. 13, 2016). On page 198, the study states: “Our preliminary findings indicate that the degree of normalization of a community setting makes a difference, with people in more normalized settings making more progress. We also find evidence that size makes a difference, with people in smaller settings doing slightly better (even though the size of the settings only ranges from 1 to 8 people).”

<sup>130</sup> The UN Committee on the Rights of Persons with Disabilities held a Day of General Discussion on article 19 on April 19, 2016 in Geneva. They solicited submissions for a general comment to be issued in 2017. See:

We have some indication of which direction the CRPD Committee is going based on its reviews of compliance reports of the Czech Republic and Guatemala in 2016 and in other countries before that.<sup>131</sup> In May 2016, the Committee called on the Czech Republic to “abolish” institutions for children with disabilities.<sup>132</sup> In September 2016, the Committee asked Guatemala to “abolish institutionalization” of children (and the Committee’s statement is *not* limited to the detention of children with disabilities).<sup>133</sup> This Comment, which appears in Spanish, appears to endorse a moratorium on new placements in institutions.<sup>134</sup>

#### IV. Standards for Placement of Children in Institutions

##### *A. Implications of the CRPD: a moratorium on orphanage placement*

The Méndez Report was submitted to the UN Human Rights Council in March 2015, more than a year before the CRPD Committee took its strong stand on the abolition of orphanages and orphanage placement. If Special Rapporteur Juan Méndez had been aware of these coming developments, perhaps he would have explicitly recommended a moratorium on new placements. The Méndez’s Report does recommend a total ban on any placement in “administrative immigration detention,” e.g. children detained because they are in violation of immigration laws.

With regard to children in immigration detention, the Méndez Report states that even short-term detention violates the protection against torture or ill-treatment and should be banned.<sup>135</sup> He states that detention is “*never* in the best interest of the child, exceeds the requirements of necessity, and becomes grossly disproportionate” to any legitimate need.<sup>136</sup> Therefore, States should “...expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status.”<sup>137</sup> Given the need for children to remain with their family, “the imper-

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Committee on the Rights of Persons with Disabilities, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/CallDGDtoliveindependently.aspx>.

<sup>131</sup> When the CRPD Committee has examined the application of the right to community integration for children, it has emphasized the importance of keeping children with families. In its review of Hungary’s report, the Committee “stresses the importance of allocating sufficient resources to enable children with disabilities to continue living with their families in their own communities.” Most of the Committee’s recommendations regarding the enforcement of Article 19, however, do not distinguish between institutions for children and adults with disabilities. In its review of China’s report, for example, the CRPD Committee recommended “immediate steps to phase out and eliminate institution-based care for people with disabilities.” *IDA’s Compilation of the CRPD Committee’s Concluding Observations and List of Issues, Article 19, Hungary and China, International Disability Alliance, cited in Arlene Kanter, THE DEVELOPMENT OF DISABILITY RIGHTS UNDER INTERNATIONAL LAW 89-90 (2015).*

<sup>132</sup> UN Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the Czech Republic*, UN Doc. CRPD/C/CZE/CO/1 (May 15, 2015), [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCZE%2fCO%2f1&Lang=en](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fCZE%2fCO%2f1&Lang=en)

<sup>133</sup> CRPD Committee review of Guatemala’s record. “Abolir la colocación de niños y niñas de todas las edades bajo el cuidado de instituciones”. “Abolish the placement of children of all ages under the care of institutions”. UN Committee on the Rights of Persons with Disabilities, *Concluding Observations of the Committee on the Rights of Persons with Disabilities on the Initial Report of Guatemala*, UN Doc. CRPD/C/GTM/CO/1 (August 31, 2016), para. 54, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?TreatyID=4&DocTypeID=5) (author’s translation).

<sup>134</sup> DRI will ask the CRPD for a clarification of its position on the placement of children in institutions in relation to article 19 of the convention. Copies of DRI’s submissions and those of other NGOs will be posted on the CRPD Committee website in 2017. DRI’s submission is available through the author of this article at [erosenthal@DRIadvocacy.org](mailto:erosenthal@DRIadvocacy.org)

<sup>135</sup> Méndez 2015 Report, *supra* note 2 at para. 62 (Méndez cites jurisprudence from the European Court to back this position).

<sup>136</sup> *Id.* at para. 80.

<sup>137</sup> *Id.*

ative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family."<sup>138</sup>

The Méndez Report does not adopt similarly strong and clear language with respect to children in custodial institutions or orphanages. If he had taken into consideration the CRPD's recognition of the right to community integration, however, he might have been just as explicit. Special Rapporteur Méndez has already provided valuable guidance, however, on the requirements of the protection against torture as interpreted under the CRPD. In his 2013 report on Torture in Healthcare, Méndez cites that protecting the right to choice is critical to the protection against torture.<sup>139</sup> He concludes that "[l]egislation authorizing institutionalization of persons with disabilities on the grounds of their disability without their free and informed consent must be abolished."<sup>140</sup>

Special Rapporteur Méndez' earlier recommendation on the abolition of involuntary admission rests, in part, on the issue of "voluntariness." An innovative provision of the CRPD, article 12, recognizes the right of persons with disabilities to make choices for themselves. Throughout the world, adults with disabilities—especially adults with intellectual or psychosocial disabilities—are seen as unable to make decisions and are placed under guardianship. When a guardian makes a "substitute decision" that detention is in a person's best interest, many legal systems recognize a legal fiction that detention is voluntary since the guardian is acting in the best interest of his or her ward. With the adoption of the CRPD, persons with disabilities have a right to support in making decisions for themselves. If a person has difficulty making a decision, they have a right to support in decision-making. Yet, the protection against torture creates an absolute limitation on subjecting any individual to severe pain or suffering. Even if a guardian or healthcare provider claims to be acting in the best interest of this individual, the Special Rapporteur recognizes that a person cannot be subject to involuntary admission or involuntary treatment.

A similar analysis could be applied to children in detention. When an adult or legal authority determines that a child should be in an institution, they may make that decision in what they perceive to be in the child's best interest. But if that choice is likely to lead to severe pain and suffering, the absolute legal obligation to prevent torture need not defer to this judgment. As stated by the European Office of the UN High Commissioner on Human Rights, "[a]n adult's judgment of a child's best interest cannot override the obligation to respect all the child's rights under the Convention."<sup>141</sup>

It would be inconsistent for adults involuntarily admitted to institutions to have even greater protections than children. Indeed, the Méndez Report calls for "higher standards" for children and "broader protections" against ill-treatment torture.<sup>142</sup> The evidence about the dangers of institutionalization shows that children are even more vulnerable than adults to the dangers of institutionalization. The core finding of Méndez's Report on Children in Detention is that children are at greater risk of being subjected to torture and ill-treatment and require higher levels of protection than adults.

The Méndez Report unfortunately misses the opportunity to call for a moratorium on new placements in institutions. But this would be the logical extension of the Special Rapporteur's analysis in

<sup>138</sup> *Id.*

<sup>139</sup> Torture in Healthcare Report, *supra* note 92, para. 68.

<sup>140</sup> *Id.* at para. 89(b).

<sup>141</sup> Europe Regional Office of the OHCHR (2011), *supra* note 66 at 9.

<sup>142</sup> Méndez 2015 Report, *supra* note 2, at para. 16.



light of developments from the CRPD Committee. Explicit recognition of this position by a future Special Rapporteur would be helpful.

### *B. The Protection Against Torture in Detention Standard*

The standard for placement of children in the Méndez Report on Children in Detention is spelled out fully as follows:

The deprivation of liberty of children is intended to be an *ultima ratio* [Latin for “last resort”] measure, to be used only for the shortest possible period of time, only if it is in the best interests of the child, and limited to exceptional cases. Failure to recognize or apply the safeguards increases the risk of children being subjected to torture or other ill-treatment, and implicates State responsibility. Therefore, States should, to the greatest extent possible, and always using the least restrictive means necessary, adopt alternatives to detention that fulfill the best interest of the child...<sup>143</sup>

As set forth here, there are four elements to what is referred to in this article as the Torture Standard for detention:

1. last resort;
2. best interests;
3. shortest time;
4. least restrictive means necessary.

When all four elements are taken together, the Torture Standard serves as guiding principles for preventing torture or ill-treatment. The Torture Standard, as set forth in the Méndez Report, makes clear that placement in an institution, intended to be long-term, is never an acceptable outcome.

The CRC Committee’s General Comment #13 states that the best interest of the child, by itself, should not be used to justify subjecting a child to violence.<sup>144</sup> Using the same rationale, a best interest analysis, by itself, should never be used to subject a child to the dangers and suffering of institutional placement. Given everything that is known about the negative impact of institutionalization on a child, it is a fundamental contradiction in terms to call such placement in the “best interest” of the child. No child should ever be placed in an institution for the long-term for his or her best interest without other limiting factors.

When a child is placed in an institution as a last resort, it is because of the failure of the social service system to provide a more acceptable placement that will nurture the child and avoid need-

<sup>143</sup> This section of the Méndez report states in full: The deprivation of liberty of children is intended to be an *ultima ratio* measure, to be used only for the shortest possible period of time, only if it is in the best interests of the child, and limited to exceptional cases. Failure to recognize or apply these safeguards increases the risk of children being subjected to torture or other ill-treatment, and implicates State responsibility. Therefore, States should, to the greatest extent possible, and always using the least restrictive means necessary, adopt alternatives to detention that fulfil the best interests of the child and the obligation to prevent torture or other ill-treatment of children, together with their rights to liberty and family life, through legislation, policies and practices that allow children to remain with family members or guardians in a non-custodial, community-based context. Alternatives to detention must be given priority in order to prevent torture and the ill-treatment of children. This includes access to counselling, probation and community services, including mediation services and restorative justice. Furthermore, if circumstances change and the reclusion of children is no longer required, States are required to release them, even when they have not completed their sentences. *Id.*, at para. 72.

<sup>144</sup> UN Committee on the Rights of the Child, General Comment 13 (2011): The right of the child to freedom from all forms of violence, April 18, 2011 CRC/C/GC/13, para. 61.

less pain and suffering. There will always be emergency situations where any form of placement could be in the best interest of the child for a very short period of time—be it administrative bungling or a broader failure of a social service system that lacks emergency family placement. When placement of the last resort takes place in this situation, it must be brought to an end as soon as possible. Given the emotional trauma of separation from a family and the dangers of placement, as Dr. Dana Johnson has observed, “a few days in an institution should be as long as children are asked to endure.”<sup>145</sup>

The institution is *usually* safer than the street though not always—given findings of exploitation and abuse in many institutions. But that should never be the choice facing children. By placing demands on social service systems to create alternatives, human rights law forces them to avoid presenting a child with these options. Emergency foster care or extended family placement systems must be established to ensure that children are not even temporarily placed in institutions. When those systems do not exist or are inadequate, governments are subjecting children to unnecessary dangers and the risk of ill-treatment or torture.

To implement the Torture Standard, social service systems should not set a high bar for placing a child in a safe family situation. The most fundamental needs for a child, beyond food, shelter, and safety are for the presence of individuals who can provide a stable environment for care and the formation of emotional attachments. The provision of more sophisticated psychological support, counselling, education, rehabilitation, or habilitation services, may be lacking in the home. If so, the same professional services are probably lacking in the institution as well. Access to education, recreation and cultural opportunities in the community, or other benefits of community life may not be fully available to every child placed in a family-setting. But if those services are not accessible to a child living in a family, they are usually less accessible to a child in an institution.<sup>146</sup>

Children should not be forced to wait for the creation of a fully inclusive society before they are given a chance to grow up with a family. As viewed within the framework of the CRPD, children have a right to full community integration under Article 19, which must be implemented by means of the provision of a full range of community services. Many other provisions of the CRPD, such as accessibility to housing, education, medical care, and cultural life, are also essential to creating a fully inclusive society. When countries fail to meet their obligations under Article 19 and other provisions of the CRPD, however, this does not mean children should forgo their right to grow up with a family under CRPD Article 23. Given the dangers of institutional care and the need to protect against the risk of torture, it is especially important to recognize that the right to a family, in some circumstances, may have to stand on its own.

It is important to keep in mind that human rights oversight, monitoring, and protection are essential in community and family settings, just as they are in the institution. These protections are described below in Section VI.

<sup>145</sup> DRI Romania Report, *supra* note 44 at 21. Dana Johnson, MD, PhD, is Professor of Pediatrics in the Division of Neonatology at the University of Minnesota.

<sup>146</sup> Apart from short-term acute care, DRI investigations have not found meaningful treatments or programs provided in institutions that are not or could not be provided for in the community. Indeed, there is little treatment other than medication and no habilitation or rehabilitation provided in many facilities. *See*, DRI reports at [www.DRIadvocacy.org](http://www.DRIadvocacy.org).

### *C. General Comment #9*

Unlike the Torture Standard, General Comment #9 of the UN Committee on the Rights of the Child only includes the first two elements of last resort and best interests of the child. The Committee:

urges States parties to use the placement in institution only as a measure of last resort, when it is absolutely necessary and in the best interests of the child. It recommends that the States parties prevent the use of placement in institution merely with the goal of limiting the child's liberty or freedom of movement. In addition, attention should be paid to transforming existing institutions, with a focus on small residential care facilities organized around the rights and needs of the child, to developing national standards for care in institutions, and to establishing rigorous screening and monitoring procedures to ensure effective implementation of these standards.

Once a child is placed in an institution as a last resort, the language of General Comment #9 does not require such placement to be temporary. Of greater concern is the fact that the above language appears to share the same assumption of CRC Article 20 that children can be placed in "suitable institutions." The creation of "small institutions" seems to be a goal, rather than a transitional step toward full community integration.

The term "transforming institutions" can be very misleading — especially to non-experts or people not familiar with the community integration of children or adults with disabilities. This author has often heard the term used by international development organizations as they invest new funds in fixing-up institutions. Recently in Ukraine, for example, Disability Rights International learned of a large World Bank Project to close institutions for children and integrate them into the community. Since there were not adequate community services available for children with disabilities, the plan called for "transforming" existing residential institutions to provide rights-oriented and family-like settings.<sup>147</sup>

As discussed in Part II of this paper, many professionals now question whether efforts to improve institutions can really meet the needs of children.<sup>148</sup> As stated by Karen Green McGowan, President of the US Developmental Disabilities Nurses Association:

A family-like institution is an oxymoron, and the effort to create one is a fool's errand. When children are tucked into bed at night, they can tell the difference between a parent and a care-giver who is heading home to take care of his or her own children. As health care professionals, we can see the impact of this difference on the child.<sup>149</sup>

Despite the ambiguities created by the language of General Comment #9, it was clearly not intended to favor long-term institutionalization and has other important provisions requiring governments to ensure that children can grow up with a family. The General Comment says that States parties are "urged to set up programmes for de-institutionalization of children with disabilities, re-placing them with their families, extended families or foster-care system. Parents and other extended family members should be provided with the necessary and systematic support/training

<sup>147</sup> Disability Rights International, *NO WAY HOME: THE EXPLOITATION AND ABUSE OF CHILDREN IN UKRAINE'S ORPHANAGES*, (2015) 21 [hereinafter *DRI Ukraine Report*]. Following the publication of the DRI report, the World Bank revised its program.

<sup>148</sup> See *supra* notes 70-73 and accompanying text.

<sup>149</sup> Karen Green McGowan, personal correspondence with the author, October 5, 2016.

for including their child back in their home environment.”<sup>150</sup> Like CRPD Art. 23, this provision of General Comment #9 mentions only family alternatives to institutions.

#### *D. Least restrictive environment: the problem of group homes*

The final element of the Torture Standard is the requirement that any placement of a child be in the least restrictive environment. Further guidance from the Special Rapporteur on Torture and social service experts would be helpful to determine exactly what kind of placement would be acceptable for specific children and particular ages. There is consensus, as reflected in the Guidelines for Alternative Care, that group homes for children under age 3 are never acceptable. Yet there is growing controversy about the acceptability of group homes for older children—or even adolescents. It is beyond the scope of this paper to resolve these issues. But the requirement that children be placed in the “least restrictive environment” raises the question as to whether the use of group homes violates the Torture Standard.

Group homes were once viewed as “the best alternative to institutionalization.”<sup>151</sup> But group homes proved not to be “family-like” because staff changes over time, conditions may become regimented, and numbers can be increased for the convenience of authorities. Studies of the population moved out of the Pennhurst Institution have demonstrated that smaller group homes produced better outcomes.<sup>152</sup> But the inherent limitations of group homes remain. Describing the US experience with deinstitutionalization of facilities for adults with mental disabilities, Professor Arlene Kanter writes:

Group homes, halfway houses, quarterway houses, and board and care homes are hardly “homes” at all. Like institutions, they segregate people with disabilities and confine them with little, if any, individual choice. The residents of such homes are seldom asked where or with whom they want to live....The places where people with mental disabilities have lived are called “congregate living facilities,” “community residences,” “residential living environments,” “community living arrangements.” And “community care facilities.” Noticeably absent in these varied descriptions is the simple word “home.”<sup>153</sup>

Problematic as they are for adults, group homes are even more inappropriate for children. The essential emotional support that children need is to live in a family where they can form long-term emotional attachments.<sup>154</sup>

<sup>150</sup> General Comment No. 9, *supra* note 9, para. 49.

<sup>151</sup> See, Kanter (2015) *supra* note 126 at 64-80 (reviewing the development of the right to community integration and the evolving “meaning of a home,” discussing the right to live in the community for people with disabilities under Article 19). See also Arlene Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People with Mental Disabilities*, 43 *The American University Law Review* 925, 932 (1994) [hereinafter “A Home of One's Own”].

<sup>152</sup> James Conroy and Valerie Bradley, *THE PENNHURST LONGITUDINAL STUDY: A REPORT OF FIVE YEARS OF RESEARCH AND ANALYSIS*, (Office of the Assistant Secretary for Planning and Evaluation, US Department of Health and Human Services, 1985). Available at <https://aspe.hhs.gov/pdf-report/pennhurst-longitudinal-study-combined-report-five-years-research-and-analysis> (last accessed October 13, 2016). On page 198, the study states: “Our preliminary findings indicate that the degree of normalization of a community setting makes a difference, with people in more normalized settings making more progress. We also find evidence that size makes a difference, with people in smaller settings doing slightly better (even though the size of the settings only ranges from 1 to 8 people).”

<sup>153</sup> A Home of One's Own, 932.

<sup>154</sup> Dozier *et. al.*, *supra* note 61, at 220.

The Guidelines for Alternative Care prohibit the use of group homes for children under age three, requiring instead that young children be placed with a family. Valuable as this provision is for the youngest children, research has shown that living in a family is also essential for older children and adolescents.<sup>155</sup>

Some professionals recognize that group care is a valuable short-term placement “as a respite, ‘cooling off’ period, or a time-limited therapeutic intervention with specific goals.”<sup>156</sup> But these professionals also believe that, for anything but short-term or transitional placement, “group care is not an appropriate living arrangement, and it can never substitute for a home environment.”<sup>157</sup>

Placement in a group home is especially dangerous for children with behavioral problems (as would be expected from children coming from institutions), leading to higher rates of delinquency and criminal activities than for children raised in foster homes. Even for young children with no previous behavioral issues or disabilities, however, group homes are likely to lead to attachment disorders.<sup>158</sup> Studies from Romania show that even children “placed in small family-like homes with four consistent care-givers” experienced attachment problems.<sup>159</sup> Recent experience has shown that all children can be transferred out of institutions and into families without reliance on group homes—and with much better social and psychological outcomes.<sup>160</sup>

Writing in a 2014 consensus statement, mental health professionals and researchers from the United States and Europe have raised concerns about so-called “residential care” and have challenged the position of the Guidelines for Alternative Care that “residential care facilities and family-based care can complement each other.”<sup>161</sup> These experts believe that while valuable in their broad support for deinstitutionalization, the Guidelines for Alternative Care do not go far enough in calling for full community integration in a family setting:

We assert a stronger position by contending that institutional care is non-optimal for children of all ages, including teenagers, and that even smaller group care settings can be detrimental to the growth and well-being of youth.<sup>162</sup>

Other professional groups have come to similar conclusions:

The vast majority of research pointed in the same direction. Residential care lacks sufficiently parent-like adult relationships to be appropriate long-term placements for maltreated children; these facilities also mirror too closely aspects of maltreatment that set children up for life-long developmental challenges.<sup>163</sup>

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 221.

<sup>157</sup> *Id.*

<sup>158</sup> *Id.* at 222.

<sup>159</sup> Save the Children (2009), *supra* note 70 at 13.

<sup>160</sup> In Oklahoma, for example, all institutions for children have been closed. Noting the dangers of placement in group homes, the reform was designed to ensure that all children with disabilities are able to live within a family or substitute family. Six-year outcome studies have shown that this reform has not only been successful—it has resulted in great improvements in quality of life. Conroy, J., *THE HISSOM OUTCOMES STUDY: A REPORT ON 6 YEARS OF MOVEMENT INTO SUPPORTED LIVING: THE PEOPLE WHO ONCE LIVED AT HISSOM MEMORIAL CENTER: ARE THEY BETTER OFF?* (The Center for Outcome Analysis, 1996); Conroy, J., Spreat, S., Yuskas, A., & Elks, M. (2003). *The Hissom Outcomes Study: A Report on Six Years of Movement to Supported Living*. *Mental Retardation*, 41, 4, 263–275.

<sup>161</sup> Dozier, *et. al.*, *supra* note 61 at 220.

<sup>162</sup> *Id.*

<sup>163</sup> Anne E. Casey Foundation, *RECONNECTING CHILD DEVELOPMENT AND CHILD WELFARE: EVOLVING PERSPECTIVES ON RESIDENTIAL PLACEMENT* (2013).

Drawing on the findings from mental health research, European human rights authorities conclude that any congregate settings, regardless of size, fail to meet the requirements of the right to community integration under the CRPD for both children and adults:

In as much as there are legal obligations that are to be immediately achieved in article 19, it would perhaps be entirely fair to infer that Article 19 prohibits the construction of new institutions—entities that are not defined exclusively by their size but by their characteristics which can effectively exclude people from meaningful engagement in the community. The fixation on size of an institution is a talisman—i.e. the view that entities with 2, 5, 10, 15 or 20 or so are unproblematic—seems entirely misplaced. No congregate setting appears conducive to the right to live independently and be included in the community.<sup>164</sup>

Rather than focusing on the type or size of a building, the CRPD emphasizes emotional connect- edness and ties with the community.

While there is a trend away from the use of group homes in parts of the world, group homes are still widely used as a part of community-based support for adults, adolescents, and even children. Experts who consider the use of group homes or other forms of residential care acceptable for children, under some circumstances, do so because they believe it “is the best currently available alternative to an abusive family situation, and it can be a short-term measure until the child can be placed with a family.”<sup>165</sup> Yet even these experts recognize the risk that this will become “the default option for children without adequate family care.”<sup>166</sup>

### *E. Inclusion of children and adults with disabilities*

The most significant limitation of the “last resort” rule without a time limitation is that it derives from what social service systems happen to offer at a given time—rather than looking to the inher- ent rights or needs of the individual child. If a social service system only provides a choice of an orphanage or the street, then an orphanage is (usually) preferable. When a social service system fails to provide protections for families or community supports for children with disabilities, it is effectively offering a child a choice between the orphanage and the street. Irrespective of his or her needs, every child with a disability must be placed in an institution when family protections and community services are absent.

Recent reforms in the Republic of Georgia demonstrate the risks of current standards established by General Comment #9. In a highly regarded manual on the implementation of the Guidelines for Alternative Care, deinstitutionalization in Georgia is identified as a “promising practice” for deinstitutionalization.<sup>167</sup> Georgia received an infusion of foreign assistance after its 2008 war with Russia and UNICEF guided the country through a rapid process of closing its orphanages. In the four years between 2008 and 2012, the number of children in institutions was reduced from 2,500 to 250.<sup>168</sup> In 2012-2013, Disability Rights International (DRI) conducted an investigation into the situa-

<sup>164</sup> Europe Regional Office of the OHCHR (2011), *supra* note 66 at 30 (discussing the challenges of implementing progressive development).

<sup>165</sup> Williamson & Greenberg (2012), *supra* note 64, at 3.

<sup>166</sup> *Id.* at 4.

<sup>167</sup> Implementing the Guidelines, *supra* note 18 at 45.

<sup>168</sup> *Id.* During this time, a third of children were reunited with their families, 400 were placed in small group homes, and the rest were placed in a new foster care system.

tion of children in Georgia's institutions.<sup>169</sup> In many ways, Georgia's rapid reforms were impressive, and they demonstrate a far greater commitment to child protection and rights enforcement than other countries of the region.<sup>170</sup> DRI found that children with disabilities, however, were largely excluded from this reform. Children with limited support needs were integrated into the community, but reformers did not plan from the outset to create the supports necessary for children with disabilities to be integrated in to the community.<sup>171</sup> As a result, by 2013, when DRI documented this situation in Georgia, three institutions for children with disabilities remained. Both governmental and international funding for reform had dried up.<sup>172</sup>

The CRPD brings the attention of governments and international development agencies to the obligation to include children with disabilities in all programs. The protection against discrimination should be understood to mean that children with disabilities must be included at all stages of reform, and not left to the end. The Torture Standard effectively complements the CRPD in this regard. Placement for the "shortest time" possible should never be interpreted to mean "whenever the needs of all the non-disabled children are met."

### V. Ill-treatment and torture in institutions

Special Rapporteurs on Torture Manfred Nowak and Juan Méndez have contributed greatly to the recognition of ill-treatment and torture in the context of health and social care. While the international legal framework for the protection against ill-treatment and torture has been applied to conditions of detention in prisons, mental health facilities, and social care institutions for children, human rights law has generally been deferential to practices justified as "treatment" or actions taken for the ostensible protection of individuals with disabilities.<sup>173</sup> Healthcare professionals are assumed to be "well intended," so it is often assumed that there is no "intent" to cause pain or suf-

<sup>169</sup> Disability Rights International, *LEFT BEHIND: THE EXCLUSION OF CHILDREN AND ADULTS WITH DISABILITIES FROM REFORM AND RIGHTS PROTECTION IN THE REPUBLIC OF GEORGIA* (2013), <http://www.driadvocacy.org/wp-content/uploads/Left-Behind-final-report.pdf> [hereinafter "DRI Georgia Report"].

<sup>170</sup> See, e.g. DRI Ukraine Report, *supra* note 148; Disability Rights International, *NO JUSTICE: TORTURE, TRAFFICKING, AND SEGREGATION IN MEXICO* (2015).

<sup>171</sup> UNICEF's Director in Georgia informed DRI in 2012 that the intention was to prioritize the deinstitutionalization of non-disabled children, and then to return to concerns of children with disabilities after that. Among the problems with this approach is that it can leave the impression that segregation is the norm. Georgia's Minister of Labor, Health, and Social Affairs stated in November 2013, for example, that: "The strategy is that physically healthy children will not stay in large-scale child care institutions, but be adopted and raised in family-based care—according to international experience it is the best option for them. As for children with disabilities, it is reasonable and fairly normal to be brought up and stay in a child care institutions." DRI Georgia Report, *supra* note 170, at viii. The Minister reversed himself after the release of DRI's report. When he was interviewed for a documentary by PBS: *Disability Rights International—THE VISIONARIES* (PBS, 2014), <http://www.driadvocacy.org/media-gallery/>. He stated that all children with disabilities would be integrated into the community within a year. (last visited November 11, 2016). As of July 2016, authorities at two remaining facilities for children with disabilities reported to this author that new admissions are still taking place in these facilities. Ministry officials report that they are committed to their closure.

<sup>172</sup> DRI found that approximately 150 children with disabilities remained in three institutions while approximately 2,000 children had been integrated into the community. DRI also found that more than 1,000 children in church-run institutions were overlooked by reformers. DRI Georgia Report, *supra* note 170, at 21. See discussion of these overlooked children and the need for improved monitoring at note 228 *supra* and accompanying text.

<sup>173</sup> See Eric Rosenthal & Laurie Ahern, *When Treatment is Torture: Protecting People with Disabilities Detained in Institutions*, 19(2) Human Rights Brief 13-17 (2012) (describing DRI's efforts to seek recognition of improper treatment as torture and examining the records of Special Rapporteurs Manfred Nowak and Juan Méndez in recognizing these protections).

fering. Demonstrating purpose has been even harder, as treatment practices are justified as a form of medically necessary care in the best interest of the subject.

As discussed in Part III above, The European Court's decision in the *Stanev* case demonstrates the challenge. Mr. Stanev was wrongfully detained for nearly ten years in a remote facility without adequate food, heat, or running water—where one in ten people died each year—yet the Court found only that conditions were “degrading.” The Court said treatment was not torture because there was no evidence that authorities at the facility “deliberately intended to inflict degrading treatment.”<sup>174</sup>

Bulgaria had not yet ratified the CRPD when the *Stanev* case was originally filed. The CRPD may now shape the Court's understanding about torture and detention, as it has influenced the work of the UN Special Rapporteurs on Torture. Shortly after the adoption of the CRPD in 2006 and before its entry into force in 2008, UN Special Rapporteur on Torture Manfred Nowak convened a group of experts on disability and torture to discuss the application of the torture convention in the context of disability.<sup>175</sup>

DRI presented its findings from recent reports on Turkey and Serbia, in which it identified “treatment” practices as a form of torture. In Turkey, DRI found that psychiatrists used so-called “unmodified” electro-convulsive therapy (ECT)—electric shock without anesthesia—on thousands of children and adults admitted to the country's Bakirköy Psychiatric Facility each year.<sup>176</sup> In Serbia, DRI found children who were tied down for years in beds or left in the cage-like confines of a crib.<sup>177</sup>

In calling these practices torture, DRI made the case that acts merely need to be intentional and that the goal of causing pain was not needed to meet the definition of torture.<sup>178</sup> DRI noted that Article 1 of CAT lists “discrimination of any kind” as a prohibited purpose. Thus, it is appropriate to look to other human rights conventions to understand the evolving concept of discrimination.<sup>179</sup> The CRPD is designed to ensure that people with disabilities are treated equally and have the same opportunities as others—and thus defines discrimination against people with disabilities. If a practice meets all the other requirements of the CAT torture definition, causing “severe pain or suffering” through the “consent or acquiescence of a public official” DRI argued that acts contrary to the CRPD, such as deprivation of liberty in an institutions, could constitute discrimination.<sup>180</sup> The DRI

<sup>174</sup> *Stanev v. Bulgaria*, *supra* note 33, at para. 211

<sup>175</sup> Office of the High Commissioner for Human Rights, EXPERT SEMINAR ON FREEDOM FROM TORTURE AND ILL TREATMENT AND PERSONS WITH DISABILITIES REPORT, (United Nations Office Geneva, 2007) [hereinafter “OHCHR Expert Seminar”].

<sup>176</sup> See Disability Rights International, BEHIND CLOSED DOORS: HUMAN RIGHTS ABUSES IN PSYCHIATRIC FACILITIES, ORPHANAGES AND REHABILITATION CENTERS FOR TURKEY, 12 (2005), <http://www.driadvocacy.org/wp-content/uploads/turkey-final-9-26-05.pdf>.

<sup>177</sup> Mental Disability Rights International, TORMENT NOT TREATMENT: SERBIA'S SEGREGATION AND ABUSE OF CHILDREN AND ADULTS WITH DISABILITIES, 16 (2007), <http://www.driadvocacy.org/wp-content/uploads/Serbia-rep-english.pdf>. [hereinafter MDRI Serbia].

<sup>178</sup> OHCHR Expert Seminar, *supra* note 176 at 5.

<sup>179</sup> These arguments were spelled out further in DRI's challenge of the use of electric shock as a form of behavior modification on children detained at the Judge Rotenberg School in Massachusetts. See Mental Disability Rights International, *supra* note 213, 20-22.

<sup>180</sup> Id. DRI (then known as MDRI) made this case as part of its report on abuses in Serbian institutions, arguing that the deprivation of liberty constitutes a form discrimination under the CRPD. MDRI Serbia, *supra* note 178, at 26.



report and an accompanying video based on findings in Serbia<sup>181</sup> galvanized the understanding of participants that such practice constituted nothing less than torture:

Many participants agreed that the situation presented in the video constituted torture as provided in Article 1 of CAT. Further, some noted that situations like the one in the video were not exclusive to Serbian institutions and that it was important to start applying the torture framework fully to the treatments and conditions inflicted on persons with disabilities.<sup>182</sup>

Nowak's final report in his capacity as Special Rapporteur on Torture finds that "there can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment."<sup>183</sup> The Nowak report also confirms DRI's analysis regarding the practice of unmodified ECT as torture or ill-treatment.<sup>184</sup> Nowak's report does not speak to whether specific practices constitute torture or ill-treatment because the specific facts of each case are relevant to making this distinction.<sup>185</sup> More important, however, Nowak clarifies that the stated "intent" of the treating professional could not shield a practice from rising to the level of torture:

This is particularly relevant in the context of medical treatment of persons with disabilities, where serious violations and discrimination against persons with disabilities may be masked as 'good intentions' on the part of health professionals... [T]he requirement of intent in Article 1 of CAT can be effectively implied where a person has been discriminated against on the basis of disability.<sup>186</sup>

Special Rapporteur Méndez's report on Torture in Healthcare follows Nowak's analysis, citing the evolving definition of torture as "subject to ongoing reassessment in light of present-day conditions and the changing values of democratic societies."<sup>187</sup> In both his reports on Torture in Health Care and Children in Detention, Méndez looks to the CRPD and CRC for a determination of intent and prohibited purpose.<sup>188</sup>

Méndez has accepted that "intent" can be "effectively implied where a person has been discriminated against on the basis of disability." He also added that "purely negligent conduct lacks the intent required under article 1, but may constitute ill-treatment if it leads to severe pain and suffering."<sup>189</sup> Méndez notes that this is particularly relevant for "children deprived of their liberty outside the criminal justice system" as ill-treatment in institutional settings may involve "acts of omission rather than commission, such as emotional disengagement or unsanitary or unsafe conditions, and result from poor policies rather than form an intention to inflict suffering."<sup>190</sup>

Acts or conditions that might rise to the level of torture, as strictly defined under CAT Article 1, are a particularly great risk within institutions. Citing Nowak's earlier report, Méndez notes

<sup>181</sup> The original raw footage from Serbian orphanages is on file with the author. NBC Nightly News broadcast part of this video posted on the Disability Rights International website at <http://www.driadvocacy.org/media-gallery/>

<sup>182</sup> OHCHR Expert Seminar, *supra* note 176, at 5.

<sup>183</sup> UN Human Rights Council, *Report of the Special Rapporteur of the Human Rights Council on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Manfred Nowak, U.N. Doc. A/63/175 (Jul. 28, 2008) [hereinafter "Nowak 2008 Report"].

<sup>184</sup> *Id.* at para. 42 n.3.

<sup>185</sup> *Id.* at para. 47.

<sup>186</sup> *Id.*

<sup>187</sup> Torture in Healthcare Report, *supra* note 92, para.14.

<sup>188</sup> Méndez 2015 Report, *supra* note 2, para. 19.

<sup>189</sup> Torture in Healthcare Report, *supra* note 92, para. 20, citing Manfred Nowak's earlier report A/t3/175, para. 49; Méndez 2015 Report, *supra* note 2, para. 4

<sup>190</sup> *Id.*

that “[t]orture as the most serious violation of the human right to personal integrity, presupposes a situation of powerlessness, whereby the victim is under the total control of another person.”<sup>191</sup> The special vulnerability of children must also be taken into account, and the “threshold at which treatment or punishment may be classified as torture or ill-treatment is therefore lower in the case of children, and in particular children deprived of their liberty.”

Identifying a practice as torture is particularly important, because CAT requires that such a practice be criminalized and prosecuted. Torture can be hard to prove, and some practices that do not meet this strict level are also protected under the CAT. In his reports on Torture in Health Care and Children in Detention, Méndez takes aim at stopping “ill-treatment” or practices that qualify somewhere on the scale of “torture or ill-treatment.” While not conflating torture and ill-treatment, the Méndez Report on Children in Detention refers jointly to both of them as “torture or ill-treatment” with regard to most of the obligations outlined in the report. Following the guidance established in CAT’s General Comment #2, Méndez points out that “conditions that give rise to ill-treatment frequently facilitate torture.”<sup>192</sup> CAT creates a duty to prevent and to provide a remedy and reparation for both torture and ill-treatment “so that it is immaterial for this purpose whether abuses in health-care settings meet the criteria for torture *per se*. This framework opens new possibilities for holistic social processes that foster appreciation for the lived experience of persons, including measures of satisfaction of non-repetition...”<sup>193</sup>

As noted above, the Special Rapporteur’s call for limiting unnecessary detention of children is based on the risk of torture created by such detention. The Children in Detention Report never states that the pain and suffering caused by detention need amount to torture. In the 2013 report on Torture in Healthcare, however, Méndez recognizes the possibility that segregation itself may constitute ill-treatment or torture. To evaluate whether detention violates the torture convention, Méndez says that it is necessary to examine “factors such as fear and anxiety produced by indefinite detention [and] the segregation from family and community.” It is unfortunate that Méndez did not develop this idea in either his 2013 or 2015 report to provide further guidance as to exactly when detention is in itself torture. This possibility, however, demonstrates the important link between protecting against torture within institutions and protecting the right to community integration. If the emotional pain and suffering caused by segregation itself constitutes ill-treatment or torture, then there can be no remedy against abuse in an institution other than community integration.

## VI. Protecting against torture within institutions

Many of the dangers of institutions, and the psychological pain and suffering that results from segregation, are inherent to placement in institutions. Yet some acts of ill-treatment or torture within institutions can be stopped by changes in law, policy, or practice. Where such practices within institutions induce severe pain, governments are obliged to act immediately to remedy those abuses. Protecting children within institutions presents a complex array of challenges.

### A. Danger of Perpetuating Segregation

Even if particular abuses within an institution can be remedied, the broader impact of such responses creates an inherent dilemma for governments. Efforts to stop torture by improving con-

<sup>191</sup> Torture in Healthcare Report, *supra* note 92, para. 31.

<sup>192</sup> Méndez 2015 Report, *supra* note 2, para. 24, *citing* General Comment No. 2, para. 3.

<sup>193</sup> Torture in Healthcare Report, *supra* note 92, para. 84.

ditions in institutions may have the unintended consequence of reinforcing a segregated service system. The experience of Romania after the fall of Nikolei Ceausescu looms large over the child protection field, as international efforts bring an end to abusive conditions in institutions created new incentives for poor families to place children in institutions.<sup>194</sup> As a result, in the six years after the fall of Ceausescu from 1989 to 1995, there was a “dramatic” increase in the population of Romania’s orphanages.<sup>195</sup> It was during this time that researchers conducting the Bucharest Early Intervention Study found that even cleaned up and well-staffed institutions were still dangerous for children.<sup>196</sup>

After many years of fruitless new investments in institutions, UNICEF described a “growing global consensus” that priority should be given to preventing new institutionalization rather than to what are called “sporadic or isolated” efforts to protect against abuses within facilities.<sup>197</sup> The Guidelines on Alternative Care reflect this new consensus contributing an invaluable shift toward deinstitutionalization and improvement of care in the community.<sup>198</sup>

The Torture Standard does not allow governments to delay protections or sacrifice any individual, even when broader policies are working toward the progressive enforcement of human rights protections. This legal principle is easier to state than it is to enforce. Some of the challenges of enforcing human rights in an institution are described below.

### ***B. Immediate enforcement needed***

The shift of resources and attention toward the creation of community alternatives is, as a general rule, a valuable trend. Yet there is a great danger of overlooking basic rights protections for children who happen to be left behind in institutions. Disability Rights International’s findings from the Republic of Georgia demonstrate this risk.<sup>199</sup>

<sup>194</sup> See Eric Rosenthal, Elizabeth Bauer, Mary F. Hayden, and Andrea Holley, *Implementing the Right to Community Integration for Children with Disabilities in Russia: A Human Rights Framework for International Action*, 4(1) HEALTH AND HUMAN RIGHTS 83, 89 (1999) (describing lessons learned from Romania and its impact on reform in other countries).

<sup>195</sup> One study found that in the six years after the fall of Ceausescu, from 1989 to 1995, there were at least 10,000 new placements of children with disabilities and the overall orphanage population increased by nearly 37%. UNICEF, *Children at Risk in Central and Eastern Europe: Perils and Promises* 66 (1997). Given the difficulties of pinning down exact numbers in institutions, other estimates are more conservative. But even one of the most cautious observers concluded that “[g]iven that the number of newborn infants fell by more than 30 percentage points during these years, this climb in cases of institutionalization must be considered dramatic.” E. Zamfir and C. Zamfir *Children at Risk in Romania: Problems Old and New*, UNICEF International Child Development Centre Innocenti Occasional Papers 37 (1996).

<sup>196</sup> Charles H. Zeanah et al., *Designing research to study the effects of institutionalization on brain and behavioral development: The Bucharest Early Intervention Project*, 15 Development and Psychopathology 885, 886 (2003) (reviewing five decades of research literature on the damaging effects of institutionalization). See also discussion about the inherent dangers of institutions in Part IIB.

<sup>197</sup> “There is a growing global consensus that sporadic or isolated efforts to improve individual institutions will not solve the problems of children in residential care, or meet their best interests. Efforts must focus more especially on the underlying reasons for decisions to place children in care in the first place. Complex and often interlinked factors—such as poverty, family breakdown, disability, ethnicity, inflexible child welfare systems and the lack of alternatives to residential care—require holistic responses that identify families at risk, address their needs and prevent the removal of their children. The ethical and practical challenge that we face is to ensure that families—with special emphasis on women who are increasingly heads of household—have the support they need to nurture and raise their children and effectively assume their childrearing responsibilities.” UNICEF, *Children in Institutions: The Beginning of the End?* (2003), *supra* note 54, at vi.

<sup>198</sup> See *Implementing the Guidelines* (2012) at 37 (describing the Guidelines and their broad implications for policy-making) and 43 (describing the importance of moving toward deinstitutionalization).

<sup>199</sup> See Disability Rights International (2013), *supra* note 170 (describing Disability Rights International’s findings in the Republic of Georgia).

As described in Part IV, the international community supported Georgia's reforms to move quickly toward the closure of orphanages. Children with disabilities, including babies at the Tbilisi Infant's Home, were overlooked. Without supportive care for children with disabilities or an opportunity to return to their families, these children were left in the institution while non-disabled children were returned to families or placed in foster care.<sup>200</sup> During this time, international funding was used to rebuild the Tbilisi Infant Home. The US Agency for International Development (USAID) funded a playground at this facility. Yet inside, many children with disabilities never left their cribs. When DRI investigators first visited in 2010, they found children with hydrocephalus left untreated—their heads growing so large that they died a slow and painful death. In one four month period between DRI visits in 2012, 50% of the children with hydrocephalus in the Tbilisi Infant Home passed away.<sup>201</sup>

Physicians interviewed by DRI said that treatment for hydrocephaly (including the placement of a shunt to drain off fluid buildup in the skull) was available in Georgia. But staff at the facility reported that children were not given this treatment because they were seen as "already damaged" by disability and would lead incomplete lives even if treated.<sup>202</sup> DRI brought in a medical expert who found that these children were not even given pain medication. The UN Special Rapporteur on Torture has stated that the denial of pain medication itself can constitute torture.<sup>203</sup> The explicit discrimination on the basis of disability in this case, causing severe pain and suffering—and eventual death—demonstrates that these children were being subject to torture.

Children with disabilities are particularly at risk of denial of pain medication because they may not be able to express the pain they are suffering. Or more likely, they face the perception that they do not feel pain or will soon die anyway because of their disability. Perceptions of caregivers or the public can be reinforced by the psychiatric or medical label they are given. At the time DRI found the children at the Tbilisi Infants Home, authorities reported that they planned to transform this into a "palliative care" facility—a designation that formally excluded them from any future inclusions in plans for community integration (and suggesting, implicitly, that they were nearing death). It is essential to challenge such assumptions through careful independent oversight and monitoring, and to ensure that children with disabilities—wherever they are—have the same right to medical care and pain relief as all other children.

While the right to basic care and treatment within an institution must be legally enforceable, it is important to recognize that there are inherent risks in the provision and funding of such care. Support for essential care inevitably allows the facility to shift resources to other operating expenses. This will support the continued operation of the institution, which will continue to draw limited funds away from community-based alternatives. To some extent, the impact of such support can be reduced by funding mechanisms that "follow the patient" or child. If a child can obtain care at home or find placement outside the facility, the funding for care must still be available to that child wherever he or she may need it. Funding mechanisms must be carefully established so that provision of care within the institution is not used as an excuse for detention of the child. Human rights monitors must be able to identify such funding sources to examine their impact on direct care and the continued operation of the institution.

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<sup>200</sup> *Id.* at 11.

<sup>201</sup> *Id.* at 4.

<sup>202</sup> *Id.* at 5.

<sup>203</sup> Torture in Healthcare Report, *supra* note 92, para. 54-56.

### *C. Implementing protections against restraints*

Various international instruments have tried to establish clear and enforceable standards for the protection against the severe pain and suffering caused by physical restraint. The adoption of the strongest possible protection is essential to avoid abuse. The experience of DRI in Mexico, however, shows that stopping the abusive use of physical restraints within institutions can be extremely difficult. Even after Mexico adopted strong international human rights standards, and after its abuses had been widely exposed and publicized, DRI has continued to find widespread abuse of restraints in Mexico's institutions.<sup>204</sup>

Following DRI's presentation about the use of restraints on children in Serbian orphanages, UN Special Rapporteur on Torture Manfred Nowak stated that the prolonged use of restraints may constitute Article 1 torture.<sup>205</sup> As Nowak's report describes:

Poor conditions in institutions are often coupled with severe forms of restraint and seclusion. Children and adults with disabilities may be tied to their beds, cribs or chairs for prolonged period, including with chains and handcuffs... [P]rolonged use of restraint can lead to muscle atrophy, life-threatening deformities and even organ failure.<sup>206</sup>

The Méndez Report specifies that States should "use restraints or force only when the child poses an immediate threat of injury to himself or others, and only for a limited period of time and only when all other means of control have been exhausted..."<sup>207</sup> Méndez's earlier 2013 report on Torture in Healthcare demands an even higher standard of protection for persons with disabilities, urging States to adopt an "absolute ban" on restraints for children or adults with mental disabilities in all places of detention.<sup>208</sup>

Neither of the Méndez reports distinguishes between chemical restraints (e.g. psychotropic medication as a sedative), mechanical restraints (such as straitjackets or even ripped pieces of bed-sheets, as commonly used in orphanages), and other physical restraints (such as having a staff member hold a child down). The European Committee for the Prevention of Torture (CPT) provides a valuable guidance and strong protections for children by distinguishing between these different kinds of restraints:

Minors below 16 years of age should in principle never be subjected to means of restraint. The risks and consequences are indeed more serious taking into account the vulnerability of minors. In extreme cases where it is necessary to intervene physically to avoid harm to self or others, the only acceptable intervention is the use of physical (manual) restraint, that is, staff holding the minor until he or she calms down.<sup>209</sup>

The CPT limits all forms of restraints except manual holding of a child. This differs slightly from a complete ban on restraints. The CPT recognizes that staff may need to hold a child for a short time until a dangerous situation is avoided. Both the 2013 and 2015 reports of the Special Rapporteur on Torture can and should be read in a manner consistent with the more specific CPT standard.

<sup>204</sup> DRI Mexico (2010), *supra* note 30, at 10; DRI No Justice (2015), *supra* note 171.

<sup>205</sup> Nowak 2008 Report, *supra* note 184, at 49.

<sup>206</sup> *Id.* at para. 55.

<sup>207</sup> Méndez 2015 Report, *supra* note 2, para. 86(f).

<sup>208</sup> Méndez states that "...any restraint on people with mental disabilities for even a short period of time may constitute torture or ill-treatment. It is essential that an absolute ban on all coercive and non-consensual measures, including restraint and solitary confinement of people with psychological or intellectual disabilities, should apply in all places of deprivation of liberty, including psychiatric and social care institutions." *Id.*

<sup>209</sup> Council of Europe, European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *The use of Restraints in Psychiatric Institutions*, (June 13, 2012), para. 3.7.

The Guidelines for Alternative Care have their own provision for the use of restraints on children. They contain a strong recommendation to limit restraints to situations where they are “strictly necessary,” but their formulation falls short of the protections called for by the UN Special Rapporteur on Torture:

Use of force and restraints of whatever nature should not be authorized unless strictly necessary for safeguarding the child’s or others’ physical or psychological integrity, in conformity with the law and in a reasonable and proportionate manner and with respect for the fundamental rights of the child. Restraint by means of drugs and medication should be used on *therapeutic needs* and should never be employed without evaluation and prescription by a specialist.<sup>210</sup>

The Guidelines allow chemical and mechanical restraints to be used on children in institutions, and they suggest that the use of restraints might be therapeutic. The Special Rapporteur on Torture has made very clear that restraints should *never* be used for therapeutic purposes.<sup>211</sup> Many social service agencies and development agencies serving children rely on the Guidelines for Alternative Care as their main guideline for protecting the rights of children. This is one area where the Guidelines for Alternative Care must be updated to reflect important developments in human rights law.

The most serious dangers of so-called “therapeutic” use of restraints can be seen in the US experience. In the state of Massachusetts at the Judge Rotenberg Center, DRI found the intentional infliction of pain was used as a form of behavior modification treatment—including the use of both electric shock and restraints for “therapeutic purposes.”<sup>212</sup> Special Rapporteurs Manfred Nowak and Juan Méndez publicly stated on US television that this practice constitutes torture.<sup>213</sup>

While international standards may make hair-splitting distinctions as to what extremely limited circumstances might permit the use of some form of restraint, the reality of children in institutions creates powerful incentives for staff to engage in practices that lead to torture. Any effort to stop the abuse of restraints must recognize this context.

The use of restraints in institutions often stems from self-abusive or other behaviors thought to be the product of a child’s disability. Children with challenging behaviors who are considered dangerous to themselves or others are the most likely to be detained in institutions. Unfortunately, the very neglect of institutional placement makes these behaviors even worse. Save the Children describes an example of this situation from an orphanage in Serbia:

A two-year-old girl with suspected learning difficulties learned that scratching herself and pulling her hair quickly got the attention of staff. The more this happened the more she scratched herself and pulled out her hair. Pain was preferable to being neglected. Given that each member of staff had seven other children to care for, they managed the situation by tying the child up in her own bed clothes to prevent her from self-harming.<sup>214</sup>

DRI has observed situations like these in hundreds of institutions around the world—they are regrettably much more the norm, rather than the exception. In such circumstances, laws or policies

<sup>210</sup> Guidelines for Alternative Care, *supra* note 19, at para. 96.

<sup>211</sup> Torture in Healthcare Report, *supra* note 92, para. 63.

<sup>212</sup> Disability Rights International, TORTURE NOT TREATMENT: ELECTRIC SHOCK AND LONG-TERM RESTRAINT IN THE UNITED STATES ON CHILDREN AND ADULTS WITH DISABILITIES AT THE JUDGE ROTENBERG CENTER (2011).

<sup>213</sup> Rosenthal & Ahern, *supra* note 174, at 16.

<sup>214</sup> Save the Children, KEEPING CHILDREN OUT OF HARMFUL INSTITUTIONS: WHY WE SHOULD BE INVESTING IN FAMILY-BASED CARE, 7 (2009).

restricting the use of restraints are often ignored because they cannot be enforced. In one institution documented by DRI in Mexico, where children were held in cages and cage-like cribs, authorities announced that they would adopt one-to-one staffing to end the use of cages. When DRI brought in an expert team to monitor the newly reformed institution, it was denied access.<sup>215</sup> Karen Green McGowan, President of the US Developmental Disabilities Nurses Association, who observed the facility on an earlier visit observed:

Going back to the days of Willowbrook in the 1970s, vast resources and staffing have been invested in trying to stop the most serious self-abusive behaviors in institutions. Yet what we have found is that these efforts, no matter how well funded, have proven futile. After all is said and done, it is when we got children into stable family environments, that is when behaviors drastically improved. Based on what I observed in Mexico, I believe that the only way to protect these children from being tied down or placed in cages is to get them out of the institution and into a family.<sup>216</sup>

Unless children are returned to the community and given the opportunity to grow up with the love and attention of a family, it may be impossible to stop self-abuse. Merely banning restraints may be a futile exercise. These protections are almost guaranteed to be violated over time by institutions, when the underlying conditions leading to self-abuse are still present. Banning improper restraints is a step that is necessary but not sufficient.

The use of restraints on children with behavioral challenges is an example of why the prevention of torture requires an investment in community services to allow children to return to their families. The initial challenge, however, may be to convince authorities that community integration of these children is even possible. Research has shown that children with the most serious behavioral difficulties can be integrated into the community and benefit greatly from such inclusion.<sup>217</sup>

The steps recommended by the Méndez Report for protection within institutions are necessary but not sufficient. Whenever new investments are made in institutions, there is a risk of creating incentives to increase the institutional population. In the immediate future, a moratorium on new placements would stop investments in institutions from serving as a magnet for new placements. To effectively prevent and stop ill-treatment and torture from taking place, however, governments must create community-based alternatives to ensure that children can live with their families.

#### ***D. Oversight and monitoring***

One component of the Méndez report on Children in Detention that is unequivocally important is the requirement that governments create safeguards for monitoring and human rights enforcement. This is an example of a protection that does not reinforce existing service systems. UNICEF has expressed concerns that oversight, monitoring, and enforcement will not, in themselves, end

<sup>215</sup> *Threats continue against DRI staff in Mexico* (ABC Evening News with David Muir, television broadcast May 12, 2016).

<sup>216</sup> Karen Green McGowan, RN, personal correspondence, October 5, 2016. Willowbrook was an institution, located in Staten Island, NY, that housed more than 5,000 people with disabilities. Following exposure of abuses at the facility and a federal lawsuit, the facility was closed down in the 1970's. Karen Green McGowan (then Karen Green) was a witness in the federal case and an expert who assisted in planning for the full community integration of all residents of Willowbrook. See David Rothman and Sheila Rothman, *THE WILLOWBROOK WARS* (2005)(describing the history of the lawsuit and community integration of Willowbrook residents).

<sup>217</sup> Raymond A. Lemay, *Deinstitutionalization of People with Developmental Disabilities: A Review of the Literature*, 28 *Canadian Journal of Community Mental Health*, 188-190 (2009).

the dangers inherent to institutions.<sup>218</sup> Oversight and monitoring are also necessary but not sufficient to prevent torture.

Special Rapporteur Méndez calls on governments to establish effective complaint mechanisms,<sup>219</sup> to investigate allegations of abuse,<sup>220</sup> and to create strong and independent oversight mechanisms.<sup>221</sup> Méndez says that States should “establish independent monitoring mechanisms at all places of deprivation of liberty, including places run by private actors, through regular and unannounced visits, and to include civil society organization in the monitoring of places of deprivation of liberty.”<sup>222</sup>

The Georgia example is again instructive and demonstrates the essential link between thorough monitoring and any effective planning for reform. Reforms in the Republic of Georgia have been cited as examples of a “promising practice” of deinstitutionalization in a manual on the application of the Guidelines for Alternative Care.<sup>223</sup> At the start of the reform, there were thought to be 2,500 children in institutions. All of the orphanages in the country were closed down except two facilities for children with disabilities. While the program was successful for the children it served, planners did not have the full information necessary to serve the entire population of children in institutions. DRI’s 2013 investigation brought to light that, in addition to leaving out children with disabilities, children in religious facilities were overlooked.<sup>224</sup> As described to DRI investigators in 2013 by the chief of the Georgia UNICEF office: “[i]t is very political and sensitive. The church is very powerful....We don’t even know the exact number of institutions or kids. It is unregulated.”<sup>225</sup> As described by a leading children’s rights advocate, “It’s trafficking. The real word is trafficking. According to law, children being transferred to church institutions are supposed to be regulated by the state, but they’re not. There’s no paperwork. Nothing.”<sup>226</sup> DRI investigators were denied access to religious facilities, but in 2016 another Georgian advocacy organization was able to visit these institutions. The report demonstrated the existence of an entire “shadow” system of services:

There are 1146 children living away from their biological families in 36 residential services throughout Georgia. All of these services are unregulated and thus are not covered by the statutory agency’s child-protection oversight and care standards. The services where these children reside in fact largely represents a shadow system of residential care services for children, where they are admitted without any assessment and decision of the mandated statutory guardianship & care authority. These children do not appear on the social services’ “radars.”<sup>227</sup>

DRI’s findings in Georgia are not unique. Romania, as it sought access to the European Union, sought to demonstrate its commitment to deinstitutionalization and adopted a moratorium on new placement of children in institutions. Yet Romania failed to create community services and family supports for these children. During an investigation in 2006, DRI found that infants were

<sup>218</sup> UNICEF: State of the World’s Children (2013), *supra* note 55, at 80.

<sup>219</sup> Méndez 2015 Report, *supra* note 2, para. 84(q).

<sup>220</sup> *Id.* at para. 84(a)

<sup>221</sup> *Id.* at para. 84(r)

<sup>222</sup> *Id.*

<sup>223</sup> Implementing the Guidelines, *supra* note 18.

<sup>224</sup> DRI Georgia Report, *supra* note 170, at 22.

<sup>225</sup> *Id.* at 22.

<sup>226</sup> *Id.*

<sup>227</sup> Partnership for Children, “Equal Treatment to the Schools of Faith: Final Report October 2015-2016” iii (2016) (report on file with the author).



abandoned in maternity wards of hospitals.<sup>228</sup> DRI also discovered a facility for 65 infants entirely off the public record. DRI found that the staffing at this facility was so low that the children never left their cribs.<sup>229</sup>

The Romanian experience demonstrates the dangers of adopting a moratorium on admissions in name only—without a corresponding effort to support families or create community services. It also underscores the need for independent advocacy. The lack of data or information about children’s services is not necessarily due to lack of knowledge or comprehensive data gathering systems. For various political reasons, governments and social service authorities may know about and choose to overlook the existence of specific residential services or abuses. Monitoring, oversight, and enforcement systems must be established with this awareness in mind.

The CRPD provides a valuable guide to the implementation of the recommendations in the Méndez Report. While Article 33 of the CRPD requires data gathering at a national level to establish policies for the enforcement of the convention, Article 16, provides for much more specific programs to monitor and protect rights in institutions and community services. To protect against violence, exploitation, and abuse, Article 16 demonstrates that visiting and counting children in an institution once is not close to sufficient. Article 16 requires the creation of age and gender sensitive information, education, and assistance programs for people with disabilities, their families, and their caregivers.<sup>230</sup> The CRPD requires that people with disabilities and advocacy organizations representing them be involved in monitoring and advocacy and program implementation.<sup>231</sup> This requirement reflects the experience that people who are most at-risk of abuse may be afraid or unable to speak to government authorities or even representatives of official monitoring organizations. In order to identify certain types of abuse that may be associated with stigma and shame, people who have experienced such abuse may be more able to establish trust and gain information.

Perhaps most importantly, Article 16 of the CRPD emphasizes that remedies for abuse should promote “physical, cognitive and psychological recovery, rehabilitation and social reintegration...”<sup>232</sup> These remedies must be gender and age sensitive. The CRPD makes a direct link between the right to a remedy for abuse and the right to community integration.

### *E. Benefits of a moratorium*

After the adoption of the CRPD, European experts recommended that EU Structural Adjustment funding for new accession countries be used only to support community integration. Yet they had to confront the immediate problem of responding to abuses within institutions, and they considered the dilemma facing donors. The “purist” response, as they described it, would be to restrict all funding to institutions. The European experts recognized that a “more nuanced” response might be needed to help countries going through a difficult reform process. They suggested that if funds were used to fix up institutions, there would be “an extremely heavy onus of proof ... on the State to show that any such investment in institutions is strictly temporary (although it is never experienced that way by the ‘residents’) and for the overriding purpose of eliminating inhumane and degrading treatment.”<sup>233</sup> That said, the experts recommended that European financial assistance

<sup>228</sup> DRI Romania Report, *supra* note 44, at iii.

<sup>229</sup> *Id.*

<sup>230</sup> CRPD, art. 16(2).

<sup>231</sup> CRPD, art. 4(3).

<sup>232</sup> CRPD, art. 16(4).

<sup>233</sup> *Id.*

should be “expended exclusively on a transition process since primary responsibility and legal liability for existing human rights institutions rests with Member States.”<sup>234</sup> This is a strong argument that could be extended to all foreign assistance to all countries that still have orphanages, rationalizing why international funding should be used only to support community integration. But it does not resolve the difficulties faced by governments themselves who have primary responsibility for the protection against torture in their own institutions.

In 2010, the World Health Organization Regional Office for Europe, in partnership with UNICEF and the European Commission, organized a conference of experts to confront the difficult question of responding to abusive institutions in Eastern Europe. The conference resulted in the adoption of the “European Declaration on the Health of Children and Young People with Intellectual Disabilities and their Families” (also known as the “Bucharest Declaration”), and is historic as the first set of international standards on the rights of children that explicitly draws on the new standards established in the CRPD. The Bucharest Declaration recognizes that “young people with intellectual disabilities have the right to grow up in a family environment.”<sup>235</sup>

The Bucharest Declaration never mentions residential care or group homes as an alternative to institutional care. The Action Plan for implementing the Declaration calls for children to be placed in kinship care, foster care, or adoption when their families cannot keep them.<sup>236</sup> Even more importantly, the Bucharest Declaration states that “[n]ew admissions to such institutions should be stopped through the development of community services.”<sup>237</sup> The Action Plan states that the “first priority must be to stop all new admissions by providing adequate support to families who are struggling for care. Children with intellectual disabilities already living in institutional care should be given high priority in the allocation of access to community-based alternative services.”<sup>238</sup> The Bucharest Declaration also emphasizes the importance of protecting children “wherever they live” to be sure that they are “guaranteed lives free from bullying, harm or abuse and should not live in fear or neglect.”<sup>239</sup> The Bucharest Declaration makes clear that children must be protected, but the focus is on the rights of the child rather than on the improvement of the institution.<sup>240</sup> The background paper for the conference speaks of the importance of improving direct care and treatment but not support of the institutions themselves.<sup>241</sup>

The Bucharest Declaration threads the needle by calling for the protection of children within the community and in the context of ending new placements. Protections and care should be provided in a manner that follows the child wherever he or she resides — and does not provide an incentive or excuse for detention or separation from family.

<sup>234</sup> Parker, *supra* note 23 at 30.

<sup>235</sup> World Health Organization Regional Office for Europe (2010), *supra* note 76, para. 5.

<sup>236</sup> *Id.*, “Action Plan” at 9.

<sup>237</sup> *Id.*, Bucharest Declaration, para. 3.

<sup>238</sup> *Id.*, at 9.

<sup>239</sup> *Id.*, para. 1.

<sup>240</sup> The “Action Plan” describes the termination of new placements—not limited to any particular age group—as a “necessary first step” that has “proved, in combination with deinstitutionalization, capable of acting as a forceful stimulus for developing modern and effective care services for children and families in the community.” WHO (2010), *supra* note 76, at 13.

<sup>241</sup> The report goes on to say that, even while moving swiftly toward deinstitutionalization, some funding for institutions would be needed “to make them acceptable, humane environments for the children placed in them, no matter how temporary. Training and support to their staff is of paramount importance, both to improve current practices pending closing and because many of them will continue to work with people with disabilities in the future, after deinstitutionalization.” *Id.*, 21.

## VII. Implementing the protection against torture

In calling on States to limit placement of children to a measure of last resort, the Méndez Report enters the field with recommendations in many ways similar to the Guidelines for Alternative Care and other reports recently inspired by the CRPD. But the Méndez report frames this as a necessary step to ensure protection against torture. The Méndez report states, for example, that “[a]lternatives to detention must be given priority in order to prevent torture and the ill-treatment of children.” The report gives further details, calling on governments “to provide for a variety of non-custodial, community-based alternative measures to the deprivation of liberty.”<sup>242</sup> This is consistent with Méndez’s earlier 2013 report on Torture in Health Care, which states that “community living, with support, is no longer a favorable policy development but an internationally recognized right.”<sup>243</sup>

### A. Enforcement obligations

The Méndez Report and recommendations demonstrate how the authority of the anti-torture framework can be used to protect children from torture and segregation. This recognition will be meaningless, however, until it is enforced. The additional obligations created by the duty to prevent torture must be understood within the broader context of the critical international law and standards already dedicated to protecting children and promoting their full inclusion in society. The most influential standard in this area, the Guidelines for Alternative Care, will be strengthened by the immediate obligations to prevent torture. As drafted, the Guidelines reflect a perspective that they are policy recommendations rather than requirements necessary to enforce rights. The Guidelines state that they are intended to “[a]ssist and encourage” governments and “[g]uide policies.”<sup>244</sup> To “promote application” of the Guidelines for Alternative Care:

States should, to the maximum extent of their available resources and, where appropriate, in the framework of development cooperation, allocate human and financial resources to ensure the optimal and progressive development of the present Guidelines throughout their respective territories in a timely manner.<sup>245</sup>

“Progressive development” of certain human rights derives from the ICESCR and is included in other conventions.<sup>246</sup> In order to strengthen this protection—and to make clear that immediate action is required, the ICESCR adopted General Comment #3, requiring that States must take action that is “deliberate, concrete, and targeted” toward full enforcement.<sup>247</sup> The Committee on Economic, Social, and Cultural Rights has also adopted recommendations on the pro-active steps and financial investments governments must take to address “structural disadvantages” faced by

<sup>242</sup> *Id.* at para. 84(c).

<sup>243</sup> Torture in Healthcare Report, *supra* note 12, para. 68.

<sup>244</sup> Guidelines, paras. 2(c) and 2 (d).

<sup>245</sup> *Id.* at para. 23.

<sup>246</sup> ICESCR, art. 2(1); CRPD, art.4(2). See generally Stephen P. Marks, *The Past and Future of the Separation of Human Rights into Categories* 24 Md. J. Int’l L. 209, 221 (2009).

<sup>247</sup> To strengthen the obligation, the UN Committee on Economic, Social, and Cultural Rights adopted Committee on Economic, Social and Cultural Rights, General Comment #3, to give this obligation some teeth “...while the full realization of the relevant right may be achieved progressively, steps toward that goal must be taken within a reasonably short time....Such steps should be deliberate, concrete, and targeted as clearly as possible toward meeting the obligations recognized in the Covenant.” UN Committee on Economic and Social Rights, General Comment No.3: The Nature of States Parties’ Obligations (Art.2, Para. 1, of the Covenant), E/1991/23, December 13, 1990, para.2.

people with disabilities.<sup>248</sup> Thus, governments must act immediately to come up with concrete and targeted plans for full community integration of children—avoiding unnecessary placements and planning for the closure of institutions. Since the vast majority of children in orphanages come from families, immediate steps can be taken in any country to ensure that they are served there rather than in institutions.

When it comes to the creation of new community services for children with disabilities, however, additional resources will be needed. Even though it is well established that serving families in the community is less expensive<sup>249</sup> than placing children in institutions, a temporary infusion of resources may be needed to help countries reform their service systems (since they must maintain the old segregated systems until new community care is established).<sup>250</sup>

While there is an obligation to expend funds to implement rights, there is an inevitable competition for scarce resources within social service systems. In any competition for funding, however, there is inevitably a tendency of governments to delay—especially during times of emergency, economic transition or austerity.<sup>251</sup>

One of the important contributions of the CRPD is that it frames the right to community integration within the legal right to protection against discrimination.<sup>252</sup> The protection against discrimination does create an obligation on governments to bring about immediate enforcement.<sup>253</sup> To the extent that the creation of community services may require funding, planning, and implementation over time, it has also been characterized by the European Commissioner for Human Rights as a “hybrid right”—requiring immediate implementation supplemented by careful planning and financing over time.<sup>254</sup> This would include, according to the European Commissioner, the obligation to adopt a no-admission policy and to create “a statutory and enforceable individual entitlement to a level of support which is necessary to ensure one’s dignity and ability to be included in the community.”<sup>255</sup> Governments must budget the necessary resources to “enable a child [to live] a full life within family and community and prevent isolation and institutionalization.”<sup>256</sup>

Powerful as the obligations already are, the Torture Standard adds critical new elements. Where a practice constitutes torture, the lack of resources cannot be an excuse for its continuation. Méndez addressed this issue in his recent analysis of the torture protection in the context of healthcare:

the absolute and non-derogable nature of the right to protection from torture and ill-treatment establishes objective restrictions on certain therapies. In the context of health-related abuses, the focus on the prohibition of torture strengthens the call for

<sup>248</sup> The ICESCR Committee has stated that governments must “do much more than merely abstain from taking measures which might have a negative impact on persons with disabilities. The obligation in the case of such a vulnerable and disadvantaged group is to take positive action to reduce structural disadvantages and to give appropriate preferential treatment to people with disabilities in order to achieve the objectives of full participation and equity within society for all persons with disabilities. This almost invariably means that additional resources will need to be made available for this purpose.” General Comment #5 U.N. Doc. E/1993/22, 11<sup>th</sup> Sess., para 3 (1993).

<sup>249</sup> “Analyses of children of all agencies in Romania, Ukraine, Moldova, and Russia show that institutional care is six times more expensive than providing social services to vulnerable families or voluntary kinship carers [and] three times for expensive than professional foster care...” Save the Children, “The Risk of Harm to Young Children in Institutional Care” 6 (2009).

<sup>250</sup> Europe Regional Office of the OHCHR (2011), *supra* note 66 at 30.

<sup>251</sup> *Id.*

<sup>252</sup> OHCHR, *supra* note 66, at 30.

<sup>253</sup> *Id.*

<sup>254</sup> European Commissioner on Human Rights (2012), *supra* note 77, at 21.

<sup>255</sup> *Id.* at 5.

<sup>256</sup> *Id.*

accountability and strikes a proper balance between individual freedom and dignity and public health concerns. In that fashion, attention to the torture framework ensures that system inadequacies, lack of resources or services will not justify ill-treatment. Although resource constraints may justify only partial fulfillment of some aspects of the right to health, a State cannot justify its non-compliance with core obligations, such as the absolute prohibition of torture, under any circumstances.<sup>257</sup>

The protection against torture provides the strongest possible claim on government resources. The European Court has taken a similar stand, making it clear that the lack of financial resources cannot be used to justify conditions of detention that amount to ill-treatment or torture.<sup>258</sup> If the European Court can call on governments to expend whatever funds are necessary to improve conditions within institutions, it should also be able to require governments to expend the same funds to provide community alternatives.

The injection of new resources into community service systems is especially important to help children who are already placed in institutions, who have lost ties to families, and who have suffered the damaging effects of institutionalization. The prevention of improper placements in orphanages is not just a question of financial resources, however. There is evidence from around the world that providing the services and protections for children to live in families is, in the long-term, less expensive than paying for them to live in institutions.<sup>259</sup> Since a large factor in institutional placement is poverty and homelessness, financial support to families can prevent orphanage placement. This is an area where some immediate savings can be realized. By protecting the child before ties with the family are broken and damage is caused by institutional placement, protecting families can avoid needless human suffering and increased financial costs for society. Thus, a major factor in avoiding orphanage placement is a matter of advance planning—and of political will.

Beyond staking a claim on financial resources, the protection against torture can be a powerful motivating factor to bring about public support for change. Failure to enforce these rights can leave a country open to the strongest national and international approbation.

In addition, the Torture Standard is associated with the obligation to “prevent, prosecute, and redress” violations of the right to protection against torture. As Méndez explains:

Examining abuses in health-care settings from a torture protection framework provides the opportunity to solidify understanding of these violations and to highlight the positive obligations that States have to prevent, prosecute, and redress such violations.<sup>260</sup>

If an act constitutes torture, CAT requires governments to criminalize this behavior and prosecute individuals who perpetrate the act.<sup>261</sup> Human rights laws also require reparations to those individuals—which includes not only monetary compensation but also medical and psychological care and other kinds of rehabilitation.<sup>262</sup> As described in Part I-B above, the recognition of improper detention or treatment as ill-treatment or torture creates opportunities for international enforce-

<sup>257</sup> Torture in Healthcare Report, *supra* note 92 at para. 83.

<sup>258</sup> See, e.g. *Stanev v. Bulgaria*, *supra* note 33, para. 210.

<sup>259</sup> “Analyses of children of all agencies in Romania, Ukraine, Moldova, and Russia show that institutional care is six times more expensive than providing social services to vulnerable families or voluntary kinship carers [and] three times for expensive than professional foster care...” Save the Children, “The Risk of Harm to Young Children in Institutional Care” 6 (2009).

<sup>260</sup> Torture in Healthcare Report, *supra* note 92. para. 82.

<sup>261</sup> CAT, art. 4.

<sup>262</sup> CAT art. 14. See discussion in Manfred Nowak & Elizabeth McArthur, *THE UNITED NATIONS CONVENTION AGAINST TORTURE* (Oxford University Press, 2008) 88,10.

ment. Significantly, the offense of torture is subject to universal jurisdiction under international law. The courts of any country can prosecute any individual in their country who has perpetrated ill-treatment or torture abroad.

In a case from Mexico being filed before the Inter-American Commission on Human Rights, DRI is now testing the theory that the right to reparations for ill-treatment in an institutions adds to the obligation to provide funding for the support necessary for a person to live in the community with adequate services. DRI's case involves 37 survivors of the abusive *Casa Esperanza* in Mexico City.<sup>263</sup> Most of these individuals were raised as children in Mexico's orphanages and subsequently transferred to a facility where many were tied down, caged, physically abused, sterilized, raped, and trafficked for sex. After DRI exposed these abuses in 2015, Mexico City authorities simply moved these individuals, mostly young adults, to supposedly cleaner and safer institutions. Two of the thirty-seven have since died, and one woman has been repeatedly sexually abused over a one-year period.<sup>264</sup> The *Casa Esperanza* case is a sad and vivid reminder of what may happen to children who are placed in institutions—supposedly for their own protection. It is also a reminder why immediate, individual remedies are needed—and why it may be dangerous for “progressive enforcement” to play itself out.

Governments may fall short of their human rights obligations and may take years to fully meet their obligations under international law. But when charities or private service providers risk criminal prosecution, they will have motivation to immediately reign in their activity. If governments were required by their own courts to remunerate victims of improper institutionalization for the damage caused by institutional placement, there would be powerful incentives for them to resolve these issues. And if governments were forced to pay a political price in the international arena for needlessly subjecting their children to ill-treatment or torture, the practice of placing children in institutions could be easily brought to an end.

In practice, it is not necessary to distinguish between different types of rights, and the international human rights community is moving away from such distinctions.<sup>265</sup> In 1993, at the Vienna Conference on Human Rights, the international community recognized that all human rights are “indivisible and inter-dependent.”<sup>266</sup> The right to community integration is a perfect example of a right that is interdependent: protection of the right to health is essential to prevent arbitrary detention, segregation from society, and the risk of torture. Without progressive enforcement through the creation of community services, people will be segregated from society and subject to discrimination. Avoiding improper placement in institutions is also necessary to protect against torture.

### ***B. Learning from earlier reform movements***

The use of the anti-torture framework to stop improper placement of children resembles, in some ways, the wave of deinstitutionalization of people with intellectual or psychosocial (mental health) disabilities that began in the United States in the 1960s and continued through the 1970s

<sup>263</sup> The facts of the case and DRI's recent history of advocacy on behalf of *Casa Esperanza* survivor are included in DRI No Justice (2015), *supra* note 171.

<sup>264</sup> Documentation of these developments are in DRI's brief submitted to the Inter-American Commission on Human Rights. At the time of this publication, details of the brief are not yet public. DRI's documentation can be obtained by contacting Disability Rights International at [info@DRIadvocacy.org](mailto:info@DRIadvocacy.org).

<sup>265</sup> See generally Stephen P. Marks, *The Past and Future of the Separation of Human Rights into Categories* 24 Md. J. Int'l L. 209, 221 (2009).

<sup>266</sup> World Conference on Human Arts., June 14-25, 1993, *Vienna Declaration and Programme of Action*, U.N. Doc A/CONF.157/23 (July 12, 1993).

and 1980s—driven by the dangers and horror of the abuse witnessed by the public in institutions.<sup>267</sup> That approach to deinstitutionalization brought about profound changes in the United States. But it has also been criticized because it closed the door to new placements before creating the community services needed to ensure the safety of formerly institutionalized people.<sup>268</sup>

The United States made mistakes in failing to provide community care for people with disabilities, but there are many reasons to be assured that these shortcomings need not happen again. The reform of the 1960s and '70s was not the first wave of deinstitutionalization in the United States. Policies against the placement of children in orphanages in the United States can be dated back to the White House Conference of 1906.<sup>269</sup> These reforms have been so successful that most people do not know about the enormous transformations that have since taken place. The protection of children within their own families is so much less expensive than institutional care and has such vastly improved outcomes in part because it avoids the damage and the cost imposed on children in institutions.<sup>270</sup>

A moratorium on new placements of children in institutions would close the gateway to a lifetime of suffering and the vastly larger problem of segregating adults. A no-new-admissions policy is a strategy that has proven effective in bringing about reform and continues to be used in court-ordered right to community integration *Olmstead* settlements in the United States.<sup>271</sup>

## Conclusion

The Méndez Report strengthens current international standards for the protection of children by requiring that any placement in an institution, even as a last resort, be limited to the shortest possible time in the least restrictive environment. More broadly, it establishes that preventing placement in institutions or orphanages is essential to protect children against ill-treatment or torture.

Since all children need to grow up with a family and models exist for integrating all children into the community, the Méndez standard effectively requires a ban on long-term placement of children in institutions. Given the lessons learned about the inherent dangers of institutions, and the existence of models for avoiding such placements, placement of a child in an institution will never meet their “best interest.” Any situation requiring placement of the “last resort” stems from the failure of the service system to provide the family support and care that the child needs—and is necessary to protect against ill-treatment or torture. The creation of protections to ensure that

<sup>267</sup> See, e.g. Rothman & Rothman, *supra* note 217 (describing the closure of Willowbrook in New York in the 1970's).

<sup>268</sup> Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation* 34 *Cardozo Law Review* 50 (2012).

<sup>269</sup> During the last century—since the Progressive Era and the first White House Conference on Children in 1909—the federal government has vastly expanded its role in promoting the welfare of America's children and youth. While families remain the bulwark for successful child development, and states, localities, and a host of private entities provide services to infants, children, youth, and their families, the federal government has long supported and provided services ranging from health care to education and enforces a wide range of laws and regulations to protect and enhance the well-being and rights of Americans under age 21. First Focus, “History of US Children's Policy 1900-Present,” posted at <https://firstfocus.org/wp-content/uploads/2014/06/Childrens-Policy-History.pdf>

<sup>270</sup> See discussion *supra* note 260.

<sup>271</sup> See, e.g. Settlement Agreement, *United States v. State of Georgia*, Civil Action No. 1:10-CV-249-CAP, United States District Court for the Northern District of Georgia, Atlanta Division; Settlement Agreement, *United States v. Delaware*, Civil Action 11-591-LPS, United States District Court for the District of Delaware, July 15, 2011.

children grow up with a family, and the creation of community supports to make that possible, provide essential safeguards against torture.

The Torture Standard, recommended by the Méndez Report, should temper the legitimate concerns of those who fear that children will end up on the streets. In a crisis, where imminent danger is created by the lack of other options, placement may be used as a “last resort.” But even then, service systems should be structured to provide emergency foster care so that no form of residential care is needed. At that point, experience shows, the “shortest possible” placement can be effectively reduced to zero. As soon as family supports and emergency foster care can be established, therefore, governments are mandated to bring an end to new placements in institutions.

The recommendations of the Méndez Report support and strengthen the protections of the CRPD. The CRPD protects the right of children to grow up with a family under Article 23 and to live as part of the community under Article 19. The Méndez Report demonstrates that failure to enforce CRPD Articles 19 and 23 subjects children to the risk of ill-treatment or torture. The duty to prevent torture should inform and drive policy in societies where service systems have not yet been brought into full compliance with the CRPD. Countries that have not yet created a fully inclusive society—as mandated by CRPD Article 19—are still required to enforce Article 23 and ensure that children can grow up with a family. As a start, the CRPD Committee also appears to be supporting a moratorium on new placements. The CRPD Committee should clarify its position on a moratorium in 2017 when it adopts a General Comment on Article 19.

The UN Committee on the Rights of the Child should update standards on placement in institutions to reflect these important developments in the protection against torture and the right to full inclusion in society. General Comment #9 and the Guidelines on Alternative Care should be revised to add the additional restrictions to institutional placement recommended in the Méndez Report: placement should be for the shortest time possible and in the least restrictive environment. A clear and strong endorsement of the mandate to adopt a moratorium on new placements would also be helpful. Further attention is needed to carefully examine the UN Guidelines for Alternative care to distinguish between what is called “residential care” and what actually constitutes an “institution.”

As established by CRPD Article 23, the right of children to grow up with a family is fundamental and does not stop at the age of three. If there are limited circumstances when residential care might be appropriate for adolescents, experience shows that careful attention is needed to ensure that “residential” alternatives are not merely small institutions. In combination with CRPD Article 23, the Méndez Report’s call limiting placement to the “least restrictive alternative” can be fulfilled by ensuring that children are provided the opportunity for full integration into society with the support of a family.

The Méndez Report is a reminder that the protection against torture can never be delayed or denied. The duty to prohibit or prevent torture must not be limited by the level of resources available to service systems. If governments can be ordered to expend the necessary funds to improve care in institutions, as the European Court has done, those funds could just as well be used to support community alternatives. As a general rule, this is the way funding should be used consistent with the duty to prevent torture and segregation.

Further guidance from the UN Special Rapporteur on Torture would be helpful to identify exactly when segregation itself rises to the level of ill-treatment or torture. Since abuses within institutions can amount to torture, governments should be challenged to fulfill their obligation to



criminally prosecute acts of torture and provide reparations as a remedy for survivors of abuse. The remedy for individuals subject to abuse should include the provision of services and supports necessary for full community integration. As described above, DRI's *Casa Esperanza* case against Mexico before the Inter-American Commission of Human Rights is testing the enforceability of this approach.

Nearly fifty years ago, Professor Louis Henkin asked the question: why do governments follow international law? His answer was that “[n]ations decide whether to obey law or agreements as they decide questions of national policy not involving legal obligations...on the basis of cost and advantage to the national interest....Nations act in conformity with law not from any concern for law but because they consider it in their interest to do so, and fear unpleasant consequences if they do not observe it.”<sup>272</sup> Governments condemned for consigning their children to segregation from society will not think of building new institutions. Nor will international charities and development agencies support such practices when it is understood that they are also perpetuating ill-treatment and torture. On the contrary, recognition of the dangers faced by children and the risk of torture may encourage and inspire international development organizations and charities to prioritize the concerns of children in institutions. Support for at-risk families and investments in community services for children with disabilities are essential to protect against ill-treatment and torture, exploitation and trafficking, and possibly life-time segregation of a large population.

Powerful as it may be to condemn human rights violations, the Méndez Report opens important new avenues for international collaboration. As he accepted his mandate as Special Rapporteur, Juan Méndez emphasized that he would take a “victim-centered” approach with the objective of “identifying areas of cooperation in this common quest and engaging States to prevent torture, and to join efforts to look for the most effective ways to achieve compliance with the absolute prohibition of torture as provided by international law.”<sup>273</sup> The analysis and recommendations in the Méndez Report can be of help to governments and international donors in developing the most effective programs to address the needs of some of the most at-risk children in the world.

The fate of 8 to 10 million children now living in institutions and orphanages—and future generations of children who may be separated from their families—hangs in the balance. Many of the troubles of the world derive from intractable problems or require the commitment of resources so great as to overwhelm efforts to bring them to an end. The segregation and abuse of children is not one of those problems. The separation of children from their parents and from society is the result of misguided, but often well-meaning, policies and programs. The resources now going to fund institutions are more than enough to protect the right of every child in the world to grow up with a family. The enormous outpouring of volunteer efforts now going to support orphanages is an indication of the deep care and concern felt for children around the world. That same energy can be redirected to protect the right of every child to grow up with a family. We are deeply in debt the UN Special Rapporteur for lighting the fire of urgency to solve this worldwide problem.

<sup>272</sup> Louis Henkin, *HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY* 88 (Columbia University Press, 1968).

<sup>273</sup> Juan Méndez, “Statement by Mr. Juan E. Méndez, Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,” Human Rights Council, 16<sup>th</sup> session, March 7, 2010, [http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE\\_March2011.pdf](http://www.ohchr.org/Documents/Issues/SRTorture/StatementHRC16SRTORTURE_March2011.pdf)

# Hidden and Invisible: Children with Intellectual Disabilities Deprived of Liberty

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## Abstract

*There are an estimated 93 to 150 million children with disabilities around the world. While data on children with intellectual disabilities is even less precise, studies have shown that up to 24% of these children have intellectual disabilities. This article explores institutionalization of children with intellectual disabilities as deprivation of liberty. Data trends suggest that children with intellectual disabilities are overrepresented in institutions. When families are unable to care for a person who has an intellectual disability, the only option is often a state-sponsored institution. There is evidence in some regions that the number of children being admitted to institutions is increasing and that new forms of institutions are being created. Renewed and reinvigorated efforts are needed to prevent new institutions from being created and to break down an institutional mindset that affects the way people with intellectual disabilities are supported. The ongoing institutionalization of children with intellectual disabilities has universally been recognized as an egregious violation of their human rights.*

*To protect children with disabilities from institutionalization, there is a need to invest in:*

*Supporting families: Families are often the key to the realization of the rights of their sons and daughters and to facilitating their inclusion in the community, and need support to do this. They express the need for information, opportunities to connect with other families, short breaks from caregiving duties, and help with disability associated costs.*

*Building inclusive communities, and in particular inclusive education: Inclusive communities ensure children with intellectual disabilities are included in all aspects of community life: recreational, social, educational, economical and political. They reduce isolation and establish lifelong patterns of inclusion. People with intellectual disabilities and their families repeatedly identify inclusive education as the key to breaking down barriers and building inclusive communities.*

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*Supporting self-advocacy: Self-advocacy starts at birth and must be encouraged and nurtured from a very young age at home, in early childhood programs and at school so that children who have intellectual disabilities learn to advocate for themselves. It fosters equality, provides people with intellectual disabilities visibility as equal peers to those without disabilities, and raises public awareness.*

*Children with intellectual disabilities have the right to live and be included in their community. They are denied their right to liberty not because communities are not able to support or include them, but because the will to do so is silenced both by their invisibility and by often outdated perceptions of what is in the best interest of the child. Children with intellectual disabilities deserve better, and States have an obligation to deliver on their rights. Ending the institutionalization of children with disabilities is a key place to start.*

## Introduction

There are an estimated 93 to 150 million children with disabilities around the world. While data on children with intellectual disabilities is even less precise, studies have shown that up to 24% of these children have intellectual disabilities.<sup>1</sup> The World Health Organization acknowledges that “the variance in prevalence figures . . . suggests that children with disabilities are not being identified or receiving needed services.”<sup>2</sup> Over the last 20 years, through efforts such as the Millennium Development Goals, there has been remarkable global progress to improve the lives of children. However, children with disabilities have not benefitted equally from this progress. Not only has progress been uneven, in many instances children with disabilities have been left out entirely.

Around the world, the reality for children with disabilities often remains one of poverty, exclusion, and marginalization. Their families struggle to access information, basic supports and services, and education. In the absence of inclusive communities, families supporting a child with disability are left on their own with no support. Stigma and outdated information represent significant barriers to children with intellectual disabilities, often meaning they are never registered at birth and therefore prevented from receiving citizenship cards, denied access to school and prevented from developing relationships with their peers and others in their communities. Children with intellectual disabilities are among the most at risk of being denied their liberty and are not being supported to fully participate in their communities.<sup>3</sup>

Children with intellectual disabilities can experience deprivation of liberty in many ways, including by:

- being kept in juvenile detention facilities—including the “schools-to-prisons” pipeline trend being seen in the United States,<sup>4</sup> whereby students with behaviour challenges, among others, are being criminalized in the public education system and essentially funnelled into detention settings;
- being shackled or locked away in their own homes because there are no supports or services in their community;
- being forced into segregated schools (sometimes residential) or programmes because no other options are available; and, most prevalently,
- being placed in institutions specifically designated to house them.

This article will specifically focus on institutions as a deprivation of liberty and highlight ways states and communities can safeguard children from being institutionalized.

Lumos, a non-profit committed to closing institutions recognizes that “[a]cross the globe 8 million children are living in institutions that deny them individual love and care. More than 80% are not orphans. They are separated from their families because they are poor, disabled or from an ethnic minority. As a result, many suffer lifelong physical and emotional harm.”<sup>5</sup>

Children with intellectual disabilities are at significant risk for institutionalization. This is a violation of their rights to liberty, to a family, and to live and be included in the community, all of which are protected under the United Nations (UN) Convention on the Rights of the Child (CRC)

<sup>1</sup> UNICEF, *State of the World's Children* (New York: UNICEF, 2013).

<sup>2</sup> World Health Organization, *World Report on Disability* (Switzerland: WHO, 2011).

<sup>3</sup> Ibid.

<sup>4</sup> American Civil Liberties Union, “School-to-Prison Pipeline” <https://www.aclu.org/issues/juvenile-justice/school-prison-pipeline>

<sup>5</sup> Lumos, available at: <https://wearelumos.org/>.

and the UN Convention on the Rights of Persons with Disabilities (CRPD). Some children are abandoned by their parents out of desperation and placed in institutions. In other cases, children with disabilities may be removed by authorities for institutional placement, which they deem as an improvement over staying in the family home or because it is the only place where any supports to the child will be provided by the State. In some countries, institutions may be the only place where children with disabilities are able to receive any kind of education.<sup>6</sup> In yet other cases, children with intellectual disabilities may be virtual prisoners, hidden in their homes. This is because of the stigma and ignorance about intellectual disability and because families fear repercussions, such as ineligibility of other family members to marry, if the occurrence of disability in the family is known by the community.

Inclusion International is a global federation of people with intellectual disabilities and their families. With over 200 members in 115 countries around the world, Inclusion International is a global voice for people with intellectual disabilities and their families. Working with its members and partners, Inclusion International advances inclusion at the international, regional, country, and local levels. As one of the only international disability organizations that includes families, Inclusion International has a distinct focus on children with intellectual disabilities.

The history of Inclusion International and its members is anchored in the mobilization of parents rejecting institutions—deeming them an unacceptable option for their sons and daughters, and demanding that governments and communities recognize their right to live and be included in the community.

In 2012, Inclusion International published *Inclusive Communities = Stronger Communities*,<sup>7</sup> a global report on the right to live and be included in the community. The report drew on contributions from thousands of people in over 95 countries; detailed country profiles from 41 countries; individual stories from 36 countries; and input from focus group in 23 countries and 5 regional forums. The report confirms that:

- People with intellectual disabilities have **limited choice** and options for where and with whom they live. Frequently they are sent to live with others based on the nature of their disability and need for support rather than on friendship or choice, often in communities where they have no other relationships
- **Institutions continue to be a major source of human rights violations**, and there is evidence in some regions that the institutionalization of children is on the rise, and that new forms of institutions are being created.
- The major sources of support and care for people with intellectual disabilities are their families, yet **families receive little or no support** from communities or governments.
- Even when people with intellectual disabilities live in the community, they are often **isolated and excluded** from their very communities
- **Communities fail to organize inclusive social systems** (i.e. education, health, transportation, political processes, cultural and religious groups, employment, etc.)

<sup>6</sup> Organization for Economic Cooperation and Development, *Reviews of National Policies for Education. Kazakhstan, Kyrgyz Republic and Tajikistan: Students with Special Needs and those with Disabilities* (OECD, 2009).

<sup>7</sup> Inclusion International, *Inclusive Communities = Stronger Communities* (Inclusion International, 2012).

## Institutions as Deprivation of Liberty

Inclusion International has adopted the definition of an institution as “any place in which people who have been labeled as having an intellectual disability are isolated, segregated and/or congregated. An institution is any place in which people do not have, or are [not] allowed to exercise control over their lives and the day-to-day decisions. An institution is not defined merely by its size.”<sup>8</sup> Often institutions are given names which suggest that they are therapeutic, educational or part of their communities which obfuscates their segregating and constraining nature.<sup>9</sup>

The CRPD, adopted by the UN in 2010 and currently ratified by over 160 countries, was developed and negotiated over a six-year period. It represented the first time that international law clearly articulated the particular right of persons with disabilities to choose their place of residence and where and with whom they live on an equal basis with others and not be obliged to live in a particular living arrangement.

CRPD Article 19 requires that persons with disabilities:

- Have a **choice** as to where and with whom they live, without being obliged to live in a particular living arrangement. The concept of choice implies that an individual has a voice in, control over, and options with regards to location and type of residence;
- Are provided with adequate support, i.e. personal assistance, financial support, help managing household responsibilities, etc.; and
- Benefit from full **inclusion** in their communities, which must organize themselves in inclusive ways (including with regards to education systems, healthcare systems, recreation, transportation, etc.).

The success of the drafting of CRPD Article 19 builds on decades of work exposing abuse in institutions and the recognition that institutionalization constitutes an unjust deprivation of liberty. Moreover, research about deinstitutionalization and living in the community has affirmed that persons with intellectual disabilities are better supported in their communities.<sup>10 11</sup>

## The Situation Today

While accurate data on the number of children in institutions is not readily available, information collected through the Inclusion International global reporting process and studies such as *Los Últimos de la Fila*<sup>12</sup> show that children and adolescents with disabilities represent a significant portion of children living in institutions. This study, for instance, reveals that “children and adolescents with disabilities make up 20% of the total number of children living in institutions” in Latin America.<sup>13</sup>

<sup>8</sup> People First of Canada, Canadian Association for Community Living, *The Right Way* (2010), 4, available at: <http://www.cacl.ca/sites/default/files/uploads/docs/The%20Right%20Way.pdf>

<sup>9</sup> Inclusion International, *Inclusive Communities = Stronger Communities* (2012), 84. Euphemisms are often used to describe institutions such as: Homes for Special Care; Special Care Homes; Personal Care Homes; Farms; Ranches; Gated Communities; Developmental Maximization Units; Community Living Centres; State Schools; Neuro-behavioural Treatment Centres; Long Term Care Homes; Centers of Excellence; and Cottages.

<sup>10</sup> Conroy, James, W. “The deinstitutionalization of America” *TASH Newsletter* Volume 24, Issue 3, (March 1998).

<sup>11</sup> Eunice Kennedy Shriver Centre “Literature Summary—Outcomes by Residential Size” (Shriver Center, May 2014).

<sup>12</sup> RELAF & UNICEF, *Los Últimos de la Fila* (August 2016).

<sup>13</sup> *Ibid.*

The UN Committee on the Rights of Persons with Disabilities, in its concluding observations for Serbia<sup>14</sup>, expressed concern that 80% of children in institutions are children with intellectual disabilities. Further, the Committee noted that “despite the legal prohibition on placement in institutions of infants under the age of 3 disabled infants with disabilities continue to be placed in institutions directly from maternity wards.”<sup>15</sup>

In its Concluding Observations, the Committee has consistently expressed concern for the abandonment and institutionalization of children with disabilities around the world.<sup>16</sup>

In its report on the European Union (EU), the Committee expressed concern that European Structural and Investment Funds (ESI Funds) are “being used for maintenance of residential institutions rather than for development of support services for persons with disabilities in local communities.” The Committee recommended that the EU strengthen the monitoring of the use of ESI Funds to ensure they are being used strictly for the development of support services for persons with disabilities in local communities, and not the re-development or expansion of institutions.<sup>17</sup>

Research conducted by Human Rights Watch in Russia suggests that nearly 30% of all children with disabilities are in orphanages, with high rates of abuse and inadequate staffing (ratio, training, etc.), and that the institutionalization of children frequently leads to lifelong institutionalization, with individuals sometimes remaining in facilities for children beyond the age of majority and others being transferred from the orphanage to state institutions for adults.<sup>18</sup>

These studies do not disaggregate by type of disability but trends suggest that children with intellectual disabilities are overrepresented in institutions.

Research in Colombia indicates that more than 6,000 children, adolescents, and adults with intellectual disabilities are presently institutionalized in residential facilities paid for by the government. The standards of care are minimal and many of them fall below international standards including by the improper use of restraints such as tying children in their beds and/or wheelchairs, and long periods of confinement. Furthermore, public policy promotes abandonment, as eligibility for governmental assistance provided by the ICBF under their public policy<sup>19</sup> requires that families state

<sup>14</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of Serbia* (CRPD/C/SRB/CO/1, May 2016) 3.

<sup>15</sup> *Ibid.*

<sup>16</sup> Committee on The Rights of Persons with Disabilities, *Concluding Observations on the initial report of Serbia* (CRPD/C/SRB/CO/1, May 2016); *Concluding Observations on the initial report of Slovakia* (CRPD/C/SVK/CO/1, May 2016); *Concluding Observations on the initial report of Thailand* (CRPD/C/THA/CO/1, May 2016); *Concluding Observations on the initial report of the European Union* (CRPD/C/EU/CO/1, October 2015); *Concluding Observations on the initial report of Kenya* (CRPD/C/KEN/CO/1, September 2015); *Concluding Observations on the initial report of Mauritius* (CRPD/C/MUS/CO/1, September 2015); *Concluding Observations on the initial report of Ukraine* (CRPD/C/UKR/CO/1, October 2015); *Concluding Observations on the initial report of Croatia* (CRPD/C/HRV/CO/1, May 2015); *Concluding Observations on the initial report of the Czech Republic* (CRPD/C/CZE/CO/1, May 2015); *Concluding Observations on the initial report of Germany* (CRPD/C/DEU/CO/1, May 2015); *Concluding Observations on the initial report of Belgium* (CRPD/C/BEL/CO/1, October 2014); *Concluding Observations on the initial report of Mexico* (CRPD/C/MEX/CO/1, October 2014); *Concluding Observations on the initial report of Costa Rica* (CRPD/C/CRI/CO/1, May 2014); *Concluding Observations on the initial report of China* (CRPD/C/CHN/CO/1, October 2012); *Concluding Observations on the initial report of Hungary* (CRPD/C/HUN/CO/1, October 2012). All available on-line: [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=4&DocTypeID=5).

<sup>17</sup> Committee on the Rights of Persons with Disabilities, *Concluding Observations on the initial report of the European Union* (CRPD/C/EU/CO/1, October 2015), 7.

<sup>18</sup> Human Rights Watch. *Abandoned by the State: Violence, Neglect and Isolation for Children with disabilities in Russian Orphanages*. (Human Rights Watch, September 2014).

<sup>19</sup> ICBF Instituto Colombiano de Bienestar Familiar and de SDIS Secretaria Distrital de Integración Social <http://www.icbf.gov.co/portal/page/portal/PortalICBF/procesos/misionales/proteccion/restablecimiento-derechos/3C8FEF8729FB1DE0E053528511AC3E58>, Chart 4, 27

and signed they are “violating their children’s rights or abusing and neglecting their children”.<sup>20</sup> Children with disabilities in state care, specifically those in institutions, receive free health care and education services.<sup>21</sup> For many families unable to afford health care and education, the policy creates an incentive for institutionalization and promotes abandonment. In practice, the policy denies children the right to a family, and by removing them from their community, makes them invisible.

In the Americas, institutionalization remains a common practice despite concerns about the conditions under which residential institutions operate. The Inter-American Commission on Human Rights report, *The Right of Boys and Girls to Have a Family: Alternative Care: Ending Institutionalization in the Americas*<sup>22</sup> reveals that a large number of children are unnecessarily institutionalized in times of crisis such as the death of a parent and calls for the development of supports to families and individuals that will end the practice of institutionalization.

While most of the large-scale institutions in countries including Norway, the United States, Canada, Australia and New Zealand have been closed there is large-scale work that needs to be done in closing those that remain.

When families are unable to care for a person who has an intellectual disability, the only option is often a state-sponsored institution. There is evidence in some regions that the number of children being admitted to institutions is increasing and that new forms of institutions are being created. Renewed and reinvigorated efforts are needed to prevent new institutions from being created and to break down an institutional mindset that affects the way people with intellectual disabilities are supported.

### **Violence and Children with Disabilities**

The 2013 State of the World’s Children<sup>23</sup> report highlights that children with disabilities are particularly vulnerable to violence and abuse. The report suggests that children with disabilities are 3 to 4 times more likely to be victims of violence, being 3.6 times more likely to experience physical violence and 2.9 times more likely to experience sexual violence. For children with mental or intellectual disabilities, the risk of being victims of violence is 4.6 times greater.

In addition to being vulnerable to all forms of violence, including bullying, children with disabilities are vulnerable to disability-specific violence. This includes violence in residential living facilities where rates of violence and abuse are extremely high; forced sterilization, especially for girls; violence in the guise of “treatment;” and the deliberate inflicting of disability on children for the purposes of exploiting them for begging etc. which then makes them vulnerable to further abuse.

### **Safeguarding Children from Deprivation of Liberty**

The best way to secure the right to liberty for children with disabilities is by supporting families, building inclusive communities—with a specific focus on inclusive education—and supporting the

<sup>20</sup> Ibid.

<sup>21</sup> Ibid. *Modalidades de Atencion*, Chart 5, 29.

<sup>22</sup> Inter-American Commission on Human Rights. *The Right of boys and girls to have a family: Alternative Care. Ending institutionalization in the Americas*(Organization of American States, October 2013)

<sup>23</sup> UNICEF, *State of the World’s Children*, 2013



development of self-advocacy, having people with intellectual disabilities make their own decisions and speak up for themselves.<sup>24</sup>

### 1. Supporting Families

Too often, children with disabilities are invisible. This invisibility is a barrier to inclusion and puts them at risk for human rights violations. Their invisibility also impacts their family units. The result is that not only their needs, but also those of their families, are invisible.

Children with intellectual disabilities may be invisible to policy-makers because they are hidden by their families due to stigma and shame, but also because they were not registered at birth<sup>25</sup> or at school age because of educational systems that do not accept them. Few States document disabilities arising in childhood after birth. There is better data on adults with disabilities in many countries, some data on incidence of certain conditions at birth, and little data on disabilities arising after birth.

Children in institutions, or who are excluded from schools, are often not counted in disability registers or education data because they are considered uneducable.<sup>26</sup>

There is a lack of coherence between policies that support families and policies that support children with disabilities. Often, policy-makers think only about supports for the child, without realizing that families need support in order to be able to adequately care for their children.

Families play a unique role in the lives of children with intellectual disabilities. Families are often the key to the realization of the rights of their sons and daughters and to facilitating their inclusion in the community, and need support to do this. The value of this role and the need to support families is reflected in the preamble of the CRPD, which states that “*the family is the natural and fundamental group unit of society and is entitled to protection by society and the State, and that persons with disabilities and their family members should receive the necessary protection and assistance to enable families to contribute towards the full and equal enjoyment of the rights of persons with disabilities.*”<sup>27</sup>

How a family supports a child with a disability depends not only on the disability-specific needs of the child but also on other factors such as cultural attitudes towards disability, the family’s resources, and the supports available to the child and to the family. At times there can be a conflict between the needs of the family and the needs of the child, and policy responses must differentiate between these, and respond to both.<sup>28</sup>

Families supporting a child with a disability face unique challenges. Negative attitudes and prejudice about disability impact the family unit as a whole, while extra costs associated with disability impact household income, and the lack of supports and services put additional pressure on the family’s caregiving roles.

<sup>24</sup> For a description of self-advocacy see: <http://inclusion-international.org/about-self-advocacy/>

<sup>25</sup> Committee on the Rights of the Child, *General Comment No.9, The Rights of Children with Disabilities*, (UN CRC/C/GC/9, Feb 2007), para 36.

<sup>26</sup> United Nations Children’s Fund, *The Right of Children with Disabilities to Education: A Rights-Based Approach to Inclusive Education*, Draft Position Paper, (Geneva: UNICEF Regional Office for Central and Eastern Europe and the Commonwealth of Independent States (CEECIS), 2011) <[www.unicef.org/ceecis/Final\\_Draft\\_-\\_Position\\_Paper2.pdf](http://www.unicef.org/ceecis/Final_Draft_-_Position_Paper2.pdf)>, 17, accessed 14 March 2012.

<sup>27</sup> UN Convention on the Rights of Persons with Disabilities. *Preamble, paragraph x*. Adopted December 2016.

<sup>28</sup> Richler, Diane “*Families and Caregivers of Children with Disabilities*”(unpublished background paper for 2013 UNICEF State of the World’s Children, 2012); World Health Organization and World Bank, *World Report on Disability*(Geneva: World Health Organization, 2011), 158; Schulze, Marianne, *Understanding the UN Convention on the Rights of Persons with Disabilities: A handbook on the human rights of persons with disabilities* (Handicap International, 2009), 20.

Additionally, families supporting a child with an intellectual disability do not experience a reduction in caregiving duties as the child grows older. Indeed, “[c]hildren with physical disabilities appear to develop peer relationships with non-disabled friends in early adolescence while children with intellectual or multiple disabilities do not, placing more onus on the family.”<sup>29</sup> Children with intellectual disabilities, may require continuous supervision due to their lifelong needs, while their peers with physical and sensory disabilities may develop more independence.

The continued intensity and duration of caregiving duties increase stress on families and put children with intellectual disabilities at risk of institutionalization as they get older. In the absence of support, caregiver burnout can lead to family breakdown. When families are isolated and not supported, crises can also arise. When families in such situations break down, it is important to recognize that the cause is rooted in the society’s failure to support children with disabilities and their family unit, rather than the nature of the disability. When this happens, children with intellectual disabilities are at a greater risk for institutionalization.

Families continue to report that they are encouraged by professionals and government officials to put their children in institutions. Furthermore, child protection systems are failing to respond to children with disabilities in the same ways as they respond to other children. For example, despite major attempts to find alternate families for abandoned non-disabled children, child welfare systems often assume that similar arrangements are not needed for children with intellectual disabilities, and sometimes, even that institutional placement is preferable.<sup>30</sup>

Families express the need for information, opportunities to connect with other families, short breaks from caregiving duties, and help with disability associated costs. Much more along these lines must be done to support families.

## 2. *Building Inclusive Communities*

Inclusive communities are an essential safeguard to protect children with intellectual disabilities from the risk of being deprived of liberty. Measures to support children with disabilities to live typical lives in their communities are transformational for both the children and their families. Inclusive communities reduce isolation, establish lifelong patterns of inclusion, and have the capacity to alter the status quo.

For children with intellectual disabilities, inclusive communities mean being included in all aspects of community life: recreational, social, educational, economical and political. Inclusive communities are key to keeping children with disabilities safe and to protecting them from harm. When children have healthy and strong relationships in their communities, they are safer. Teachers, peers, and youth program leaders can help teach children how to protect themselves against violence and abuse, and can be valuable monitors to watch for signs of violence and abuse.

People with intellectual disabilities and their families repeatedly identify inclusive education as the key to breaking down barriers and building inclusive communities. Inclusion International’s 2009 report, *Better Education for ALL* found that while children who are excluded from school are more likely to experience exclusion throughout their lives, those who are included are more likely to be connected to their community and have meaningful relationships beyond their immediately

<sup>29</sup> Ytterhus, Borgunn, Christian Wendelborg and Hege Lundeby, ‘Managing turning points and transitions in childhood and parenthood—insights from families with disabled children in Norway’, *Disability and Society*, vol. 23, no. 6, (2008), 627, accessed 1 February 2012, In Richler, Diane, *Ibid.* above.

<sup>30</sup> *Ibid.*

family. The latter are also more likely to get jobs and be healthier, be engaged in the civic life of their community, and are less likely to live in poverty.<sup>31</sup>

Inclusive education provides a better system for educating all children. Not only can inclusive education provide better academic outcomes for all children, inclusive schools foster and promote social inclusion of other marginalized groups, such as ethnic minorities, child labourers, and girls, as well. Moreover, inclusive education helps build social cohesion and social capital that has lasting impact in the lives of individuals and within communities.<sup>32</sup>

Yet most families report continuing struggles to achieve inclusive education for their sons and daughters. Despite a clear recognition that the right to education means the right to an inclusive education,<sup>33</sup> children with intellectual disabilities are disproportionately denied this right. Restrictions on educational placement and requirements that force children with intellectual disabilities to attend segregated schools can constitute a form of deprivation of liberty. For instance, a recent case in the Netherlands involved the parents of a child with an intellectual disability being threatened with loss of custody of their child, if they did not agree to his placement in a segregated school—to which they eventually did.<sup>34</sup>

### 3. *Supporting Self-Advocacy*

Self-advocacy is a collective concept that provides people with intellectual disabilities opportunities to come together to share experiences and advocate for change in their lives, their communities, their countries, and at regional and international levels. The self-advocacy movement stemmed from the desire of people with intellectual disabilities to advocate for themselves, which gave rise to the term self-advocacy. Since that time there has been a rise in self-advocacy around the world, albeit unevenly as in some places the practice of self-advocacy is still emerging. In order to enable people who have been denied their voice to reclaim it, several steps are needed:

**Personal empowerment**, which can empower people with intellectual disabilities to have a voice, choice, and control in their own lives;

- **Mutual support and self-help groups**, as a means of creating opportunities for self-advocates to come together and provide support to one another in their communities or in different areas of interest;
- **Self-advocacy for collective action**, which can enable and support the collective voice of self-advocates to advance a shared agenda for social change.

*Empower Us: A Global Resource to Support Self-Advocacy*, an initiative by Inclusion International, has stemmed from the need to support the development of self-advocacy and to build the “how-to” capacity of families, organizations and individuals. Inclusion International’s forthcoming 2016 Global Report, *Self-Advocacy Around the World*, defines self-advocacy and highlights how it has been developed around the world. It also provides guidance from self-advocates on “good practice” and sets out recommendations for a global initiative to support self-advocacy.

Self-advocacy is important because it fosters equality, provides people with intellectual disabilities visibility as equal peers to those without disabilities, and raises public awareness. Self-

<sup>31</sup> Inclusion International, *Hear Our Voices* (Inclusion International, 2006).

<sup>32</sup> Inclusion International, *Article 24: Implications of Implementation for People with Intellectual Disabilities* (submission to the Committee on the Rights of Persons with Disabilities, March 2015).

<sup>33</sup> Committee on the Rights of Persons with Disabilities, *General Comment No. 4 Article 24: Right to inclusive education* (UN CRPD/C/GC/4, 2016).

<sup>34</sup> Personal Correspondence with authors

advocacy starts at birth and it must be encouraged and nurtured from a very young age at home, in early childhood programs and at school so that children who have intellectual disabilities learn to advocate for themselves, and so that others see them as capable of making their own decisions, albeit often with support. Investments are needed to help nurture and sustain self-advocacy from a very young age.

The CRPD has supported a paradigm shift from regarding persons with disabilities, including children, as objects, to regarding them as persons who are subjects with rights. The CRC and the CRPD both recognize the evolving capacity of children and the need to ensure that children with disabilities are able to make decisions. In this context, Article 7.3 of the CRPD mandates that State Parties must give children's views "due weight in accordance with their age and maturity, on an equal basis with other children, and [provide them] with disability and age-appropriate assistance to realize that right." Being seen as an equal and as persons with control in their lives helps safeguard children with intellectual disabilities. Having one's voice recognized while still a child helps contribute to successful self-advocacy in the future, and to the exercise of personal decision-making and public participation through voting, advocacy, and other forms of public engagement.

### The CRPD and the Sustainable Development Goals

The CRPD provides a human rights framework that can be used to hold states accountable for protecting and promoting the rights of children with disabilities. Article 7 on children with disabilities is a cross-cutting article that relates to all of the Convention's other articles. As such, the CRPD is central to securing all rights for children with disabilities. Particularly relevant in this context is a child's right to a family, life in the community, inclusive education, liberty of movement, to make his or her decisions, with support if necessary. The CRPD is more than a listing of entitlements. It recognizes the particular supports that need to be in place to make rights real and meaningful.

For the foreseeable future, the 2030 Agenda will be guiding much of the world's international development efforts. The Sustainable Development Goals (SDGs), the core of the 2030 Agenda, represent the first time an international development agenda has specifically recognized persons with disabilities.

Overall, there are 11 distinct references to persons with disabilities in the 2030 Agenda; There are four references in the declaration and seven references in the sustainable development goals:

- Goal 4: Education—has 2 references
- Goal 8 Employment—has 1 reference
- Goal 10: Reducing inequalities—has 1 reference
- Goal 11: Inclusive cities—has 2 references
- Goal 17: Means of implementation.

The overarching principle is **leave no one behind**.<sup>35</sup>

The 2030 Agenda represents an opportunity to ensure that children with disabilities benefit equally from investments in children and that this time, children with disabilities will not be left behind.

<sup>35</sup> United Nations, *Transforming our World: The 2030 Agenda for Sustainable Development* (New York: United Nations, A/Res/70/1, 2015).

## Moving Forward

Children with intellectual disabilities have the right to live and be included in their community. They are denied their right to liberty not because communities are not able to support or include them in their communities, but because the will to do so is silenced both by their invisibility and by often outdated perceptions of what is in the best interest of the child. Children with intellectual disabilities deserve better, and States have an obligation to deliver on their rights. Ending their deprivation of liberty by placing children with disabilities in institutions is a key place to start.

Moving forward, there is an immediate need to:

- **transition** from segregated models (whether in terms of employment, housing, or education) to **community-based** models;
- build and support **self-advocacy** groups;
- develop **family resource and training programmes** and assist families in building and sustaining natural supports in the community;
- secure **budget allocation** for disability supports and inclusion in **mainstream** budgets that fund programs for all children, such as for education, recreation, health services and income support.

<b>BOX 1: Recommendations from Inclusive Communities = Stronger Communities<sup>37</sup></b>	
<b>Key Messages</b>	<b>Recommendations</b>
<b>Institutions deprive people of their rights.</b>	<ul style="list-style-type: none"> <li>• Cease new admissions.</li> <li>• Do not build new large centres to house people with intellectual disabilities.</li> <li>• Do not invest in refurbishing existing large centres.</li> <li>• Start planning for the people now living in large centres so that they can become included in their communities.</li> </ul>
<b>Most individuals with intellectual disabilities live at home with their families and receive little or no support.</b>	<ul style="list-style-type: none"> <li>• Remove all incentives that give more support to children or adults if they move away from their families into institutional arrangements.</li> </ul>
<b>Families receive little or no support to help care for a person with an intellectual disability.</b>	<ul style="list-style-type: none"> <li>• Provide supports to families AND to individuals with disabilities.</li> <li>• Provide support organizations of families as well as self-advocacy.</li> </ul>
<b>Support to Imagine a Better Future</b>	<ul style="list-style-type: none"> <li>• Alternative options to institutions need to be promoted.</li> <li>• Provide better information for families.</li> </ul>

## Conclusion

The ongoing institutionalization of children with intellectual disabilities has universally been recognized as an egregious violation of their human rights.

A multi-faceted approach is required to effectively safeguard children with intellectual disabilities from deprivation of liberty in institutions. Across policy and programming efforts, investments in supporting families, building inclusive communities—in particular inclusive education—and supporting self-advocacy, are needed. The recently launched UN Global Partnership to End Violence Against Children provides an opportunity to raise this issue within the mainstream agenda. Initiatives such as this could foster collaboration among the many groups committed to protecting the rights of children with disabilities.

At a time where there is unprecedented commitment to take action to improve children's rights, it is imperative that children with intellectual disabilities are not left out or left behind.

<sup>37</sup> Inclusion International, *Inclusive Communities = Stronger Communities*, 139



# Abuses against Children Detained as National Security Threats

BY JO BECKER\*

## Abstract

*The rise of extremist armed groups such as the Islamic State and Boko Haram has brought renewed attention to the plight of children—both as victims of abuses and as fighters and militants. Human Rights Watch field research around the world increasingly finds that in countries embroiled in civil strife or armed conflict, state security forces arrest and detain children for reasons of “national security.” Empowered by new counterterrorism legislation, they apprehend children who are linked to non-state armed groups or pose other perceived security threats, and often hold them without charge or trial for months or even years. While some children may have committed illegal acts, many others are detained on the basis of groundless suspicion, flimsy evidence, or broad security sweeps.*

*The treatment of these children, and their conditions of detention, frequently violate international legal standards. Security forces have carried out torture and other cruel, inhuman and degrading treatment against children to elicit confessions, extract intelligence information, or as punishment. Former child detainees report being subject to beatings, electric shocks, prolonged stress positions, forced nudity, and threats of execution and rape.*

*This chapter examines in particular the detention of children for national security reasons in Afghanistan, the Democratic Republic of Congo, Iraq, Israel, Nigeria, and Syria, as well as detention of children by the United States in Afghanistan, Iraq, and Guantanamo Bay. It also examines legislative measures in other countries allowing authorities greater scope to detain individuals, including children, perceived as security threats.*

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## Children Detained as National Security Threats

The rise of extremist armed groups such as the Islamic State and Boko Haram has brought renewed attention to the plight of children—both as victims of abuses and as fighters and militants. All too often, the concern and the assistance offered abuse victims does not extend to those children caught up on the wrong side of the law or the front line.

Human Rights Watch field research around the world increasingly finds that in countries embroiled in civil strife or armed conflict, state security forces arrest and detain children for reasons of “national security.” Empowered by new counterterrorism legislation, they apprehend children who are linked to non-state armed groups or pose other perceived security threats, and often hold them without charge or trial for months or even years. Their treatment and their conditions of detention frequently violate international legal standards.

Since 2011, the United Nations secretary-general has repeatedly raised concerns regarding the detention of children who are perceived as a threat to national security, suspected of participating in violent activity, or alleged to belong to armed groups. In 2014, he reported that such detention took place in 17 of the 23 situations of armed conflict or concern covered by his annual report on children and armed conflict.<sup>1</sup> In countries including Afghanistan, Iraq, Israel, Nigeria, Somalia, and Syria, hundreds of children may be detained at any given time for alleged conflict-related offenses.

Many children are detained on the basis of groundless suspicion, flimsy evidence, or broad security sweeps. Some are detained because of alleged terrorist activities by other family members. They are often denied access to lawyers and relatives, and the opportunity to challenge the basis of their detention before a judge. Many have been subjected to coercive interrogations and torture, and in places like Syria, an unknown number have died in custody.

Conditions of detention are frequently appalling, with grossly inadequate food or medical care. Children often share overcrowded cells with unrelated adults, putting them at additional risk of physical and sexual violence. The UN Committee on the Rights of the Child has urged countries to avoid bringing criminal proceedings against children within the military justice system, but some countries allow for the detention of children by military authorities and prosecution of children before military courts even when the civilian courts are functioning. Military courts typically make no arrangements for alleged juvenile offenders.

Security forces have carried out torture and other cruel, inhuman and degrading treatment against children to elicit confessions, extract intelligence information, or as punishment. Former child detainees report being subject to beatings, electric shocks, prolonged stress positions, forced nudity, and threats of execution and rape. In some countries a significant proportion of detained children report such abuse. As discussed below, in some circumstances, security forces may be more likely to torture children than adults.

Governments also have used the authority of UN Security Council resolutions to detain children indefinitely. For example, Security Council resolutions adopted between 2004 and 2006 authorized Coalition forces to detain persons in Iraq “for imperative reasons of security”—a standard normally only applicable during a military occupation under the 1949 Geneva Conventions. Following the occupation of Iraq, US military procedure was to hold any person considered a “security risk,”

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<sup>1</sup> U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, ¶ 9, U.N. Doc. A/68/878-S/2014/339 (May 15, 2014), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/339](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/339).

often indefinitely, without transferring them to the Iraqi criminal justice system or providing basic due process protections. US forces detained hundreds of children under this protocol.

The impact of security-related detention on children can be profound. Children are separated from their families and communities, and typically denied access to education, leaving them further behind their peers once released. In cases of indefinite detention, with no knowledge of when they might be released, children may experience depression and despair. Detention with adults also offers more opportunities to learn criminal behavior from older detainees. Large-scale research studies in criminal justice have found that children detained with adults are significantly more likely to engage in future criminal activity than children held with their peers.<sup>2</sup> In general, juvenile justice research finds that children who have been subjected to detention end up with lower educational achievement, lower rates of employment, higher suicide rates, and higher re-arrest rates than their peers who have also committed offenses but are placed in community-based alternative programs.<sup>3</sup>

During armed conflict and situations of extremist violence, children who are ill-treated in detention may easily become alienated and seek retaliation by joining armed groups. When children who have no association with armed groups perceive that they may be subject to detention based on mere suspicion of involvement, they may be more likely to join such groups, seeking protection. Rather than reducing threats, the practice of detaining children may actually increase them.

International human rights and humanitarian law provide special protections for children during peacetime and situations of armed conflict. Children who have committed illegal acts need to be treated in accordance with international juvenile justice standards, which emphasize alternatives to detention, and prioritize the rehabilitation and social reintegration of the child. The Convention on the Rights of the Child states that, regardless of the circumstances, the arrest, detention, or imprisonment of a child should be used only as a measure of last resort and for the shortest appropriate period of time.<sup>4</sup>

International law recognizes the recruitment of anyone under 18 by armed groups as a violation of children's rights, and stress that child soldiers should be treated primarily as victims, with a focus on their rehabilitation and reintegration into civilian life, including those responsible for war crimes.<sup>5</sup> The Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict obligates countries to provide children who have been illegally recruited and used as child soldiers "all appropriate assistance for their physical and psychological recovery and their social reintegration."<sup>6</sup>

The United Nations has often played an important role in protecting children during armed conflict. The UN secretary-general has said that depriving children of their liberty because of their association with armed groups "is contrary not only to the best interests of the child, but also to the interests of society as a whole," and notes that such detention can lead to the creation of com-

<sup>2</sup> Richard R. (2010). Juvenile Transfer Laws: An Effective Deterrent to Delinquency? *Juvenile Justice Bulletin*, US Dept. of Justice, Office of Juvenile Justice and Delinquency Prevention. Retrieved from <https://www.ncjrs.gov/pdffiles1/ojdp/220595.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> Convention on the Rights of the Child art. 37(b), adopted Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 12, 1990).

<sup>5</sup> U.N. Children's Fund [UNICEF], *The Paris Principles: Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, paras. 3.6, 3.11, Feb. 2007, available at: <http://www.unicef.org/emerg/files/ParisPrinciples310107English.pdf>.

<sup>6</sup> Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, art. 6, adopted May 25, 2000 G.A. Res. A/Res/54/263 (entered into force Feb. 12, 2002).

munity grievances.<sup>7</sup> The UN in a number of situations has advocated successfully for the release of children or negotiated protocols to ensure the transfer of children from detention centers to child protection agencies that can assist in their rehabilitation and reintegration into society. In far too many cases around the world, however, detention remains the norm.

The following country discussions highlight recent patterns in the detention and treatment of children for alleged conflict-related and other national security offenses. The cases cited are not exhaustive. Other countries also routinely detain children as perceived security threats. Somalia, for example, detained over 1000 children in 2013, many suspected of belonging to the Islamist armed group Al-Shabaab.<sup>8</sup> The UN secretary-general has also highlighted concerns regarding the detention of children in Mali, Pakistan, the Philippines, Sudan, Thailand, and Yemen.

## Afghanistan

Afghan security forces have detained hundreds of children on suspicion of being Taliban fighters, attempting suicide attacks, manufacturing or placing improvised explosive devices (IEDs), or otherwise assisting opposition armed groups. According to the Ministry of Justice, 214 boys were detained in juvenile rehabilitation centers on national security-related charges as of December 2015.<sup>9</sup>

The overall number of children in detention for security-related charges may be significantly higher. Afghanistan maintains over 200 detention facilities run by various entities, including the Afghan National Police, the National Directorate of Security, and the Afghan National Army. For example, the Parwan detention facility, under the authority of the Ministry of Defense, held 166 detainees arrested as children for security-related offenses in 2015, including 53 who were still under age 18.<sup>10</sup> According to government figures, a total of 7,555 individuals were held in Afghan detention facilities or prisons for alleged conflict-related offenses in October 2014, nearly four times the number in 2011. Random interviews conducted by the UN in dozens of these facilities suggest that up to 13 percent of these detainees—thus more than 900 individuals—may be children under the age of 18.<sup>11</sup>

Torture is routine in many Afghan detention facilities. The UN found that of 790 detainees randomly interviewed in 2013 and 2014, 35 percent provided credible and reliable accounts of torture or ill-treatment. The detainees described over a dozen methods of torture, including prolonged and severe beating with cables, pipes, hoses or wooden sticks (including on the soles of the feet), punching, hitting and kicking (including jumping on the detainee's body), twisting of genitals (including with a wrench-like device), and threats of execution and sexual assault. Detainees also

<sup>7</sup> U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, ¶ 16, U.N. Doc. A/70/836-S/2016/360 (June 16, 2016), available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2016/360](http://www.un.org/ga/search/view_doc.asp?symbol=S/2016/360).

<sup>8</sup> U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, ¶ 117, U.N. Doc. A/68/878-S/2014/339 (May 15, 2014), available at: [http://www.un.org/ga/search/view\\_doc.asp?symbol=S/2014/339](http://www.un.org/ga/search/view_doc.asp?symbol=S/2014/339).

<sup>9</sup> *Id.* ¶ 23.

<sup>10</sup> *Id.*

<sup>11</sup> The UN randomly interviewed 790 detainees in 2013 and 2014, of whom 105—or 13 percent—were under the age of 18. A similar study of detainee abuse conducted in 2010 and 2011 randomly interviewed 324 detainees charged with conflict-related offenses, and found that 37—or 11 percent—were under the age of 18. See U.N. Assistance Mission in Afghanistan [UNAMA] and Office of the High Comm'r for Human Rights [OHCHR], *Update on the Treatment of Conflict-Related Detainees in Afghan Custody: Accountability and Implementation of Presidential Decree 129* [hereinafter *Update on Treatment of Detainees in Afghan Custody*], (Feb. 2015), available at: [http://www.ohchr.org/Documents/Countries/AF/UNAMA\\_OHCHR\\_Detention\\_Report\\_Feb2015.pdf](http://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_Detention_Report_Feb2015.pdf).

reported suspension, electric shocks, being forced to stand for prolonged periods (including in extremely hot or cold temperatures), being forced to drink excessive amounts of water, and being denied food, water, and prayer time.<sup>12</sup>

Afghan security forces may subject children to torture more frequently than adults. The UN's 2013-2014 interviews found that 42 percent of the children interviewed provided credible accounts of torture or ill-treatment, 7 percentage points higher than for adults.<sup>13</sup> Similarly, random interviews conducted by the UN between October 2010 and August 2011 found that 46 percent of all detainees reported torture or ill-treatment, while 62 percent of detained children did so.<sup>14</sup>

Afghan security forces typically use torture to extract confessions or other information. Detainees reported that if they refused to confess to the crime they were accused of, or provide the information interrogators wanted, authorities would vary the methods of torture to escalate the levels of pain. Most of the detainees who said they were tortured reported that they eventually made a confession to stop the abuse.<sup>15</sup>

Impunity for members of the security forces who are responsible for torture and other ill-treatment was also the norm. In February 2013, a boy reported that Afghan National Police in Kandahar raped him while he was in detention. When the case was reported, it was referred for investigation to the same authorities that were alleged to have committed the rape. The victim withdrew his allegation, later saying that he had done so after members of the police threatened him.<sup>16</sup> In 2013 and 2014, the UN found only one case where security force personnel were prosecuted for torture of detainees. The two officials involved were each sentenced to eight months' imprisonment.<sup>17</sup>

The Constitution of Afghanistan and the 2014 Criminal Procedure Code include due process guarantees intended to protect detainees from the use of torture. These protections, however, are often disregarded. According to the UN, judges and prosecutors routinely ignore legal prohibitions against using evidence gained through torture for prosecution, and deny detainees their right to mandatory access to defense counsel.<sup>18</sup> A September 2015 presidential decree further undercut protections by amending the Criminal Procedure Code to permit indefinite detention of security suspects without trial. Under the amended code, Afghan authorities may detain for a renewable one-year period anyone suspected of "crimes against internal or external security," or believed "likely to commit such a crime."<sup>19</sup>

## Democratic Republic of Congo

In the Democratic Republic of Congo (DRC), security forces have arrested and detained hundreds of children suspected of association with armed groups. According to the UN, the Congolese armed forces arrested and detained at least 257 children during 2013 and 2014. Forty percent of the

<sup>12</sup> *Id.* at 19-20.

<sup>13</sup> *Id.* at 18.

<sup>14</sup> UNAMA and OHCHR, *Treatment of Conflict-Related Detainees in Afghan Custody*, (Oct. 2011), available at: [http://www.ohchr.org/Documents/Countries/AF/UNAMA\\_Detention\\_en.pdf](http://www.ohchr.org/Documents/Countries/AF/UNAMA_Detention_en.pdf).

<sup>15</sup> *Id.* at 20.

<sup>16</sup> *Update on Treatment of Detainees in Afghan Custody*, *supra* note 11 at 91-92, available at: [http://www.ohchr.org/Documents/Countries/AF/UNAMA\\_OHCHR\\_Detention\\_Report\\_Feb2015.pdf](http://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_Detention_Report_Feb2015.pdf).

<sup>17</sup> *Id.* at 28.

<sup>18</sup> *Id.*

<sup>19</sup> Human Rights Watch. (2015, November 15). Afghanistan: Reject Indefinite Detention Without Trial [News Release]. Retrieved from <https://www.hrw.org/news/2015/11/15/afghanistan-reject-indefinite-detention-without-trial>.

children interviewed by the UN said they had been subjected to ill-treatment during their detention. Officials released the children only after advocacy by the UN.

In December 2015, Human Rights Watch interviewed 29 children detained in appalling conditions in a military prison in Angenga, northwest DRC.<sup>20</sup> Congolese authorities alleged that the boys were members of the Democratic Forces for the Liberation of Rwanda (FDLR), a rebel armed group, though none had been formally charged with any crime. Seventeen of the boys told Human Rights Watch they had never been affiliated with the FDLR, while others said they had belonged to the FDLR, but had demobilized months or years previously and reintegrated into civilian life. Only two children said they were active FDLR fighters at the time of their being apprehended. The commander of the Congolese army regiment who carried out the arrests denied that children or civilians were among those detained at Angenga and claimed all of the detainees were FDLR fighters who had been “captured on the front lines.”<sup>21</sup>

One 15-year-old boy told Human Rights Watch, “I was never with the FDLR. One day, I was on my way to the market to buy some things. On my way I ran into Congolese army soldiers, and they arrested me. . . . They transferred me to Bukavu, then Goma and finally to Angenga. I don’t know what they want from me. Maybe they just want to say they arrested FDLR. I don’t know.”<sup>22</sup> Another 16-year-old who was forcibly recruited by the FDLR managed to escape two months later and surrender to the FARDC. “I handed myself over to the Congolese army in Kitchanga so the FDLR wouldn’t find me,” he said. “They put me in prison and now I’m in Angenga.”<sup>23</sup>

Some of the children, all boys between 15 and 17, had been held for more than a year. None had access to lawyers. They were comingled with adult detainees during the day, and had little access to food, clean water, or medical care. Because Human Rights Watch was able to interview only a small number of the 750 detainees at Angenga prison, it believed that the actual number of children detained was likely much higher than the 29 it interviewed.<sup>24</sup> Several weeks after Human Rights Watch publicized the children’s detention, the government and the UN in a joint mission removed nearly all of the children.

## Iraq

Iraqi security forces have detained children on suspicion of armed activity, including association with the Islamic State (known as ISIS). Iraq’s 2005 Anti-Terrorism Law permits the death penalty for “those who commit...terrorist acts,” and “all those who enable terrorists to commit these crimes.”<sup>25</sup> According to the UN, at least 391 children, including 16 girls, had been indicted or convicted of terrorism-related charges under the law and were being held in detention facilities as of December 2014. Some had been detained for more than three years.<sup>26</sup>

<sup>20</sup> Human Rights Watch. (2014, April 4). DR Congo: Children Held in Remote Military Prison [News Release]. Retrieved from <https://www.hrw.org/news/2016/04/04/dr-congo-children-held-remote-military-prison>.

<sup>21</sup> Human Rights Watch, personal communication with Col. Ringo Heshima, Former Commander of the 3303 Regiment, Congolese army, March 17, 2016.

<sup>22</sup> Human Rights Watch. (2014, April 4). DR Congo: Children Held in Remote Military Prison [News Release]. Retrieved from <https://www.hrw.org/news/2016/04/04/dr-congo-children-held-remote-military-prison>.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> Anti-Terrorism Law No. 13 of 2005 (Iraq). Retrieved from [http://www.vertic.org/media/National%20Legislation/Iraq/IQ\\_Anti-Terrorism\\_Law.pdf](http://www.vertic.org/media/National%20Legislation/Iraq/IQ_Anti-Terrorism_Law.pdf).

<sup>26</sup> U.N. Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, U.N. Doc. A/69/926-S/2015/409 (June 5, 2015), [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2015/409](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/409).

Security authorities commonly hold suspects, particularly terrorism suspects, incommunicado for weeks or months following arrest. Detainees have no access to lawyers or their family, and are cut off from the outside world in a detention system rife with corruption.<sup>27</sup> In cases in which the government provides no information on the fate or the whereabouts of those detained, it amounts to a forced disappearance in violation of international law.

Iraqi security forces also arrest and detain women and children without evidence of any wrongdoing, for alleged terrorist activities by male family members. Arrests of family members because of their relationships to suspects, without any evidence they have committed a crime, violates international law and amounts to collective punishment.

For example, in February 2013, Human Rights Watch interviewed two girls, ages 11 and 12, who were held under suspicion of terrorism at the Karrada juvenile detention center in Baghdad. They were arrested in November 2012 when federal police broke into 11 homes in the town of al-Taji, 20 kilometers north of Baghdad, and rounded up 11 women and 29 children. The police held the group overnight, and the next day, police took 10 women and the 2 girls to the Kazhimiyya police station. Some of the women said that police tortured each detainee with electric shocks and by placing plastic bags over their heads until they began to suffocate, seeking information about their male family members.<sup>28</sup>

The two girls were detained for six weeks at the police station, and then moved to the juvenile detention center. Both girls said that they had not seen a lawyer or their parents during their detention, and had not been told of charges against them. A senior official told Human Rights Watch that the 11-year-old was charged with “covering up” terrorist acts, and was accused of taking documents from a locker and hiding them in her clothes. The women who had been arrested at the same time were also charged with terrorism for “covering up” for their husbands.<sup>29</sup>

In some cases, the authorities have detained young children and infants with their mothers. They have subjected these family members to threats and physical abuse, including severe beatings, burns with cigarettes, and electric shocks, to coerce confessions implicating their husbands, brothers, or other male family members.

For example, in September 2012, federal police arrested a woman with her three young children, ages 6, 4, and 5-months. Her 6-year-old son told his aunt that he saw police blindfold, beat, and electrocute his mother, as they sought information about her husband. “She started to turn around and around and shake from the electricity,” he told her.<sup>30</sup> The children were detained for 40 days before they were released.

In September 2012, security forces arrested a couple from their car, together with their 14-year-old daughter with a disability, and 10-year-old son. The couple’s 17-year-old son was arrested later that day. The 10-year old later told his grandmother that when the security forces arrested him with his parents, they held his head near a car tire and threatened to run him over if he didn’t tell them “where they hid the weapons.” The father died in detention, but police continued to detain the mother and her three children for a total of three months at the Qanaa General Security office

<sup>27</sup> See, for example., Amnesty International (2015). *Iraq: Submission to the UN Committee against Torture*, available at: [http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRQ/INT\\_CAT\\_CSS\\_IRQ\\_21017\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/IRQ/INT_CAT_CSS_IRQ_21017_E.pdf); Human Rights Watch (February 2014), *No One is Safe: Abuses of Women in Iraq’s Criminal Justice System*, available at: <https://www.hrw.org/report/2014/02/06/no-one-safe/abuse-women-iraqs-criminal-justice-system>.

<sup>28</sup> Human Rights Watch, personal communication, Baghdad, Iraq, February 2013.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

in Baghdad. The daughter, who is paralyzed, told her grandmother that “when the human rights groups would come to the prison, they would take us and hide us in the bathrooms.”<sup>31</sup>

In a case documented by Amnesty International, security forces detained 13-year-old Mundhir al-Bilawi and his father, Samir Naji ‘Awda al-Bilawi, at a checkpoint in Ramadi in September 2012. Mundhir said that security forces took them first to a local police station where they were both assaulted, and then to the Directorate of Counter-Crime in Ramadi, where they were both tortured with electric shocks. Mundhir said that interrogators forced him to implicate his father in terrorism, including in front of an investigating judge.<sup>32</sup>

Iraqi security forces have also raped and sexually assaulted girls along with women in detention. Even girls who have not been raped experience the stigma resulting from being raped, because of the societal presumption that female detainees have been sexually assaulted.<sup>33</sup>

Pro-government militias have also detained children. In March and April 2015, after the Iraqi government dislodged ISIS forces from the city of Tikrit and other areas northeast of Baghdad, pro-government militias looted, torched and blew up hundreds of civilian houses in the area and unlawfully detained approximately 200 men and boys, witnesses told Human Rights Watch. They said that the militias separated women and children below the age of about 13 from men and older boys, and released the women and younger children within a couple of days. Of the 200 men and boys detained, at least 160 were still unaccounted for in September 2015 and feared to have been forcibly disappeared.<sup>34</sup>

In January 2016, Human Rights Watch spoke to three Sunni Arab women in northern Iraq who had fled ISIS. They said that in November 2015, the military of the Kurdish Regional Government in Iraq, known as the Peshmerga, had detained 10 of their close male relatives, including a 16 and a 17-year-old, for alleged links to ISIS. The men and boys were held without charge, some for more than a month. One woman said her husband called her from a Kirkuk prison, and said that internal security forces had tortured him and their 17-year-old son during interrogation by pulling out their fingernails.<sup>35</sup>

In March 2015, the UN Committee on the Rights of the Child expressed serious concerns regarding the large number of children indicted or convicted of terrorism-related charges in Iraq, and reports of ill-treatment and torture during their detention. The committee said that children detained under terrorism charges were reportedly held in extralegal facilities, including those run by the Iraqi National Intelligence Service, and that children who were relatives of terrorism suspects were also subject to wrongful arrest, held without charge, or charged with covering up terrorist acts. The committee also found that children’s families were not notified of the child’s detention, and that when detainees turned 18, they were transferred to death row.<sup>36</sup> Human Rights Watch learned several years ago of the impending execution of a Yemeni child in custody that was only stopped by diplomatic intervention at the highest level of the Iraqi government.

<sup>31</sup> *Id.*

<sup>32</sup> Amnesty International. (2013, March). *Iraq: A Decade of Abuses*, (p. 26). Retrieved from <https://www.amnesty.org/en/documents/document/?indexNumber=MDE14%2F001%2F2013&language=>.

<sup>33</sup> See Human Rights Watch. (2014, February). *No One is Safe: Abuses of Women in Iraq’s Criminal Justice System*. Retrieved from <https://www.hrw.org/report/2014/02/06/no-one-safe/abuse-women-iraqs-criminal-justice-system>.

<sup>34</sup> Human Rights Watch. (2015). *Ruinous Aftermath: Militia Abuses following Iraq’s Recapture of Tikrit*. Retrieved from <https://www.hrw.org/report/2015/09/20/ruinous-aftermath/militias-abuses-following-iraqs-recapture-tikrit>.

<sup>35</sup> Human Rights Watch, personal communications, Leylan, Iraq, January 2016.

<sup>36</sup> U.N. Comm. on the Rights of the Child. *Concluding Observations on the Report Submitted by Iraq under Article 8, Paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, para. 33, U.N. Doc. CRC/C/OPAC/IRQ/CO/1, (Mar. 5, 2015).

In September 2015, the Committee on Torture also expressed deep concern at reports suggesting a consistent pattern “whereby alleged terrorists and other high-security suspects, including minors, are arrested without any warrant, detained incommunicado or held in secret detention centers for extended periods of time, during which they are severely tortured in order to extract confessions.”<sup>37</sup>

## Israel/Palestine

Israel prosecutes between 500 and 700 Palestinian children in military courts each year, charging the vast majority with throwing stones at Israeli soldiers or settlers in the occupied West Bank. The Israeli military court system tried Palestinian children from the West Bank for security-related offenses, with the exception of children from East Jerusalem. As of 2009, children are tried in a designated military court, whose judges receive special training. The military justice system, however, does not focus on rehabilitation and social reintegration for children, as provided under international law.<sup>38</sup>

In 2015, Israel held an average of 220 Palestinian children in custody each month, an increase of 10 percent over the previous year, according to data provided by the Israel Prison Service.<sup>39</sup> As violence in the West Bank increased in late 2015, the number of Palestinian children in Israeli prisons increased to the highest level since 2009. A total of 422 Palestinian children were in the Israeli prison system at the end 2015, including 116 children between the ages of 12 and 15.<sup>40</sup> In 2015, the Israeli military also placed 6 Palestinian children under administrative detention, which allows for prolonged detention without charge or trial. This is the first time the measure has been used against Palestinians under 18 in nearly four years.<sup>41</sup>

Large numbers of former child detainees have reported ill-treatment by Israeli security forces. In 2013 and 2014, the UN obtained affidavits from over 200 Palestinian children regarding treatment by Israeli security forces during arrest, transfer, interrogation, or detention.<sup>42</sup> Children alleged the use of painful restraints, blindfolds, strip-searches, verbal and physical abuse, solitary confinement, and threats of violence, including sexual violence. In at least five cases, the children were under the age of 12. Of 208 affidavits, 171 children said they were subject to physical violence and 168 said they were not informed of their rights to a lawyer or to remain silent during interrogation.<sup>43</sup> Fifteen formal complaints were lodged with Israeli authorities regarding abuses against Palestinian chil-

<sup>37</sup> U.N. Comm. against Torture, *Concluding Observations on the Initial Report of Iraq*, para. 16, U.N. Doc. CAT/C/IRQ/CO/1 (Sept. 7, 2015).

<sup>38</sup> See International Covenant on Civil and Political Rights, art. 14(4), 16 Dec. 1966, 999 U.N.T.S. 171 (entered into force Jan. 3, 1976); Convention on the Rights of the Child, *supra* note 5, at art. 40(1); U.N. General Assembly, U.N. Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), rule 2.3, U.N. Doc A/Res/40/33 (Nov. 29, 1985).

<sup>39</sup> Defense for Children International—Palestine. (2016, April). *No Way to Treat A Child: Palestinian Children in the Israeli Military Detention System* (p. 20), available at: [http://www.dci-palestine.org/palestinian\\_children\\_in\\_the\\_israeli\\_military\\_detention\\_system](http://www.dci-palestine.org/palestinian_children_in_the_israeli_military_detention_system).

<sup>40</sup> *Id.* at p. 2.

<sup>41</sup> *Id.*

<sup>42</sup> *Report of the Secretary-General on Children and Armed Conflict*, *supra* note 26, ¶ 96, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2015/409](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/409).

<sup>43</sup> Human Rights Watch. (2016, April 11). Palestine: Israeli Police Abusing Detained Children [News Release]. Retrieved from <https://www.hrw.org/news/2016/04/11/palestine-israeli-police-abusing-detained-children>.



dren during arrest, interrogation and detention in 2013, but none resulted in dismissal, indictment, or arrest of the security force personnel involved.<sup>44</sup>

In several cases investigated by Human Rights Watch, children reported that police officers had hit and kicked them in custody, and forced them to spend hours outside in the cold in the early morning and at night, handcuffed to chairs in police compounds. One 14-year-old boy told Human Rights Watch that his interrogators threatened to revoke his parents' residency rights in East Jerusalem and told him to sign papers written in Hebrew, a language he could not read. When he asked what the papers said, he was told it was a statement declaring that he had not been beaten.<sup>45</sup> Another boy, 16, said he was arrested in November 2015 at a friend's home by soldiers who accused him of having a knife. He was blindfolded, handcuffed, and taken to a police station for interrogation, and then to a military compound, where he said six or seven soldiers forced him onto the ground and started hitting and kicking him. "I was hit on my back and legs, with kicks and blows to my head," he told Human Rights Watch. "I don't know how long it lasted, but it was painful and the time passed slowly." He was released six days later, without charge, after DNA testing failed to link him to a knife that had been found.<sup>46</sup>

Between 2012 and 2015, Defense for Children International-Palestine (DCI-Palestine) documented 66 cases of Palestinian children subjected to solitary confinement. The longest period of time spent in solitary was 45 days, and the average was 13 days. Israeli security forces used solitary confinement almost exclusively before trial, possibly to obtain confessions and intelligence. DCI-Palestine reported that in 60 out of the 66 cases it documented, children held in solitary confinement provided a confession.<sup>47</sup>

The primary military order relevant to the arrest and detention of Palestinian children, Military Order 1651, was adopted in November 2009. This order gives Israeli military courts jurisdiction over any person 12 years and older, and allows authorities to arrest and imprison Palestinians for "security offenses," such as causing death, assault, personal injury or property damage, kidnapping, and harming a soldier.<sup>48</sup> Throwing stones—the charge against the vast majority of Palestinian children detained in Israeli military detention—can carry penalties of up to 20 years in prison, depending on the age of the child, plus fines. Many children maintain their innocence, but plead guilty in order to avoid prolonged detention before trial. Most receive plea deals of less than 12 months, and are ordered to pay fines averaging US\$400. If families are unable to pay this amount, the child is detained longer.<sup>49</sup>

Israel's Youth Law and military orders applicable in the West Bank require police to notify parents of a child's arrest and to allow the child to consult with a lawyer before interrogation. The Youth Law also entitles children to have a parent present during interrogation. The Youth Law for-

<sup>44</sup> *Report of the Secretary-General on Children and Armed Conflict, supra* note 2, ¶ 81, [http://www.un.org/en/ga/search/view\\_doc.asp?symbol=S/2014/339](http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2014/339).

<sup>45</sup> *Id.*

<sup>46</sup> Human Rights Watch. (2016, April 11). Palestine: Israeli Police Abusing Detained Children [News Release]. Retrieved from <https://www.hrw.org/news/2016/04/11/palestine-israeli-police-abusing-detained-children>.

<sup>47</sup> Defense for Children International—Palestine. (2016, April). *No Way to Treat A Child: Palestinian Children in the Israeli Military Detention System* (p. 41). Retrieved from [http://www.dci-palestine.org/palestinian\\_children\\_in\\_the\\_israeli\\_military\\_detention\\_system](http://www.dci-palestine.org/palestinian_children_in_the_israeli_military_detention_system).

<sup>48</sup> Order regarding Security Provisions [Consolidated Version] (Judea and Samaria) (No. 1651), 5770-2009, Chapter G, § 212(1)-(3) (Nov. 1, 2009). Retrieved from <http://nolegalfrontiers.org/military-orders/mil01?lang=en>.

<sup>49</sup> Defense for Children International—Palestine. (2016, April). *No Way to Treat A Child: Palestinian Children in the Israeli Military Detention System* (p. 2). Retrieved from [http://www.dci-palestine.org/palestinian\\_children\\_in\\_the\\_israeli\\_military\\_detention\\_system](http://www.dci-palestine.org/palestinian_children_in_the_israeli_military_detention_system).

mally applies to Israel and East Jerusalem, but Israeli military authorities have told Human Rights Watch that they also implement the law's provisions in the West Bank.

In practice, the provisions of the Youth Law are often disregarded. A lawyer who has represented hundreds of children in 2015 and 2016 told Human Rights Watch that senior police officers can grant interrogators an order allowing interrogations without a child's parents present. He said, "This order, as far as we see, is used against Palestinian children in political cases only, and it gives the interrogators the freedom to harass, scream, threaten the children and push them to confess to crimes they have not committed out of fear."<sup>50</sup>

In July 2013, the UN Committee on the Rights of the Child found that Palestinian children arrested by Israeli forces were systematically subjected to degrading treatment, and often torture, and that Israel had "fully disregarded" previous recommendations to comply with international law. The committee urged Israel to "dismantle the institutionalized system of detention" and open an immediate independent inquiry into all alleged cases of torture and ill-treatment of Palestinian children.<sup>51</sup>

## Nigeria

Since it began its attacks in 2009, the extremist armed group Boko Haram has recruited hundreds, and possibly thousands, of boys and girls for its military operations, used dozens of children—mostly girls—as suicide bombers, and launched increasingly brutal attacks against civilians. Between 2009 and 2015, Boko Haram's attacks destroyed more than 910 schools and forced at least 1,500 more to close. The group has abducted more than 2,000 civilians, many of them women and girls, including large groups of students.

In its efforts to counter Boko Haram, the Nigerian government has rounded up and detained thousands of individuals—mostly men and boys—for suspected participation in the group, or support for its activity. Arrests are often based on flimsy evidence provided by unreliable informants. Military officers said that informants have provided false information simply to get paid.<sup>52</sup> Security forces, including members of the government-allied Civilian Joint Task Force, also conduct large sweeps, arresting people en masse. According to Amnesty International, since 2009 Nigerian military forces have arbitrarily arrested at least 20,000 people, including children as young as 9.<sup>53</sup>

In May 2013, then-President Goodluck Jonathan declared a state of emergency in three north-east states. He issued regulations allowing him to order the detention of any person, whether in the emergency area or elsewhere,<sup>54</sup> and stated that the armed forces and other security agencies involved in countering Boko Haram "have orders to take all necessary action... to put an end to the impunity of insurgents and terrorists."<sup>55</sup> A witness from Borno state told the Watchlist on Children

<sup>50</sup> See Personal communication with attorney Mohammed Mahmoud in Human Rights Watch (2016, April 11). Palestine: Israeli Police Abusing Detained Children [News Release]. Retrieved from <https://www.hrw.org/news/2016/04/11/palestine-israeli-police-abusing-detained-children>.

<sup>51</sup> U.N. Comm. on the Rights of the Child, *Concluding Observations on the Second to Fourth Periodic Reports of Israel, Adopted by the Committee at its Sixty-third Session (27 May—14 June 2013)*, paras. 35, 36, 73, 74, U.N. Doc. CRC/C/ISR/CO/2-4 (Jul. 4, 2013).

<sup>52</sup> Amnesty International. (2015, June). *Stars on their Shoulders, Blood on their Hands: War Crimes Committed by the Nigerian Military* (p. 8), available at: <https://www.amnesty.org/en/documents/afr44/1657/2015/en/>.

<sup>53</sup> *Id.* at p. 4.

<sup>54</sup> Emergency Powers (General) Regulations, 2013 Notice No. (85) (2013) 100:27 O.G. § 3(2)(a) (Nigeria), <http://www.placng.org/new/publications/emergencyrule.pdf>.

<sup>55</sup> BBC. (2013, May 15). Nigeria: Goodluck Jonathan Declares Emergency in State. Retrieved from <http://www.bbc.com/news/world-africa-22533974>.

and Armed Conflict that, “As soon as the insurgents attack an area, the military will come and start arresting men. They arrest old, middle, and even young ones but only men. ... Once you hear a gunshot you run because if the military comes they will arrest every person.”<sup>56</sup>

Local residents told Human Rights Watch that soldiers would pound on doors at 5 a.m., ordering young males out of their homes. One woman said that eight soldiers ordered her 10-year-old son to lie down, beat him with batons and tied him up, piled him face down with 22 others in an open-back vehicle, and then drove them away. Another woman described how security forces had arrested her seven sons, ages 12 to 30, as they gathered in front of their home for evening prayers.<sup>57</sup>

Security forces hold the majority of detainees in barracks and detention centers in Borno, Yobe, and Adamawa states. Former detainees held in the Giwa barracks and in military detention centers in Damaturu described horrific conditions. They said the facilities were extremely overcrowded, with hundreds of detainees packed into small cells. Because of lack of space, former detainees said they had to take turns sleeping or even sitting on the floor. They said they received a small amount of rice once a day and had no access to medical assistance, even for life-threatening conditions.<sup>58</sup> Torture and ill-treatment was common. A former child detainee in Yobe state said he was among a group of 50 people, mostly between ages 13 and 19, who were arrested in March 2013 and held in Sector Alpha (also known as “Guantanamo”) in Damaturu. He said that while he was in custody, security forces beat him with gun butts, batons, and machetes, forced to him to walk and roll over broken bottles, and poured melted plastic on his body.<sup>59</sup>

Former detainees have reported that large numbers of detainees have died as a result of dehydration, starvation, illness, and torture, and that many others were executed.<sup>60</sup> Amnesty International estimates that more than 7,000 men and boys died in detention between March 2011 and June 2015, based on visits to mortuaries, internal military reports, statistics recorded by local human rights activists and interviews with witnesses, victims, former detainees, hospital staff, mortuary personnel and military sources.<sup>61</sup> In June 2013 alone, more than 1,400 corpses were delivered from the Giwa barracks to one of the mortuaries in Maiduguri.<sup>62</sup>

Authorities arrest many children on their own, and also detain young children and babies together with their mothers. Between February and May 2016, 11 children under the age of 6, including four babies, died in Giwa barracks due to disease, hunger, and dehydration, according to Amnesty International. One witness said that they had seen the bodies of eight dead children including a 5-month-old baby. In February 2016, the military released 275 people who it said had

<sup>56</sup> Personal communication with an internally displaced woman in April 2014, reported in Watchlist on Children and Armed Conflict. (2014). *Who will Care for Us? Grave Violations against Children in Northeast Nigeria*. Retrieved from [http://watchlist.org/wordpress/wp-content/uploads/2111-Watchlist-Nigeria\\_LR.pdf](http://watchlist.org/wordpress/wp-content/uploads/2111-Watchlist-Nigeria_LR.pdf).

<sup>57</sup> Human Rights Watch. (2013, November 29). Boko Haram Abducts Women, Recruits Children [News Release]. Retrieved from <https://www.hrw.org/news/2013/11/29/nigeria-boko-haram-abducts-women-recruits-children>.

<sup>58</sup> Human Rights Watch. (2013, November 29). Boko Haram Abducts Women, Recruits Children [News Release]. (p.7). Retrieved from <https://www.hrw.org/news/2013/11/29/nigeria-boko-haram-abducts-women-recruits-children>.

<sup>59</sup> Amnesty International. (2014, May 13). *Stop Torture Country Profile: Nigeria*. (p. 5).

<sup>60</sup> Amnesty International. (2014, March 31). *Nigeria: More than 1,500 Killed in Armed Conflict in North- Eastern Nigeria in Early 2014*. (p. 20). Retrieved from <https://www.amnesty.org/en/documents/AFR44/004/2014/en/>.

<sup>61</sup> Amnesty International. (2015, June). *Stars on their Shoulders, Blood on their Hands: War Crimes Committed by the Nigerian Military* (p. 6-7), available at: <https://www.amnesty.org/en/documents/afr44/1657/2015/en/>.

<sup>62</sup> Id.

been wrongfully held on suspicion of being involved in terrorist or insurgent activities. Among the 275 were 72 children, including 50 who had been arrested and detained with their mothers.<sup>63</sup>

Nigeria's Terrorism Prevention Act, adopted in 2012 and amended in 2013, gives the military wide powers to arrest and detain people. Section 27 allows the arrest and detention of a person "found on any premises or places or in any conveyance" by the "relevant law enforcement officer of any agency until the completion of the search or investigation under the provisions of this act." The act appears to allow for indefinite detention, allowing the court to grant an order for the detention of a suspect for 90 days, and to renew the order for additional 90-day periods until "the conclusion of investigation and prosecution." Under the act, anyone who engages in, attempts, threatens or assists an act of terrorism, or "omits to do anything that is reasonably necessary to prevent an act of terrorism" may be guilty under the act and subject to penalties including up to life imprisonment.<sup>64</sup> Children are not excluded from the act.

While some detainees have been released, many remain unaccounted for. Very few have faced trial. Between December 2010 and 2015, only 24 court cases were concluded, involving fewer than 110 people.<sup>65</sup> Amnesty International estimated that in May 2016, at least 120 children remained in Giwa barracks, making up at least 10 percent of the barrack's detained population.<sup>66</sup> According to a credible source, as of early 2016, hundreds of children were still detained, many having been held for months or even years.<sup>67</sup>

## Syria

Since the beginning of the Syrian conflict in 2011, Syrian authorities have detained tens of thousands of people in dozens of detention centers scattered across the country. According to the Violations Documentation Center in Syria, at least 1,426 of these detainees have been children.<sup>68</sup> In cases documented by Human Rights Watch, detained children were usually between the ages of 13 and 17, but some witnesses and defectors have reported seeing boys as young as 8 in Syrian detention centers.<sup>69</sup>

<sup>63</sup> Amnesty International. (2016, May 11). Nigeria: Babies and children dying in military detention [News release]. Retrieved from <https://www.amnesty.org.uk/press-releases/nigeria-babies-among-149-dead-horrific-conditions-giwa-barracks-new-briefing>.

<sup>64</sup> Terrorism (Prevention) Act No. (10) (2011) (Nigeria), [https://www.unodc.org/tldb/pdf/Nigeria/NIR\\_Terror\\_Prevent\\_2011.pdf](https://www.unodc.org/tldb/pdf/Nigeria/NIR_Terror_Prevent_2011.pdf); Terrorism (Prevention)(Amendment) Act No. (3) (2013) 100:25 O.G., (Nigeria) [http://lawsofnigeria.placng.org/laws/terrorism\\_bill.pdf](http://lawsofnigeria.placng.org/laws/terrorism_bill.pdf).

<sup>65</sup> International Criminal Court Office of the Prosecutor. (2014, December 2). Report on Preliminary Examination Activities 2014. (p.44). Retrieved from <http://www.icc-cpi.int/iccdocs/otp/OTP-Pre-Exam-2014.pdf>. The report states that between December 2010 and October 2013, 21 cases for alleged involvement in Boko Haram crimes were concluded before Nigerian courts involving 96 defendants. Amnesty International reports that according to media accounts, since October 2013, a further 3 cases involving 6 people were concluded.

<sup>66</sup> Amnesty International. (2016, May 11). Nigeria: Babies and children dying in military detention [News release]. Retrieved from <https://www.amnesty.org.uk/press-releases/nigeria-babies-among-149-dead-horrific-conditions-giwa-barracks-new-briefing>.

<sup>67</sup> Information supplied to Human Rights Watch from a confidential source, April 21, 2016.

<sup>68</sup> Latest detainees. (accessed 2016, April 28). Violations Documentation Center in Syria. Retrieved from <http://www.vdc-sy.info/index.php/en/detainees/1/c29ydGJ5PWEuaTN0ZXFhbF9kYXRIfHNvcnRkaXI9REVTQ3xhcHByb3ZlZD12aXNpYmxlfGV4dHJhZGlzcGxheT0wfHNleD00fA>.

<sup>69</sup> Human Rights Watch. (2012, July). *Torture Archipelago: Arbitrary Arrests, Torture, and Enforced Disappearances in Syria's Underground Prisons since 2011*. (p. 32). Retrieved from [https://www.hrw.org/sites/default/files/reports/syria0712webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/syria0712webwcover_0.pdf).

During 2011, 2012 and parts of 2013, intelligence services, often assisted by the military, apprehended people following anti-government protests in large-scale house-to-house “sweep” operations and at checkpoints on roads. Defectors from the Syrian military told Human Rights Watch that anyone over 14 was liable to be arrested and detained. In 2011, a lieutenant colonel deployed in Douma with the 106th Brigade of the Presidential Guard told Human Rights Watch that his brigade arrested about 50 people, any male between ages 15 and 50, at his checkpoint after each Friday protest.<sup>70</sup> Security forces also targeted specific activists for arrest, and if they were not at home, arrested family members, including children, instead.

A former officer with the 46th Special Forces Regiment said that 10 to 30 detainees were brought to his camp in Idlib every evening, lined up, blindfolded, put on their knees, and beaten. He said, “Most of them were between 16 and 18 years old, but there were some kids that looked much younger.” He asked two boys who looked particularly young when they were born, and discovered one was 13. The former officer said, “I think many kids were caught because they didn’t know how to escape.”<sup>71</sup>

In 2011 and 2012, Human Rights Watch conducted 200 interviews with former detainees, including children, and defectors from the Syrian military and intelligence agencies. Almost all the former detainees interviewed said they had been subjected to torture or witnessed the torture of others. Syrian security forces used a broad range of torture methods, including prolonged beatings, often with objects such as batons and wires, holding the detainees in painful stress positions for long periods, electrical shocks administered with stun guns and electric batons; use of improvised metal and wooden “racks,” burning with car battery acid, sexual assault and humiliation, the removal of fingernails, and mock execution.<sup>72</sup> Of the cases Human Rights Watch documented, 27 involved children. One 13-year-old boy, “Hossam,” said he had been tortured for three days at a military facility near Tal Kalakh:

Every so often they would open our cell door and yell at us and beat us. They said, “You pigs, you want freedom?” They interrogated me by myself. They asked, “Who is your god?” And I said, “Allah.” Then they electrocuted me on my stomach, with a prod. I fell unconscious. When they interrogated me the second time, they beat me and electrocuted me again. The third time they had some pliers, and they pulled out my toenail. They said, “Remember this saying, always keep it in mind: We take both kids and adults, and we kill them both.” I started to cry, and they returned me to the cell.<sup>73</sup>

Former detainees described appalling detention conditions, with grossly overcrowded cells, where at times detainees could only sleep in turns. They said they received very little food. One

<sup>70</sup> Human Rights Watch. (2011, December). *By All Means Necessary!: Individual and Command Responsibility for Crimes against Humanity in Syria*. (p. 6), available at: [https://www.hrw.org/sites/default/files/reports/syria1211webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/syria1211webwcover_0.pdf).

<sup>71</sup> *Id.* at p. 51.

<sup>72</sup> Human Rights Watch. (2012, July). *Torture Archipelago: Arbitrary Arrests, Torture, and Enforced Disappearances in Syria’s Underground Prisons since 2011*. (p. 2). Retrieved from [https://www.hrw.org/sites/default/files/reports/syria0712webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/syria0712webwcover_0.pdf).

<sup>73</sup> Human Rights Watch, personal communication with “Hossam,” January 28, 2012. See Human Rights Watch. (2012, July). *Torture Archipelago: Arbitrary Arrests, Torture, and Enforced Disappearances in Syria’s Underground Prisons since 2011*. (p. 32). Retrieved from [https://www.hrw.org/sites/default/files/reports/syria0712webwcover\\_0.pdf](https://www.hrw.org/sites/default/files/reports/syria0712webwcover_0.pdf).

former detainee told Human Rights Watch that he had lost nearly half his body weight during just six months of detention.<sup>74</sup>

“Ala’a,” a 16-year-old from Tal Kalakh said that Syrian security forces detained him for eight months, starting in May 2011, after he participated in and read political poetry at demonstrations. He was released in January 2012 after his father bribed a prison guard with 25,000 Syrian pounds (US\$436). During his detention he was held in seven different detention centers, including at the Military Security branch in Homs:

When they started interrogating me, they asked me how many protests I had been to, and I said “none.” Then they took me in handcuffs to another cell and cuffed my left hand to the ceiling. They left me hanging there for about seven hours, with about one-and-a-half to two centimeters between me and the floor—I was standing on my toes. While I was hanging there, they beat me for about two hours with cables and shocked me with cattle prods. Then they threw water on the ground and poured water on me from above. They added an electric current, and I felt the shock. I felt like I was going to die. They did this three times. Then I told them, “I will confess everything, anything you want.”

He said that in the Homs Central Prison, he was kept in a large cell with some 150 boys under age 18, as well as about 80 men over 50.<sup>75</sup>

Many detainees, including children, have died in Syrian custody. In August 2013, a military defector code-named Caesar smuggled over 50,000 photographs out of Syria, depicting at least 6,786 detainees who died in detention or after being transferred from detention to a military hospital. Caesar said that he had served as an official forensic photographer for the Military Police, and been responsible for photographing the bodies of dead detainees, as well as members of security forces who died in attacks by armed opposition groups. A doctor working for the Syrian Association for Missing and Conscience Detainees reviewed all of the photographs and estimated that at least 100 of the dead were boys under age 18.<sup>76</sup>

Human Rights Watch was able to locate and interview 33 individuals who said they had identified relatives or friends among the Caesar photographs. Among the cases Human Rights Watch verified was one of a 14-year-old boy, Ahmad al-Musalmani, from Namr, Daraa. Ahmad was arrested in August of 2012 while traveling in a minibus to attend his mother’s funeral. According to his fellow passengers, officers from Air Force Intelligence stopped the car at a checkpoint and an officer asked Ahmad why he was crying. Ahmad answered, “I am crying because my mother died.” The officer took the passengers’ phones and began to search them. When he found an anti-Assad song on Ahmad’s phone, he began to insult Ahmad and dragged him into a small room at the checkpoint. The other passengers were allowed to travel on, and later contacted Ahmad’s family to report what had happened.

Ahmad’s family members tried for nearly three years to locate the boy. After the Caesar photographs were released, Ahmad’s uncle found photos of Ahmad’s body among them, in a folder dated August 2012—the month of Ahmad’s arrest. He told Human Rights Watch, “It was a shock.

<sup>74</sup> Human Rights Watch. (2015, December). *If the Dead Could Speak: Mass Deaths and Torture in Syria’s Detention Facilities*. (p. 8). Retrieved from [https://www.hrw.org/sites/default/files/report\\_pdf/syria1215web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/syria1215web_0.pdf).

<sup>75</sup> Human Rights Watch. (2012, February 3). Syria: Stop Torture of Children [News release]. Retrieved from <https://www.hrw.org/news/2012/02/03/syria-stop-torture-children>.

<sup>76</sup> Human Rights Watch. (2015, December). *If the Dead Could Speak: Mass Deaths and Torture in Syria’s Detention Facilities*. (p. 8). Retrieved from [https://www.hrw.org/sites/default/files/report\\_pdf/syria1215web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/syria1215web_0.pdf).

Oh, it was the shock of my life to see him here. I looked for him, 950 days I looked for him. I counted each day."<sup>77</sup> Forensic pathologists who examined the photos reported marks of blunt force trauma on Ahmad's body.<sup>78</sup>

Of the 1442 children the Violations Documentation Center in Syria had identified as being detained by Syrian authorities by October 2016, only 421 were known to have been released.<sup>79</sup> The status of the remainder is unknown.

## United States

During US military operations in Iraq and Afghanistan, US forces apprehended and detained thousands of boys suspected of participating in armed activities. In Iraq alone, the US confirmed that between 2003 and 2008, it detained at least 2,400 children. According to the US, these children were captured engaging in anti-coalition activity, such as planting improvised explosive devices (IEDs), operating as lookouts for insurgents, or actively fighting against US or coalition forces.<sup>80</sup>

After the 9/11 attacks, the US military took into custody at least 15 children and brought them to the Guantanamo Bay detention facility where they were detained for periods ranging from a few months to 10 years.<sup>81</sup> Several of the child detainees alleged torture, including threats of rape, sleep deprivation, and shackling in painful positions, before and after being sent to Guantanamo. At least two child detainees attempted suicide while at Guantanamo, and according to US government documents, one other former child detainee committed suicide at Guantanamo at age 21.<sup>82</sup> Two child detainees, Omar Khadr and Mohammed Jawad, were charged with offenses before the US military commissions. Jawad was detained for six years before a federal judge ordered his release back to Afghanistan in 2009. Khadr accepted a plea bargain and after 10 years at Guantanamo, was repatriated to Canada in 2012 to serve the remainder of his sentence.<sup>83</sup> He was released in May 2015.

During the US "troop surge" in Iraq in early 2007, US military apprehensions of children there rose to an average of 100 per month, compared to 25 per month the previous year.<sup>84</sup> In September 2007, US military officials reported that 828 children were held at Camp Cropper in Iraq, including

<sup>77</sup> Human Rights Watch. (2015, December). *If the Dead Could Speak: Mass Deaths and Torture in Syria's Detention Facilities*. (p. 50). Retrieved from [https://www.hrw.org/sites/default/files/report\\_pdf/syria1215web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/syria1215web_0.pdf).

<sup>78</sup> Human Rights Watch. (2015, December). *If the Dead Could Speak: Mass Deaths and Torture in Syria's Detention Facilities*. (p. 50). Retrieved from [https://www.hrw.org/sites/default/files/report\\_pdf/syria1215web\\_0.pdf](https://www.hrw.org/sites/default/files/report_pdf/syria1215web_0.pdf).

<sup>79</sup> Latest Detainees, Violations Documentation Center in Syria, available at: <http://www.vdc-sy.info/index.php/en/detainees/1/c29ydGJ5PW EuaTN0ZXFB9kYXRl fHNvcnRkaX I9REVTQ3x hcHByb3ZlZD1 2aXNpY mxlfGV4dHJhZ GlzcGxheT0wfHN leD0y fA==>. (Accessed 2016, October 10).

<sup>80</sup> U.N. Comm. on the Rights of the Child, *Written Replies by the Government of the United States of America Concerning the List of Issues (CRC/C/OPAC/USA/Q/1) to be Taken up in Connection with the Consideration of the Initial Report of the United States of America under article 8, paragraph 1 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict (CRC/C/OPAC/USA/1)*, para. 31, U.N. Doc. CRC/C/OPAC/USA/Q/1/Add.1Rev.1 (June 2, 2008), available at: <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC.C.OPAC.USA.Q.1.Add.1.Rev.1.pdf>.

<sup>81</sup> The United States reported to the Committee on the Rights of the Child in May 2008 that 8 children had been detained at Guantanamo. Later, it acknowledged that 12 children had been detained at the facility. However, detainee assessment briefs and other classified documents released by Wikileaks in April 2011 revealed that at least 15 children had been detained at Guantanamo since 2002.

<sup>82</sup> Guantanamo's Children: The Wikileaked Testimonies. (n.d.) Center for the Study of Human Rights in the Americas (University of California, Davis), available at: <http://humanrights.ucdavis.edu/reports/guantanamos-children-the-wikileaked-testimonies/guantanamos-children-the-wikileaked-testimonies>.

<sup>83</sup> Human Rights Watch. (2012, October 25). Omar Ahmed Khadr [News release]. Retrieved from <https://www.hrw.org/news/2012/10/25/omar-ahmed-khadr>; (2012, October 26) Mohammed Jawad [News release], available at: <https://www.hrw.org/news/2012/10/26/mohammed-jawad>.

<sup>84</sup> Agence France-Presse. (2007, August 19). U.S. Detains Nearly 800 Juveniles in Iraq.

some as young as 11.<sup>85</sup> The US opened a non-residential facility called Dar al-Hikmah to provide 600 child detainees with education services pending their release or transfer to Iraqi custody, but excluded an estimated 100 children from participation in the program, reportedly on the grounds that they were “extremists” and “beyond redemption.”<sup>86</sup> US soldiers stationed at US-run detention centers and former detainees described abuses against child detainees, including the rape of a 15-year-old boy at Abu Ghraib prison, forced nudity, stress positions, beating, and the use of dogs.<sup>87</sup>

In 2010, the US told the UN Committee on the Rights of the Child that it had “gone to great lengths” to reduce the number of children held in detention and that as of December 31, 2009, the US held fewer than five detainees under the age of 18 in Afghanistan and Iraq.<sup>88</sup> However, when Human Rights Watch visited the main US-operated detention facility in Parwan, Afghanistan in March 2012, facility representatives told Human Rights Watch researchers that they held 250 detainees under the age of 18, including 11 15-year-olds.<sup>89</sup> They stated, contrary to international law, that only those under 16 were considered “children” and were separated from the adult population. Detainees ages 16 or 17 were typically held with adult detainees in rooms holding up to 34 people. Detainees who exhibited good behavior were allowed to participate in rehabilitation programs, including gardening, masonry, and metalwork, but no special programs or education were available for the 16 and 17-year-olds. Although US military representatives said that no children under 15 were detained at Parwan, a lawyer representing several Pakistani detainees told Human Rights Watch that one of her clients was picked up and taken to the facility at age 14. The US rejected requests by the UN children’s fund, UNICEF, to have access to the children in detention.

According to the US government, children detained by the US in Afghanistan received a review through a Detainee Review Board after 60 days and every six months thereafter. However, these review boards did not meet international due process requirements for individuals apprehended in a non-international armed conflict, which was the situation in Afghanistan by 2002. For example, detainees did not have access to counsel and did not see all the evidence used against them.

According to the US government, the average length of detention for children at Parwan was approximately one year.<sup>90</sup> The US asserted that detention was “preventative” rather than punitive, and that the detention of “enemy combatants” for the duration of an armed conflict “is a fundamental incident of waging war.”<sup>91</sup> It said that because detention was to prevent a combatant from returning to the battlefield, a detainee would generally not be provided legal assistance, as would be done if the detainee were charged with a crime.<sup>92</sup> This approach ignored that during a non-inter-

<sup>85</sup> Fletcher, M. (2007, September 15). They Have Planted Bombs and Shot Soldiers—Now it is Time for School. *The Times* (London), available at: <http://www.timesonline.co.uk/tol/news/world/iraq/article2457299.ece>.

<sup>86</sup> Agence France-Presse. (2007, August 19). U.S. Detains Nearly 800 Juveniles in Iraq; Fletcher, M. (2007, September 15). They Have Planted Bombs and Shot Soldiers—Now it is Time for School. *The Times* (London), available at: <http://www.timesonline.co.uk/tol/news/world/iraq/article2457299.ece>.

<sup>87</sup> Amnesty International. (2004, October). USA: Human Dignity Denied: Torture and Accountability in the ‘War on Terror’ (p. 128-29), available at: [http://web.amnesty.org/library/pdf/AMR511452004ENGLISH/\\$File/AMR5114504.pdf](http://web.amnesty.org/library/pdf/AMR511452004ENGLISH/$File/AMR5114504.pdf).

<sup>88</sup> U.N. Comm. on the Rights of the Child. *Consideration of Reports Submitted by States Parties under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, para. 210, U.N. Doc., CRC/C/OPAC/USA/2 (Oct. 31, 2011).

<sup>89</sup> Human Rights Watch, personal communication with staff at the Detention Facility in Parwan (DFIP), March 2012, Bagram, Afghanistan.

<sup>90</sup> U.N. Comm. on the Rights of the Child, *List of Issues Concerning Additional and Updated Information Related to the Consideration of the Second Periodic Report of the United States of America (CRC/C/OPAC/USA/2)* para. 36, U.N. Doc. CRC/C/OPAC/USA/Q/2/Add.1 (Dec. 12, 2012).

<sup>91</sup> *Id.* at para. 35.

<sup>92</sup> *Id.* at para. 37.



national armed conflict—involving one or more countries fighting a non-state armed group—the home country’s criminal laws remain in effect.<sup>93</sup>

In 2014, the United States and Afghanistan reached an agreement by which Afghanistan took responsibility for detention facilities as of January 1, 2015. As of December 10, 2014, the US Department of Defense no longer operated detention facilities in Afghanistan.<sup>94</sup> Currently, US forces that capture individuals, including children, suspected of security-related offenses may detain them for a few hours to several days at an international military facility before turning them over to Afghan authorities.<sup>95</sup>

## Legislation

In recent years a number of countries have introduced, enacted, or amended laws allowing authorities greater scope to detain individuals, including children, perceived as security threats. These laws increase the periods of time under which suspects can be detained without charge, allow preventive and indefinite detention, and expand the scope of military courts and detention under military authority. Below are just a few examples of such laws that are likely to affect children.

In late 2015, the Australian government proposed counter-terrorism legislation that would reduce the age for children who are subject to a control order from 16 to 14.<sup>96</sup> The Justice Minister stated that the government would also consider extending control orders to children as young as 12.<sup>97</sup> Such control orders could include electronic tagging, curfews, requirements to report to police, and restrictions on movement and association. The following month, the parliament enacted the Australia “allegiance” act, allowing the immigration minister to strip Australian citizenship from dual nationals as young as 14 if they are alleged to have engaged in terrorism abroad or are outside Australia at the time the allegations surface, even if they have not been convicted of any crime.<sup>98</sup>

In Indonesia, after ISIS carried out attacks in Jakarta in January 2016, the government introduced a counterterrorism bill allowing preventive detention of terrorist suspects for up to six months. The law at the time allowed for seven days’ detention before suspects must be charged or released and required evidence of a criminal act. The proposed bill increased the period of pre-charge detention to 30 days, and increased the maximum period of detention for investigation purposes from six months to 8 to 10 months.<sup>99</sup>

<sup>93</sup> Human Rights Watch. (2009, March 26). Letter to President Barack Obama on Afghanistan, available at: <https://www.hrw.org/news/2009/03/26/human-rights-watch-letter-president-barack-obama-afghanistan>.

<sup>94</sup> U.N. Comm. on the Rights of the Child, *Combined Third and Fourth Periodic Report of the United States of America on the Optional Protocols to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict and the Sale of Children, Child Prostitution, and Child Pornography*, para. B-24, U.N. Doc CRC/C/OPAC/USA/3-4 (Jan. 22, 2016 (revised Feb. 8, 2016)).

<sup>95</sup> Between February 2013 and December 2014, UNAMA interviewed 31 individuals who had been captured by international forces (usually identified as US soldiers) and initially detained at an international military facility at the provincial level before being handed over to Afghan authorities; 3 of the 31 were children. *Update on Treatment of Detainees in Afghan Custody*, *supra* note 11 at 69-73, available at: [http://www.ohchr.org/Documents/Countries/AF/UNAMA\\_OHCHR\\_Detention\\_Report\\_Feb2015.pdf](http://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_Detention_Report_Feb2015.pdf).

<sup>96</sup> The Counter-Terrorism Legislation Amendment Bill (No. 1) 2015, was introduced into Parliament November 12, 2015, and lapsed in April 2016.

<sup>97</sup> Martin, S. (2015, October 16). Control order crackdown on pre-teen terrorists. *The Australian*. Retrieved from <http://www.theaustralian.com.au/in-depth/terror/control-order-crackdown-on-preteen-terrorists/news-story/5e7e004d9d7c5374b7fc736ce588b431>.

<sup>98</sup> *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth) s 33AA.

<sup>99</sup> Rachman, A. (2016, March 11). Indonesia Presses for Counterterrorism Legislation. *Wall Street Journal*. Retrieved from <http://www.wsj.com/articles/indonesia-presses-for-counterterrorism-legislation-1457696882>.

In January 2016, a counterterrorism law was passed in Brazil, with vague and overbroad language that could be used against peaceful advocacy groups. Under the law, damaging any public or private property, and “taking over” various sites, including schools and bank offices, can be considered terrorist acts. The law also establishes the crime of “promoting,” “forming,” “joining” or “aiding” terrorist organizations without providing a definition of what constitutes a “terrorist organization.” The crime is punishable with a prison sentence of five to eight years for adults, and up to three years’ confinement for children.<sup>100</sup>

In Egypt, after a 2014 attack killed dozens of Egyptian soldiers in the Sinai Peninsula, Egypt’s president issued a decree vastly extending the reach of the country’s military courts.<sup>101</sup> Between October 2014, when the decree was issued, and April 2016, military courts tried at least 7,420 Egyptian civilians, including at least 86 children.<sup>102</sup> In one case, a high school student arrested in the street outside his school told his mother that National Security agents stripped him, walked on him, extinguished cigarettes on his skin, and gave him electric shocks on various parts of his body, including his genitals, to make him confess to belonging to a “terrorist cell” that planted explosives and burned electricity stations. A military court sentenced him to three years in prison. In another case, a military court sentenced a 15-year-old to three years in a juvenile detention facility for allegedly participating in an illegal protest.<sup>103</sup>

The following year, Egypt enacted a new counterterrorism law,<sup>104</sup> increasing authorities’ power to impose harsh sentences, including the death penalty, for crimes under a definition of terrorism that is so broadly worded it could encompass peaceful civil disobedience. The new law also gave prosecutors greater power to detain suspects without judicial review and order wide-ranging and potentially indefinite surveillance of terrorist suspects without a court order.<sup>105</sup>

## Conclusions

As governments respond to armed conflicts and violence by extremist armed groups, they have detained thousands of children for actual or suspected association with non-state armed groups, participation in conflict-related offenses, or as perceived threats to national security. Governments have expanded counterterrorism laws and given military and other authorities greater leeway to detain suspects, including children, often indefinitely and without charge.

Children are often rounded up in massive sweeps, or arrested based on flimsy or baseless accusations. Large numbers of children detained for national security reasons are subject to torture and other ill-treatment, often to coerce confessions or intelligence information. They frequently are denied access to lawyers, other due process guarantees or protections established under international juvenile justice standards. They are often held with adult detainees in severely overcrowded cells, lacking adequate water, food, or medical care. Rarely do they have access to education or any

<sup>100</sup> Human Rights Watch. (2016, March 14). Brazil: Veto Overbroad Counter-terrorism Bill, Letter to President Dilma Rousseff [News release]. Retrieved from <https://www.hrw.org/news/2016/03/14/brazil-veto-overbroad-counterterrorism-bill-0>.

<sup>101</sup> Human Rights Watch. (2016, April 13). Egypt: 7,000 Civilians Tried in Military Courts [News release], available at: <https://www.hrw.org/news/2014/11/17/egypt-unprecedented-expansion-military-courts>.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Law No. 95 of 2015 (Confronting Terrorism) (Egypt).

<sup>105</sup> Human Rights Watch, (2015, August 19), Egypt: Counterterrorism law erodes basic rights [News release], available at: <https://www.hrw.org/news/2015/08/19/egypt-counterterrorism-law-erodes-basic-rights>.

rehabilitative programs. In the most extreme cases, detained children have died from starvation, dehydration, lack of medical care, or as a result of torture.

To uphold the rights of the child as well as enhance community safety, governments should immediately end all use of detention without charge for children, and strictly comply with international legal obligations to detain children only as a last resort and for the shortest possible period of time. They should ensure that children associated with armed groups are transferred to child protection authorities for rehabilitation and in cases where children may have committed illegal acts, ensure their treatment is consistent with international juvenile justice standards.

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# Addressing the Gaps in Security Sector Training: The Detention of Child Soldiers

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## Abstract

*Children are increasingly used around the world by armed groups, state armed forces, terrorist organizations, and criminal and maritime pirate gangs in a range of combat and support roles. In all these contexts children are often detained by state actors for their participation in an armed group or in illegal activities, or in the case of maritime piracy are released along with the adult pirates without any attempt to rescue them from their circumstances. All too often they are considered to be only combatants, criminals or terrorists, not children, and hence are at greatly increased risk of ill-treatment or torture in detention or are simply abandoned back to their abusive environment. In his report (Méndez, 2015) the UN Special Rapporteur has called for child-protection-focused training for security sector personnel. This has also been encouraged by the UN Security Council in UNSCRs 2143 and 2151, where Member States are called upon to prepare peacekeeping personnel through training to prevent violations against children, and to change standard operating procedures and military training to include child protection as well as seeing the preparation as a critical part of security sector reform. The education and training developed and provided by the Roméo Dallaire Child Soldiers Initiative serves as a leading example of security sector training that promotes the identification of child soldiers as a unique phenomenon, recognition of them as a distinct security concern demanding unique attention, and addresses the need to collaborate with partner child protection agencies to ensure their protection from torture and ill-treatment, while recognizing and supporting the physical and psychological safety requirements of the security sector actors.*

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## Legal Foundations pertaining to the Detention of Child Soldiers

The Special Rapporteur's report (Méndez, 2015) covers a wide range of situations in which children are deprived of liberty and made vulnerable to ill-treatment and torture. It deals in general with children who are in conflict with the law, but does not address the specifics of detention of child soldiers, whether under domestic criminal law or international humanitarian law.

The most widely accepted definition of a child soldier is in the Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups:

A child associated with an armed force or armed group refers to any person below 18 years of age who is, or who has been, recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys and girls, used as fighters, cooks, porters, spies or for sexual purposes (UNICEF, 2007).

It is using this definition that this paper will next examine the legal regime applicable to the detention of child soldiers.

Child soldiers are encountered in many situations, whether framed as an international or a non-international armed conflict, and are also commonly recruited and used in contemporary situations of instability immediately preceding and following armed conflict where UN or regional organization peacekeeping efforts are operating (United Nations General Assembly, 2016). Situations of armed conflict are the most universally accepted subject of International Humanitarian Law (IHL). In situations of instability involving peacekeeping forces, the governing legal regime becomes more complex as International Human Rights Law (IHRL) and domestic laws (of both the host State and Troop Contributing Countries—TCCs) will also apply, or in some situations govern (Naert, 2006). This is a critical factor to bear in mind, as Prisoners of War detained under IHL are subject to different rights and standards of treatment than civilians detained in accordance with IHRL (Naert, 2006).

Applicable UN Security Council Resolutions, IHRL, and a State's domestic laws are the primary sources of law when discussing peacekeeping operations in environments short of international armed conflict (Naert, 2006). Most important for discussing the detention of children is the UN Convention on the Rights of the Child (CRC) and its Optional Protocol (United Nations General Assembly, 1989; Weissbrodt, Hansen, & Nesbitt, 2011).

In any situation, the grounds for detention must be lawful under either IHL or IHRL plus domestic laws of both the host State and the TCC and likewise the rights enjoyed by detainees will flow from these same sources. Adults and children may be deprived of liberty during international armed conflicts for "imperative reasons of security" or if "absolutely necessary" (International Committee of the Red Cross, 1949c, art. 42 and art. 78; Weissbrodt, Hansen, & Nesbitt, 2011). In armed conflicts not of an international character or during peacekeeping operations, the lawful basis for the detention of individuals is applied against those suspected of posing a security threat or of having committed a crime (Naert, 2006).

All persons detained in situations of international armed conflict benefit from the same general protections under IHL, including the right to be treated humanely and without distinction, and while not further defined this term has come to include freedom from murder, torture, cruel or inhumane treatment, corporal punishment, mutilation, and sexual violence (International Committee of the Red Cross, 1864, arts. 12 and 50; International Committee of the Red Cross, 1949a, arts. 12 and 51; International Committee of the Red Cross, 1949b, arts. 13, 17, 87, 89, and 130; International

Committee of the Red Cross, 1949c, arts. 3, 5, 27, 32, and 147; International Committee of the Red Cross, 1977a, arts. 75(1) and 75(2)(b); International Committee of the Red Cross, 1977b, arts. 4(1) and 4(2)(e); Vité, 2011). They also have the right to be informed of the reason for their detention, the right to a fair trial, and the right not to be arbitrarily detained (International Committee of the Red Cross, 1977a, art. 75; Naert, 2006).

In peacekeeping operations to which IHL does not apply the rights enjoyed by those detained should be examined on a case-by-case basis and are substantially informed by the UN Security Council Resolution authorizing the peacekeeping operation, IHRLs to which the States involved (host State and TCC) have bound themselves, and the domestic laws of the host State (Naert, 2006). In peacekeeping operations attention should be paid to any derogations from international treaties, domestic laws, and other peacetime rules regarding the deprivation of liberty; their necessity and extent; conditions of that deprivation; and rules regarding the transfer of detainees (normally to the host nation for domestic prosecution, administration, or other action). Such derogations are usually only permitted “in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed” (United Nations General Assembly, 1966, art. 4; Naert, 2006). However, the CRC does not permit derogations (United Nations General Assembly, 1989), and the right to freedom from torture can never be derogated from (Pejic, 2005).

In addition to general protections under either IHL or IHRL, children also benefit from protections specific to their youth. Their human rights must always be respected, including humane treatment while detained; access to legal council and a fair trial; that children are housed either with their family, or if not possible or in their best interest, separate from adults; promotion of efforts to rehabilitate and reintegrate them; and most importantly that detention is used as a last resort (International Bureau for Children’s Rights, 2010). Other child-centric protections include access to school, playgrounds for sport for those under 15 years of age, and additional food (International Committee of the Red Cross, 1949c, arts. 79-135). Detained children must be “treated in accordance with international standards of human rights and humanitarian law when transferred to national authorities” (Committee on the Rights of the Child, 2006, para. 11) and may not be sentenced to death by either state or non-state authorities for crimes committed when they were under 18 at the time of the offence (International Committee of the Red Cross, 1977a, art. 77(5); International Committee of the Red Cross, 1977b, art. 6(4)). In summary then, detention of children must be in conformity with national law and IHL or IHRL as appropriate, and be used as a measure of last resort and imposed for the shortest necessary time (Office of the Special Representative of the Secretary-General for Children and Armed Conflict, 2013).

Ultimately, the law and security sector actors must recognize that not all child soldiers are committing a crime, but they are all children—some degree of culpability may be found for their acts while used as child soldiers, but this determination cannot be made during field operations nor by those who detain them. It is important to recognize that the ultimate culpability must be firmly placed on the adults who are using and recruiting and not upon the child. Security sector actors must be properly trained to provide a standard of care for children that is no less than that demanded by international and domestic law, until an empowered government or non-governmental authority, or UN personnel concerned with child welfare or protection of children, has been contacted and identified to provide the appropriate measures for the handover and care of the child concerned.



## Seeing the Child and the (Child) Soldier

When a security sector actor encounters a child soldier, they must acknowledge the duality inherent to them: that person is still a child who is impressionable, vulnerable, sometimes irrational, and is deserving of protection and care; at the same time, the person is also a soldier and could pose a distinct threat to the security sector actor. Both of these aspects of the child soldier must be kept in mind. When the child soldier is not seen as a soldier, the security sector actor risks under-reacting to a potentially dangerous situation, and therefore puts themselves, their comrades, and the mission at greater risk, as this non-contextualized view of a simple child is likely not in line with the child's experience and capacity for violence (Whitman, Zayed, & Conradi, *Child Soldiers: A Handbook for Security Sector Actors*, 2014). Failure to see the child in the child soldier, however, makes it less likely that the child will receive the treatment that all children deserve and are entitled to under international law, and increases the chance that the security sector actor will over-react to the situation and therefore place the mission, support of the local population and their own nation, and themselves at risk.

When security sector actors encounter child soldiers in the field, it is often not surprising that they soon come to see the child soldier purely as a soldier, and often a particularly dangerous and unpredictable one. As Major Phil Ashby recounted from his experiences as a UN peacekeeper in Sierra Leone, the child soldiers he encountered there were frequently drunk and on drugs, were highly irrational, and had little to no idea of what the UN was, that it was neutral, and that there was an ongoing peace process. This made it difficult to see them as anything other than a threat (Ashby, 2002). In many conflicts, child soldiers may have many years of experience fighting and may be more capable than their adult commanders. They are often far more reckless than adult combatants would be, increasing the threat they pose to the soldiers facing them. On the other hand, between the lack of formal doctrine and training for many militaries on child soldiers, and the human inclination to see a child as only that and nothing more, child soldiers are often able to sneak through checkpoints, conduct ambushes, and demoralize troops and their fellow citizens back home through forcing them to fight and kill children (Singer, 2005). Security sector actors must always realize that child soldiers can pose a very real threat to their safety, despite their age.

At the same time, child soldiers are in one way or another victims, whether they were forcibly recruited or joined an armed group out of lack of economic options, ideological or political convictions, or the desire for revenge. They are still children, no matter the acts they have committed or witnessed and are deserving of protection (Whitman, Zayed, & Conradi, *Child Soldiers: A Handbook for Security Sector Actors*, 2014). Studies have found that child soldiers can still in most cases go on to live stable, productive lives, given the proper support from their communities and governments (Boothby & Thomson, 2013). To properly protect child soldiers, security sector actors must keep in mind their status as both children and victims of crimes by adults, and as soldiers—and then act professionally and do their utmost to provide the child with protection and their rights prescribed under the UN CRC that must emphasize a “do no harm” approach under the circumstances, ensuring that the detained child soldiers are moved on to the appropriate and equipped child specialists.

## Case Studies: Child Soldiers in Detention

Despite the increased emphasis on demobilization, disarmament, and reintegration of former child soldiers, they are often treated either solely as security threats or solely as innocent victims

in many contexts. One does not have to look far for accounts of former child soldiers or children in criminal organizations being denied juvenile justice protection, arbitrarily detained, mistreated, tortured, or killed. All too often such children are seen first and only as a security threat, especially when they are involved in terrorism. While some child soldiers may well pose a serious threat, and may be brought to trial for their actions, neither of these is an excuse for denying their human rights as children. This section will explore some case studies of the treatment of child soldiers in detention, demonstrating the urgent need for better training of and practice by security sector actors to ensure that the rights of children are protected while addressing the threat presented by the organizations and individuals who use them.

### *Seeing a child soldier only as a soldier*

The best documented case of ill-treatment and abuse of a child soldier in detention is certainly that of Omar Khadr. Khadr was born in Canada and brought to Pakistan and Afghanistan as a young child by his parents. His father joined al-Qaeda and was in Afghanistan with Khadr after the US invasion. It is alleged that Khadr received training from al-Qaeda members on using small arms and explosives, and helped in building and planting IEDs targeting American forces (Happold, 2008).

In July 2002 Khadr was in a compound during a fight between American and Afghan forces and al-Qaeda members. At the end of the fight Khadr is alleged to have thrown a grenade which killed an American soldier, Sergeant First Class Christopher Speer. Khadr was shot and wounded, and taken to Bagram Air Base for medical treatment. At the time, Khadr was 15 years old (Happold, 2008).

Khadr testified that while being treated at Bagram he was interrogated, and that interrogators used his wounds and treatment as a means of coercion (Amnesty International, 2010). While at Bagram, he was subjected to a variety of ill-treatment, including being restrained in stress positions, having cold water thrown on him, being frightened by dogs, and being forced to urinate himself. During this time the Canadian government requested consular access to him, which was denied (Happold, 2008).

In October 2002, after Khadr had turned 16, he was transferred to Guantánamo Bay, where he was detained with adults, and subjected to further mistreatment, including being threatened with deportation to Middle Eastern countries where he would be tortured and raped in detention, and being held for long periods in solitary confinement, in addition to the type of treatment he had already received at Bagram. He was denied access to legal counsel until November 2004, and was not put on trial until November 2005 (Happold, 2008). Other children held in US detention during the War on Terror, such as Mohammed Jawad, also at Guantánamo, and children at Abu Ghraib in Iraq, were treated similarly (Amnesty International, 2010).

The military tribunals that tried Khadr contained no special provisions for child defendants or consideration of the goals of rehabilitation and reintegration, allowed the consideration of information obtained through coercive means or torture, and were not independent or impartial (Amnesty International, 2008). The UN Special Representative for Children and Armed Conflict, UNICEF, and advocacy organizations such as Amnesty International have all expressed grave concern over the treatment of Khadr at the hands of American authorities (Amnesty International, 2008), and many academic articles have analysed the illegality of his treatment (see Happold, 2008; Dore, 2007-2008; Jamison, 2005; Ryan, 2010; and Ward, 2012).

Other examples are not difficult to find. In Somalia, the Somali intelligence agency NISA is alleged to have detained hundreds of children captured from the terrorist group al-Shabaab for years, pressing some into service as informants (Sieff, 2016). NISA also controlled who could enter UN-sponsored DDR programs for child soldiers from al-Shabaab, making opaque and arbitrary decisions on who to admit as low-risk or detain as high-risk (Felbab-Brown, 2015).

Another example from Somalia is that of children involved in maritime piracy. It is estimated that up to 1/3 of pirates in Somalia may be under 18, and make up an even larger portion of the crews who actually go out to sea to attack ships (Drumbl, 2013). International naval forces countering pirates, and sometimes private maritime security company (PMSC) personnel, often detain pirates during operations. Some are taken back to the country of origin of the naval or security personnel for trial, while others are released back to their boats after being disarmed (Whitman, Williamson, Sloan, & Fanning, 2012). The naval and PMSC personnel who detain children involved in piracy on board ships have minimal to no training in child protection or human rights, and lack protocols for detention, restraint, interview, and treatment of children (Conradi & Whitman, 2014). The extreme constraints in space on board naval vessels make legally required practices for child detention such as separating children from adults very difficult to implement (Conradi & Whitman, 2014). In many cases child pirates are treated as adults in criminal proceedings and are not afforded access to juvenile justice systems, where they exist. This is particularly the case in the US, Kenya, and the Seychelles (though practices have improved in the latter) (Drumbl, 2013).

In Nigeria, Amnesty International revealed that at least 120 children were being detained for suspected involvement with the terrorist group Boko Haram. They were held in extremely inhumane conditions, lacking medical care, sufficient food and water, sanitation, or contact with the outside world. They were held with no evidence and never charged. At least 12 died in detention due to the conditions in the prison, including some children who were under 5 (Amnesty International, 2016).

These examples demonstrate the kind of human rights violations and extreme abuse that can result when security sector actors fail to see a child soldier as a child deserving of the full protection of the law. The opposite however may also cause negative repercussions.

### *Seeing a child soldier only as a child*

If security sector actors see a child soldier as only a child, however, they may put both themselves and the child at much greater risk. Child soldiers are frequently forced to consume drugs or alcohol to reduce their capability for rational thought and risk assessment, leading them to act erratically or dangerously. They may not view the security sector actor as someone trying to help them and attempt to fight back or escape. In one case relayed to the authors, a demobilized child soldier was being relocated by helicopter to Goma with the assistance of UN peacekeepers. The child was not perceived as a threat, and so was not searched before getting on the helicopter. When he was given a new change of clothes upon arrival at the transit centre, it was discovered that he had a live grenade in his pocket, which could have exploded at any point during his transfer (Whitman, Zayed, & Conradi, *Child Soldiers: A Handbook for Security Sector Actors*, 2014).

### *Seeing the child and the soldier*

To fully protect the rights of children while preventing their use as soldiers and protecting themselves and the public, security sector actors must use a more nuanced approach. Central to the training that will be discussed in the next section is the emphasis on “see[ing] the child first and

the (child) soldier second” (Whitman & Zayed, 2014, p. 7). Unfortunately, this is still a rare occurrence. The increasing use of children by terrorist organizations such as Islamic State will present particular challenges for detention. As cases like that of Omar Khadr demonstrate, viewing child members of terrorist organizations only as security threats leaves the door open for widespread torture and abuse; at the same time, the indoctrination that such highly ideological groups engage in, on top of the normalization of violence common to the experience of child soldiery, means that these children may very well present a continuing security threat (Benotman & Malik, 2016).

This nuanced perspective of viewing both the child and the soldier in such situations is therefore critical for protecting all involved. While the security sector has often failed to apply this perspective to child soldiers, there is significant experience in dealing with children in gangs that should be applied. This experience is particularly relevant for dealing with children involved in terrorism and extremist violence (Benotman & Malik, 2016).

### **Training Security Sector Actors on Child Soldiers**

The Special Rapporteur’s report (Méndez, 2015) calls for training for security sector actors in child protection principles and human rights in order to protect children deprived of their liberty from being abused. In paragraph 17, it notes that specific standards and practices need to be in place to protect children who are deprived of their liberty. Paragraph 81 calls on States to train security sector actors such as police and border guards who are likely to encounter children in their work on child protection and on the vulnerability of children, especially of girls, disabled children, and other marginalized groups. While it does not mention the military specifically, it does list “others who may encounter children deprived of their liberty.” Paragraph 85(e) also calls for this training to be mandatory, and 95(j) calls for clear guidelines for security sector actors for dealing with children, including such provisions as minimal length of detention, legal and medical assistance, and child-friendly interview practices (Méndez, 2015).

When it comes to child soldiers, however, there is globally a lack of guidance and training for security sectors actors on the intersection of child soldiers, child protection protocol, and security concerns. The issue of child soldiers has primarily been addressed through legal, humanitarian, and child protection channels without cooperation or coordination between these sectors and the security sector. The work of the Roméo Dallaire Child Soldiers Initiative (the Dallaire Initiative) has sought to fill this gap by developing, providing, and advocating for training for security sector actors, primarily from the military, police, and prisons services, on addressing child soldiers in their work in a manner that prioritizes the protection of children, respect for their rights, the safety of security sector personnel, and the realities that they face when dealing with child soldiers in the field (Whitman, Zayed, & Conradi, *Child Soldiers: A Handbook for Security Sector Actors*, 2014).

#### ***Best practices in training***

In focusing solely upon disarmament, demobilization and reintegration (DDR) and not upon the complete eradication of the use of child soldiers, the international community has merely attempted to fix the broken, rather than to protect the whole. Until this issue is elevated within the security agenda, the international community will continue to squander opportunities to prevent the recruitment of children into armed forces and groups.

By framing the issue of children in armed conflict as a specific priority concern for security sector actors, the Dallaire Initiative empowers military, police, and prison personnel to develop better

policies and strategies to not only limit and prevent child soldier recruitment, but also to improve security sector interactions with children.

While pre-deployment training for military, police and prison officials is improving—particularly with respect to children’s rights and the protection of civilians—very little is currently being done to prepare security sector actors for the possibility of confronting child soldiers before or during active hostilities. This presents security sector actors with a serious dilemma, as they are forced to juggle ethical considerations and their Rules of Engagement (ROE) with the basic need to protect themselves, their colleagues, and affected civilians. Through the development of its training program, the Dallaire Initiative found that no military or police force in the world has coherent and comprehensive doctrine or protocol on interacting with child soldiers before or during hostilities. The training program is designed to address these gaps, with a focus throughout on proactive child protection.

At the core of this training is a set of scenarios involving child soldiers that security sector personnel are likely to encounter in the field. These scenarios were developed through a rigorous process of consultation and validation with security sector actors from around the world, former child soldiers, and humanitarian, legal, and academic experts. Each scenario provides guidance on tactics and responses, premised on protecting both the child and the security sector actor, and counteracting the tactical and strategic advantages that lead to children being used as soldiers. The training also includes the relevant legal background, crosscutting issues such as gender, and complementarity with other actors such as civilian child protection (Whitman, Zayed, & Conradi, *Child Soldiers: A Handbook for Security Sector Actors*, 2014).

The current edition of the Dallaire Initiative training handbook (2<sup>nd</sup> revised edition) has one detailed interaction specifically on detention and interview of child soldiers. It covers a number of key child protection concerns:

- Do not detain child soldiers for more than 48 hours;
- Child protection must be contacted immediately after the child is detained;
- All of the child’s basic needs such as medical attention, food, shelter, etc. must be provided;
- Children must be separated from all adults unless detained with their parents;
- Absolute prohibition on torture or any coercive measures;
- Address the specific needs and vulnerabilities of girl child soldiers, such as separating them from men and boys and having female personnel interact with them;
- Do not separate mothers from their children;
- Children should only be restrained to prevent harm to security sector actors or the child, or the destruction of key evidence. Restraints should be applied for the minimum time necessary;
- If interviews are necessary for the best interests of the child, cooperate with child protection officers in conducting them, wear civilian clothing, minimize the number of interviews, and only conduct interviews with the child protection officer (or parent or guardian) present;
- Ensuring that all personnel follow this protocol and any abuses are reported.

Dallaire Initiative staff are currently in the process of completing a third edition of the training handbook, which will have more up-to-date, comprehensive, and nuanced guidance on the detention and interview of child soldiers.

Complementary to this scenario-based training is discussion on situational awareness for protection of children during armed conflict. This is primarily conveyed through a village mapping exercise, where training participants examine the various geographic locations where children are at increased vulnerability during conflict. Through small group and classroom discussion, trainees consider the common features of towns around the world, particularly in areas where peacekeeping missions take place and child soldiers are used, such as schools, markets, mines, police and military bases, prisons, and water sources. With respect to detention, this exercise further emphasizes the vulnerability of children when they are deprived of their liberty.

### *Evaluation of training*

As part of the constant process of developing and reviewing its training, the Dallaire Initiative has been conducting in-depth qualitative research on the behavior change resulting from its training in Sierra Leone. The Dallaire Initiative has worked for several years with the Sierra Leonean government to implement its training with that country's armed forces, police, and prison service, and as of July 2016, 37% of the Dallaire Initiative's trainees are from there.

This evaluation work is currently ongoing, but has so far found several important behavioral and attitudinal changes among trainees. Trainees indicated a critical shift in perception of child soldiers, moving from viewing them primarily as a security threat and perpetrators of violence, to also viewing them as victims of violence and abuse by adults, and deserving of protection and rehabilitation. There were also measurable behavior shifts on the core competencies mentioned above of seeing the child first and the soldier second, and on the need for improving interactions with child soldiers and on collaborating better with partners outside of the security sector. While these findings require further reinforcement through other research methods, they do indicate that the training delivered by the Dallaire Initiative can be successful in changing how security sector actors view child soldiers (O'Bright, Whitman, Bryce, & Holland, 2016).

As discussed above, these types of attitude shifts are key to protecting child soldiers deprived of their liberty by security sector actors from mistreatment, abuse, and torture.

### *High-level advocacy*

There is an important need to advocate for policy change at the international and domestic level with respect to practices related to the protection of children, child soldiers, and detention. This policy change must be translated into tangible actions that can be implemented by the very people who will encounter children in difficult contexts such as security sector actors. In other words, laws and policies have to be applied at a practical level in a scenario-based format to ensure that they are having the desired impact. Ensuring that such a process occurs requires an understanding and commitment of resources by nations.

At the level of the United Nations, a concerted effort by a collective of UN bodies that is concerned with the protection of children, security sector reform, peacekeeping operations, the rule of law, and the protection of civilians must work together to ensure directives are clear and consistent. There are times when the mandate of one UN body may have good intentions but rarely coordinates clearly with the mandate of another UN body to avoid replication or contradiction. This becomes additionally problematic in the face of dealing with countering violent extremism efforts and terrorism.

In terms of the work of the Roméo Dallaire Child Soldiers Initiative, we have worked hard to advocate for policy change with respect to training of security sector actors to improve their interactions with children. Such advocacy has taken place at the UN with partners such as UNICEF who have recognized the gaps that exist and the role the Dallaire Initiative can undertake to help with the overall child protection efforts. In particular, we have a partnership contribution agreement with UNICEF that has resulted in the enhancement of child protection in the AU Mission to Somalia through the secondment of a child protection officer to that mission. His presence has allowed for issues such as detention of children who are being used by groups such as Al Shabaab to be addressed and not forgotten. The result of this partnership has led to the desire to expand this agreement to another 5 African nations in an overall aim to build the capacity of the African Union to improve child protection. The Dallaire Initiative has also worked with the UN Department of Peacekeeping Operations to contribute to their standard training modules on child protection.

In addition, the Dallaire Initiative has been working with NATO towards the completion of a policy directive on children and armed conflict and the first standard operating procedure (SOP) for the organization on children and armed conflict. One of the key dynamics of this SOP has been the requirement for scenario based training that improves the options for troops under NATO command to react and deal with children in armed conflict, which includes the presence of child soldiers.

In conjunction with the efforts to change training standards at multi-lateral organizational levels, is the need to ensure that national level training is conducted globally for troops long before they ever deploy on a peacekeeping mission. If we want to ensure long-term attitude and behavior change, this is critical to impacting child protection from a holistic perspective. The Dallaire Initiative has made huge strides in conducting national level programmes in Sierra Leone, Uganda, Somalia and Rwanda and we hope to continue this momentum step by step in every nation of the globe.

Coupled with the efforts to impact training and create new standards that change doctrinal frameworks for the military and police is the important work on the international justice front. The Dallaire Initiative has been working with the Office of the Chief Prosecutor of the International Criminal Court to assist with the development of the first policy on children and armed conflict. Ending impunity for those that use and recruit children as soldiers is critical to the advocacy efforts of the Dallaire Initiative to promote the training and doctrinal changes that are required by the security sector.

The Dallaire Initiative has just become a member of the Paris Principles working group on children and armed conflict. This comes at a time when that milestone document has now reached its ten year anniversary and we are hopeful that our approach can be complimentary to the urgent efforts needed to prioritise the prevention of the use of children as soldiers globally.

## Conclusion

The use of child soldiers is one of the most pressing security concerns in the modern world. As security sector actors address situations from terrorism to peacekeeping to piracy, they must be prepared to humanely and legally treat child soldiers who come into their custody, whether detained as a security threat or while they are being transferred to child protection actors. The work of the Special Rapporteur has highlighted how children in the custody of security forces are vulnerable to abuse and torture, and this is only heightened if that child was a member of an opposing

force. Effective, proactive training on child protection is needed for security sector actors to be able to properly interact with child soldiers they encounter in their work and protect the rights and best interests of children they detain. The Dallaire Initiative is the first organization to address the use of child soldiers as a security sector concern, and this chapter has provided the organization with the opportunity to further discuss the impact of our training on detention practice and reflect on next steps in improving our work.

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# General Assembly

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## Human Rights Council

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**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

### **Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez\***

#### *Summary*

In the present report, the Special Rapporteur focuses on children deprived of their liberty from the perspective of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment.

In the report, the Special Rapporteur explores the international legal framework and standards protecting children deprived of their liberty from being subjected to torture or other ill-treatment and from experiencing developmentally harmful and torturous conditions of confinement. He also examines specific statutes and standards applying to prevent torture and ill-treatment of children deprived of liberty, and shortcomings in the practical implementation of legal standards.

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\* Late submission.



A/HRC/28/68

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## I. Introduction

1. The present report is submitted to the Human Rights Council in accordance with Council resolution 25/13.

2. In an addendum to the present report (A/HRC/28/68/Add.1), the Special Rapporteur makes his observations on cases sent to Governments between 1 December 2013 and 30 November 2014, as reflected in the communications reports of special procedures mandate holders (A/HRC/26/21, A/HRC/27/72 and A/HRC/28/85). The Special Rapporteur made follow-up visits to Tajikistan and Tunisia (A/HRC/28/68/Add.2). During the period under review, the Special Rapporteur also visited Mexico (see A/HRC/28/68/Add.3) and the Gambia (see A/HRC/28/68/Add.4).

## II. Activities of the Special Rapporteur

### A. Upcoming country visits and pending requests

3. The Special Rapporteur plans to visit Georgia from 12 to 20 March 2015. He is engaged with the Governments of Thailand and Brazil to find mutually agreeable dates for visits in 2015.

4. The Special Rapporteur, with the support of the Anti-torture Initiative, plans to conduct follow-up visits to Morocco and Western Sahara, and to Ghana.

5. The Special Rapporteur continues to request an invitation from the Government of the United States of America to visit the detention centre at Guantanamo Bay, Cuba, on conditions that he may accept. His request to visit State and federal prisons in the United States is still pending. Similarly, the Government of Bahrain has not suggested new dates for a visit after the second postponement.

### B. Highlights of key presentations and consultations

6. From 21 April to 2 May 2014, the Special Rapporteur conducted a country visit to Mexico at the invitation of the Government.

7. From 4 to 6 June 2014, the Special Rapporteur conducted a follow-up visit to Tunisia at the invitation of the Government to assess the level of implementation of his recommendations and to identify remaining challenges regarding torture and other ill-treatment.

8. On 3 September 2014, the Special Rapporteur published a volume entitled *Próximos pasos hacia una política penitenciaria de derechos humanos en Uruguay: Ensayos de seguimiento a las recomendaciones de 2009 y 2013 de la Relatoría de Naciones Unidas sobre la tortura* ("Next Steps Towards a Human Rights Penitentiary System in Uruguay: Reflections on the Implementation of the 2009 and 2013 Recommendations of the United Nations Special Rapporteur on Torture")

9. On 8 September 2014, the Special Rapporteur participated in a webinar on police torture and human rights in Pakistan, co-organized by Justice Project Pakistan.

10. On 9 September 2014, the Special Rapporteur held a lecture on the theme “the Argentine experience and the emergence of a universal right to truth” at the Duke Human Rights Center at the Franklin Humanities Institute.
11. On 20 October 2014, the Special Rapporteur presented his interim report on the role of forensic and medical science in the prevention of torture to the General Assembly (A/69/387). He also participated in side events and met with representatives of permanent missions and civil society organizations.
12. From 3 to 7 November 2014, the Special Rapporteur conducted a country visit to the Gambia at the invitation of the Government.
13. On 10 and 11 November 2014, the Special Rapporteur held an expert consultation in Washington, D.C. on the theme “Children deprived of their liberty” with support of the Anti-Torture Initiative and the Ford Foundation.
14. On 14 November 2014, the Special Rapporteur held a presentation at the Rothko Chapel in Houston, Texas, as part of an event entitled “Mainstreaming torture: ethical approaches in the post-9/11 United States”.
15. On 19 November 2014, the Special Rapporteur held a presentation at a reception organized by the World Organization against Torture for the launch of the new edition of its publication *Seeking Remedies for Torture Victims: A Handbook on the Individual Complaints Procedures of the UN Treaty Bodies*.

### **III. Torture and ill-treatment of children deprived of their liberty**

16. Children deprived of their liberty are at a heightened risk of violence, abuse and acts of torture or cruel, inhuman or degrading treatment or punishment. Even very short periods of detention can undermine a child’s psychological and physical well-being and compromise cognitive development. Children deprived of liberty are at a heightened risk of suffering depression and anxiety, and frequently exhibit symptoms consistent with post-traumatic stress disorder. Reports on the effects of depriving children of liberty have found higher rates of suicide and self-harm, mental disorder and developmental problems.
17. The unique vulnerability of children deprived of their liberty requires higher standards and broader safeguards for the prevention of torture and ill-treatment. Specific practices and issues, such as segregation, the organization and administration of detention facilities, disciplinary sanctions, opportunities for rehabilitation, the training of specially qualified personnel, family support and visits, the availability of alternative measures, and adequate monitoring and oversight, require specific attention and modified standards.
18. For the above reasons, the Special Rapporteur has chosen to dedicate his thematic report to the unique forms of protection due to children deprived of their liberty and the particular obligations of States with regard to preventing and eliminating torture and ill-treatment of children in the context of deprivation of liberty.

#### **A. Legal framework and international standards**

19. A number of international human rights treaties are relevant to torture and other ill-treatment in the context of children deprived of their liberty. These include the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the International Covenant on Civil and Political Rights, as well as regional treaties, such as African, Inter-American and European regional instruments. The Convention on the Rights of the Child is *lex specialis* on the human rights protections afforded to children.

20. Other legal instruments applicable to children include the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (Bangkok Rules) and the Standard Minimum Rules for the Treatment of Prisoners.

### 1. Deprivation of liberty of children

21. For the purpose of the present report, “deprivation of liberty” denotes any form of detention or imprisonment or the placement of a child in a public or private custodial setting where that child is not permitted to leave at will by order of any judicial, administrative or other authority (A/68/295, para. 27). Deprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement: it includes police custody, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization and institutional custody. It also includes children deprived of their liberty by private individuals or entities that are empowered or authorized by a State to exercise powers of arrest or detention.

22. In accordance with the Convention on the Rights of the Child, and regardless of the age of majority, the terms “children” and “child” refer to all persons under the age of 18 years.

### 2. Prohibition of torture and other ill-treatment of children

23. The prohibition of torture is one of the few absolute and non-derogable human rights standards, a peremptory norm of customary international law or *jus cogens*. In addition, international law acknowledges the need for special protections for children and detained persons.

24. In its general comment No. 2, the Committee against Torture interpreted States’ obligations to prevent torture are indivisible, interrelated and interdependent with the obligation to prevent cruel, inhuman, or degrading treatment or punishment (ill-treatment) because conditions that give rise to ill-treatment frequently facilitate torture (CAT/C/GC/2, para. 3). The Convention on the Rights of the Child and the Havana Rules have extended this protection to children deprived of their liberty, specifying that no member of the detention facility or institutional personnel may inflict, instigate or tolerate any act of torture or any form of harsh, cruel, inhuman or degrading treatment, punishment, correction or discipline under any pretext or circumstance whatsoever.

25. Under article 37 (b) of the Convention on the Rights of the Child and explained by the Committee on the Rights of the Child in its general comment No. 10 (CRC/C/GC/10), the deprivation of liberty of a child should be a last resort measure to be used only for the shortest possible period of time. Similarly, the Havana Rules require that deprivation of liberty be limited to exceptional cases. Both the Beijing Rules and the Riyadh Guidelines emphasize this principle. In addition, the best interests of the child must be a primary consideration in every decision on initiating or continuing the deprivation of liberty of a child.<sup>1</sup>

26. Where the deprivation of liberty of a child can be justified as necessary, limited and consistent with the best interests of the child, the child must be treated with humanity and respect for his or her inherent dignity and in a manner that takes into account the needs of

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<sup>1</sup> Convention on the Rights of the Child, art. 3 (1).



persons of their age and maturity.<sup>2</sup> The Convention on the Rights of the Child specifies that the right to be confined in an age-appropriate manner includes, in particular, the right to be separated from adults unless it is considered in the child's best interest not to do so, and the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances. Article 40 (1) of the Convention emphasizes this principle with regard to children in conflict with the law by adding the desirability of promoting the child's reintegration and assumption of a constructive role in society.

27. The Havana Rules indicate how States should approach the deprivation of liberty of children, going beyond the Standard Minimum Rules for the Treatment of Prisoners by including guidelines on classification and placement, physical environment and accommodation, education, vocational training and work, recreation, religion and medical care, notification of illness, injury and death, contact with the wider community, limitations of physical restraint and the use of force, as well as disciplinary procedures and return to the community.

28. The role of medical and forensic sciences in the prevention of torture and other ill-treatment for children deprived of their liberty is clear (see A/69/387, paras. 19-57). All children are to be properly interviewed and physically examined by a medical doctor or qualified nurse reporting to a doctor as soon as possible after their admission to an institution, preferably on the day of arrival. In the case of girls, access to gynaecologists and education on women's health care are to be provided.<sup>3</sup>

29. To ensure that detention will not disrupt preparation for adulthood and the full realization of a child's potential, access to education is a fundamental right of children deprived of their liberty.<sup>4</sup> While Rule 77 (1) of the Standard Minimum Rules for the Treatment of Prisoners states that the education of illiterates and children should be compulsory, articles 38 to 46 of the Havana Rules also recommend participation in community schools, the availability of diplomas without reference to institutionalization, and the provision of vocational training.

30. Article 40, paragraphs 3 (b) and (4), of the Convention on the Rights of the Child provides that alternatives to detention, such as care, guidance and supervision orders, counselling; probation, foster care, education and vocational training programmes should first be sought, or other alternatives that ensure that children are dealt with in a manner appropriate to their well-being and proportionate to both their circumstances and the offence committed.

31. Lastly, regardless of the form of deprivation of liberty, whether criminal, institutional or administrative, article 37 (d) of the Convention on the Rights of the Child requires that any decision to deprive a child of liberty must be subject to periodic review of its continuing necessity and appropriateness. In its general comment No. 35, the Human Rights Committee specified that the child has a right to be heard, directly or through legal or other appropriate assistance, in relation to any decision regarding their deprivation of liberty, and that the procedures employed should be child-appropriate (CCPR/C/GC/35, para. 62).

<sup>2</sup> International Covenant on Civil and Political Rights, art. 10; Convention on the Rights of the Child, art. 40; Beijing Rules, para. 5.1.

<sup>3</sup> Bangkok Rules 6-18.

<sup>4</sup> European Convention on Human Rights, art. 5; European Court on Human Rights, *Buomar v. Belgium*; Inter-American Court of Human Rights, *Juvenile Reeducation Institute v. Paraguay*, judgement of 2 September 2004, para. 161.

### 3. Vulnerability of children and the threshold for torture and other ill-treatment

32. Children are particularly vulnerable to certain human rights violations, including torture and other forms of ill-treatment. The Convention on the Rights of the Child, in its article 37 (c), establishes the obligation to take into account the age-specific needs of children. The Human Rights Committee, the European Court of Human Rights and the Inter-American Court of Human Rights, have also recognized the need for States to provide special measures or heightened “due diligence” to protect the personal liberty and security of every child.<sup>5</sup>

33. Children experience pain and suffering differently to adults owing to their physical and emotional development and their specific needs. In children, ill-treatment may cause even greater or irreversible damage than for adults.<sup>6</sup> Moreover, healthy development can be derailed by excessive or prolonged activation of stress response systems in the body, with damaging long-term effects on learning, behaviour and health. A number of studies have shown that, regardless of the conditions in which children are held, detention has a profound and negative impact on child health and development. Even very short periods of detention can undermine the child’s psychological and physical well-being and compromise cognitive development. Children held in detention are at risk of post-traumatic stress disorder, and may exhibit such symptoms as insomnia, nightmares and bed-wetting. Feelings of hopelessness and frustration can be manifested in acts of violence against themselves or others. Reports on the effect of detention on children have found higher rates of suicide, suicide attempts and self-harm, mental disorder and developmental problems, including severe attachment disorder.<sup>7</sup> The threshold at which treatment or punishment may be classified as torture or ill-treatment is therefore lower in the case of children, and in particular in the case of children deprived of their liberty.

## B. Torture and other ill-treatment of children deprived of their liberty in law and in practice

### 1. Children in conflict with the law

34. International standards require the establishment of a minimum age of criminal responsibility that reflects when a child has the adequate mental capacity and moral

<sup>5</sup> Human Rights Committee, general comments No. 17, para. 1 and No. 35, para. 62; European Court of Human Rights, *Z and Others v. United Kingdom*, paras. 74-75; Inter-American Court of Human Rights, *Gonzales v. USA*, final observations, 24 March 2008, pp. 64-67;.

<sup>6</sup> See for example Anthony Lake and Margaret Chan, *Putting science into practice for early child development*, UNICEF, New York and WHO Geneva, 20 September 2014; and Michael D. De Bellis et al., “Developmental Traumatology Part II: Brain Development”, *Biological Psychiatry*, vol. 14, No. 10 (15 May 1999), pp. 1271-1284.

<sup>7</sup> See *The heart of the nation’s existence: a review of reports on the treatment of children in Australian detention centres*, ChilOut, 2002, appendix E, Michael Dudley and Bijou Blick; Sarah Mares and Jon Jureidini, “Psychiatric assessment of children and families in immigration detention – clinical, administrative and ethical issues”, *Australian and New Zealand Journal of Public Health*, vol. 28, No. 6 (2004) pp. 520-526; Human Rights and Equal Opportunity Commission, “A last resort? National Enquiry into Children in Immigration Detention”, April 2004; Zachary Steel et al., “The politics of exclusion and denial: the mental health costs of Australia’s refugee policy”, 12 May 2003, p. 10.

competence to be punished for crimes. In its general comment No. 10 (CRC/C/GC/10), the Committee on the Rights of the Child encouraged States parties to increase their lower minimum age of criminal responsibility to the age of 12 years as the absolute minimum age, and to continue to increase it to a higher age level. Nevertheless, many countries still maintain a minimum age of criminal responsibility well below 12 years.

35. States have an international obligation to put in place a dedicated legal system and law enforcement processes for children. All too often, criminal justice systems are designed for adults and incorporate none of the specific procedural safeguards required for children. In particular, adult criminal justice systems expose children to a range of sentences and disciplinary punishments aimed specifically at adults, without any rehabilitative component.

36. The imposition of the death penalty on children is forbidden under international law and has been accepted so universally as to reach the level of a *jus cogens* norm (A/67/279, para. 62).

37. Similarly, life sentences without the possibility of release for children are expressly prohibited by international law and treaties, including article 37(a) of the Convention on the Rights of the Child. The Committee on the Rights of the Child, in its general comment No. 10 (CRC/C/GC/10), and the Human Rights Committee, in its general comment No. 21, confirmed that life imprisonment without the possibility of release is never an appropriate punishment for an offence committed by a juvenile offender.<sup>8</sup> The vast majority of States have taken note of the international human rights requirements regarding life imprisonment of children without the possibility of release. Significantly, the United States of America is the only State in the world that still sentences children to life imprisonment without the opportunity for parole for the crime of homicide.

38. With regard to life imprisonment of children, the Human Rights Council, in its resolution 24/12, and the Committee on the Rights of the Child, in its general comment No. 10, urged States to ensure that no one is sentenced to life imprisonment for an offence committed by persons under 18 years of age.

39. Although the Convention on the Rights of the Child requires States to ensure that detention or imprisonment of children should only be used as a measure of last resort, in exceptional circumstances, for the shortest possible period of time and only if it is in the best interests of the child, in reality, detention is often used as the first response to perceived problems. During his country visits, the Special Rapporteur observed that, although alternative or non-custodial measures are provided by law, in a high percentage of cases, detention is the preferred option and not the last resort (see A/HRC/22/53/Add.3, para. 53).

40. In many instances, the worst situations for children arise at the time of arrest by the police, and during transportation or subsequent questioning in police custody (see A/HRC/16/52/Add.5, para. 43 and A/HRC/22/53/Add.1, para. 73). During the period immediately following apprehension, children are at particularly high risk of physical, verbal and psychological violence, such as verbal abuse, threats and beatings, and they are too often not provided with information on their human rights and the allegations brought against them in a manner that they can understand.<sup>9</sup> Following their arrest, children often

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<sup>8</sup> See also CCPR/C/112/D/1968/2010, paras. 7.7 and 7.11, and Inter-American Commission on Human Rights, *Juvenile Justice and Human Rights in the Americas: Rapporteurship on the Rights of the Child* (UNICEF, 13 July 2011), para. 364.

<sup>9</sup> See, for example, Association for the Prevention of Torture, Jean-Jacques Gautier NPM Symposium, "Addressing children's vulnerabilities in detention", outcome report, June 2014, p. 14

do not have prompt and private access to legal assistance or notification of their parents or caregivers, which makes them even more vulnerable and subject to a higher risk of being subjected to torture or other ill-treatment.

41. Despite the international legal framework in place, the majority of children deprived of their liberty are held in pretrial detention, often for prolonged periods, and for minor offences, often in unsuitable premises.<sup>10</sup> In many countries, the excessive use of pretrial detention leads to overcrowded facilities.

42. Many States continue to hold children and adults in the same facilities, in particular those in pretrial detention and police custody, but also during transportation or in the context of immigration detention. Moreover, the continuous trying and sentencing of children as adults and the lack of specialized juvenile facilities have resulted in numerous children being placed in adult prisons. Disciplinary and other administrative rules and procedures are often applied, regardless of child status.

43. Detaining children and adults together will inevitably result in negative consequences for the children, who are five times as likely to be subjected to a substantiated incident of sexual violence, and are also much more likely to witness or experience other forms of violence, including physical harm by facility staff members.<sup>11</sup> They are also more likely to commit suicide or engage in other forms of self-harm when housed in adult – rather than juvenile – facilities. Research also shows that imprisoning children with adults can result in increased recidivism and negative long-term consequences for children, their families and communities.<sup>12</sup>

44. In many States, solitary confinement is still imposed on children as a disciplinary or “protective” measure. National legislation often contains provisions to permit children to be placed in solitary confinement. The permitted time frame and practices vary between days, weeks and even months. In accordance with views of the Committee against Torture, the Subcommittee on Prevention of Torture and the Committee on the Rights of the Child, the Special Rapporteur is of the view that the imposition of solitary confinement, of any duration, on children constitutes cruel, inhuman or degrading treatment or punishment or even torture (see A/66/268, paras. 77 and 86, and A/68/295, para. 61).<sup>13</sup>

45. During country visits, the Special Rapporteur regularly observes the practice of corporal punishment as a disciplinary measure for children in detention, including severe caning, flogging, beating with sticks and electric cords, beatings on the buttocks with wooden boards, and being forced to kneel for long periods with hands in the air (A/HRC/25/60/Add.1, paras. 64-65 and A/HRC/22/53/Add.2, para. 56). Some States still allow the use of corporal punishment as a criminal sentence for children. With regard to the jurisprudence of United Nations treaty bodies and the European Court, the mandate holder has found that any form of corporal punishment is contrary to the prohibition of torture and other cruel, inhuman or degrading treatment or punishment (see A/60/316 and A/67/279).

<sup>10</sup> Ibid. and A/HRC/21/25, para. 8.

<sup>11</sup> See Anna Volz, “Stop the Violence! The overuse of pre-trial detention, or the need to reform juvenile justice systems”, Defence for Children International, Geneva, July 2010, p. 16.

<sup>12</sup> Information received from the American Civil Liberties Union during the expert consultation held in Washington, D.C. on 10 and 11 November 2014.

<sup>13</sup> See also A/HRC/22/53/Add.1, para. 73; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, para. 67; Committee on the Rights of the Child, general comment No. 10 (CRC/C/GC/10), para. 89.

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He also noted that States cannot invoke provisions of domestic law to justify violations of the prohibition of corporal punishment.

46. Children are subjected to a range of adult punishments in detention, including physical and manual restraints, routine humiliation and degrading searches, and the indiscriminate use of mace, pepper spray and other harmful chemicals. During country visits, the Special Rapporteur has observed the use of psychotropic drugs for children in detention in order to maintain security in juvenile detention facilities (see A/HRC/22/53/Add.3, para. 52). In some instances, such forms of punishment (especially restraints) are adopted as a first resort rather than being used only in exceptional cases.

47. A large number of children deprived of their liberty show signs of mental health problems, or mental illnesses or psychological disorders, which are often exacerbated during their detention. Children in detention are prone to self-harm, including suicide, because of depression. In many instances, children who suffer from mental health problems have no access to mental health screening within the first hours of admission to a detention centre and do not receive adequate treatment, including psychosocial counselling during detention. Moreover, children showing signs of mental health problems are often held together with children who do not show such signs.

48. Girls deprived of their liberty are at a heightened risk of sexual violence, sexual exploitation and underage pregnancies while in detention. The risk of sexual abuse is greater when male guards supervise girls in detention. Girls deprived of their liberty have different needs not only to those of adults but also of boys. Girls in detention are often not only children but also carers, either as mothers or as siblings, and have specific health, hygiene and sanitary needs. Across the globe, girls are rarely kept separately from women in pretrial and post-conviction settings (see A/HRC/16/52/Add.3, para. 54). Similarly, the Special Rapporteur notes that lesbian, gay, bisexual, transgender and intersex children are at a heightened risk.

49. Children deprived of their liberty are often not allowed to maintain regular contact with their families and friends, because either they are denied contact as a form of punishment or are placed in facilities located far away from their homes and families. A lack of vocational, educational and recreational activities for children deprived of their liberty creates situations of risk of abuse and ill-treatment. When children spend most of their time confined in their cells, they may experience a lack of motivation and even depression, which in turn can lead to incidents of abuse and violence between children or with staff members. The Special Rapporteur wishes to point out that, while lack of activities is detrimental for any prisoner, it is especially harmful for children, who have a particular need for physical activity and intellectual stimulation. This is also true for children detained with their mothers in prison. During country visits, the Special Rapporteur has observed that women's section of prisons often show inadequate space for women with children and a lack of well-equipped recreation areas for children (see A/HRC/22/53/Add.2, para. 58).

## **2. Children in institutions**

50. The State's obligation to prevent torture applies not only to public officials, such as law enforcement agents, but also to medical doctors, health-care professionals and social workers, including those working in private hospitals, other institutions and detention centres (A/63/175, para. 51 and A/HRC/22/53, paras. 23-26).

51. The Special Rapporteur has previously recognized that ill-treatment may occur in a diverse range of settings, even where the purpose or intention of the State's action or inaction was not to degrade, humiliate or punish the child. He notes that most instances of ill-treatment of children deprived of their liberty outside of the criminal justice system, such as children in administrative immigration detention or institutional settings, involve acts of

omission rather than commission, such as emotional disengagement or unsanitary or unsafe conditions, and result from poor policies rather than from an intention to inflict suffering. Purely negligent conduct lacks the intent required under the prohibition of torture, but may constitute ill-treatment if it leads to pain and suffering of some severity (A/63/175, para. 49). This is the case when the suffering is severe and meets the minimum threshold under the prohibition against torture and other ill-treatment, when the State is, or should be, aware of the suffering, including when no appropriate treatment was offered, and when the State has failed to take all reasonable steps to protect the child's physical and mental integrity.

52. Private detention is often presented as a preferable alternative to forced criminal or health-related institutionalization of children with special needs, whether those needs be physical, mental or psychological. The Special Rapporteur notes that, because national law often does not regulate private detention centres, there is a gap in legal protections that may lead to rampant abuse.

53. Special attention should be paid to children deprived of their liberty in health-care institutions (including hospitals, public and private clinics, hospices and institutions where healthcare is delivered). Children are detained in such settings primarily to treat psychiatric, psychosocial or intellectual disabilities, or drug dependence issues. Almost all States have legislation that permits the detention of children for psychiatric health purposes.<sup>14</sup> Persons with disabilities are particularly affected by forced medical interventions, and continue to be exposed to unwarranted non-consensual medical practices (A/63/175, para. 40). During his country visits, the Special Rapporteur has observed that, in particular with regard to children with disabilities, "incapacity" is often presumed, which limits their ability to decide where to live and what treatment to receive,<sup>15</sup> and may be taken as the basis of substitution of determination and decision-making by the child, or by parents, guardians, carers or public authorities.<sup>16</sup> Structural inequalities, such as the power imbalance between medical doctors and patients, exacerbated by stigma and discrimination, result in children with disabilities being disproportionately vulnerable to having informed consent compromised (A/HRC/22/53, para. 29). In this context, the Committee on the Rights of Persons with Disabilities, in its general comment No. 1 (CRPD/C/GC/1), explained that involuntary psychiatric treatment is prohibited on the grounds that it violates the right to consent to medical treatment under article 12 of the Convention on the Rights of Persons with Disabilities and the absolute prohibition of torture and cruel, inhuman and degrading treatment (para. 42). The Committee on the Rights of the Child, in its general comment No. 12 (CRC/C/GC/12), stated that children should be provided with information about proposed treatments and their effects and outcomes, including in formats appropriate and accessible to children with disabilities (paras. 48 and 100).

54. The Special Rapporteur observes that children who use, or are suspected of using, drugs are commonly involuntarily confined in so-called rehabilitation centres. Children thus confined are compelled to undergo diverse interventions (A/HRC/22/53, para. 40), including painful withdrawal from drug dependence without adequate medical assistance, administration of unknown or experimental medications, State-sanctioned beatings, caning or whipping, forced labour, sexual abuse and intentional humiliation. Other reported abuses included "flogging therapy", "bread and water therapy", and electroshock resulting in seizures, all in the guise of rehabilitation. In some countries, a wide range of other

<sup>14</sup> Carolyn Hamilton et al., "Administrative detention of children: a global report", UNICEF and the Children's Legal Centre, February 2011, p. 140.

<sup>15</sup> See A/HRC/25/60/Add.1, para. 80 and CRC/C/GC/12, para. 21.

<sup>16</sup> See Convention on the Rights of Persons with Disabilities, art. 7.

marginalized groups, including street children and children with psychosocial disabilities, are reportedly detained in these centres.

55. Similarly, the involuntary commitment of children with mental disabilities, including those who have long-term intellectual or sensory impairments, to psychiatric and social care institutions, psychiatric wards, prayer camps, secular and religious-based therapeutic boarding schools, boot camps, private residential treatment centres or traditional healing centres has been well documented. Such children may live their whole lives in such psychiatric or social care institutions (A/HRC/22/53, paras. 57 and 68). Article 14, paragraph 1 (b) of the Convention on the Rights of Persons with Disabilities unambiguously states that “the existence of a disability shall in no case justify a deprivation of liberty”. The Committee on the Rights of Persons with Disabilities has found that legislation that allows detention in a mental health institution on the basis of a standard of danger to self or others infringes this provision. Indeed, the Committee has repeatedly urged States to ensure that no one is detained against their will in any kind of mental health facility.<sup>17</sup> Furthermore, the Special Rapporteur has observed the continued use of solitary confinement and prolonged restraint of children with disabilities in psychiatric institutions. The environment of patient powerlessness and abusive treatment of children with disabilities in which restraint and seclusion are used can lead to other non-consensual treatment, such as forced medication and electroshock procedures (A/HRC/22/53, para. 63).

56. One of the most egregious forms of abuse in health and social care settings is unique to children. Numerous studies have documented that a child’s healthy development depends on the child’s ability to form emotional attachments to a consistent care-giver.<sup>18</sup> Children need more than physical sustenance; they also require emotional companionship and attention to flourish. Unfortunately, this fundamental need for connection is consistently not met in many institutions, leading to self-abuse, including children banging their head against walls or poking their eyes. In reaction, care-givers use physical restraints as a long-term solution, or hold the children in cages or their beds, practices that have been linked to muscular atrophy and skeletal deformity.

57. Another form of ill-treatment of children in health and social care detention settings is inappropriate medical care, including the use of psychoactive medications on children for punitive purposes, such as injected tranquilizers, which immobilize children for days, and forced labour in the guise of medical necessity. During one mission, the Special Rapporteur witnessed appalling conditions and ill-treatment of children with mental disabilities in so-called prayer camps, which are alternative residential facilities. He documented cases of shackling to the walls, floors or trees and forced fasting, in some cases on children with neurological problems (see A/HRC/25/60/Add.1, paras. 74-77).

58. Unsanitary and unsafe conditions may also lead to a violation of the prohibition of ill-treatment. The Special Rapporteur observes that overcrowding is present in many institutions, leading to severe constraints on institutional resources, shortages of adequate food, clean drinking water, bedding and medical care. Overcrowding also increases the risk of disease transmission and infection. Furthermore, adults and children are often not segregated in institutional facilities, leading to issues of exploitation.

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<sup>17</sup> See for example CRPD/C/AUT/CO/1 paras. 29-30, CRPD/C/SLV/CO/1 para. 31-32 and CRPD/C/AZE/CO/1, paras. 28-29.

<sup>18</sup> See Marinus H. van IJzendoorn et al., “Children in institutional care: delayed development and resilience”, *Monographs of the Society for Research in Child Development*, vol. 76, No. 4 (2011), pp. 8-30; and Rebecca Johnson et al., “Young children in institutional care at risk of harm”, *Trauma, Violence & Abuse*, vol. 7, No. 1 (2006), pp. 34-60.

### 3. Children in administrative immigration detention institutions

59. States frequently detain children who are refugees, asylum seekers or irregular migrants for a number of reasons, such as health and security screening, to verify their identity or to facilitate their removal from the territory. Sometimes, children may be inadvertently detained because there is a failure to distinguish between child and adult migrants, such as when children are unable to prove their age.<sup>19</sup> The Special Rapporteur has previously noted with concern that unaccompanied child migrants are systematically held in detention at police stations, border guard stations or migration detention centres instead of being held in reception centres, which are in practice often not numerous enough or are overcrowded (see A/HRC/16/52/Add.4, paras. 68-69). Most of the unaccompanied minors are not adequately informed about asylum procedures or their rights, do not have access to legal counsel or guardians, and are generally ignorant of the system.<sup>20</sup> Furthermore, the procedure to identify minors and to assess their age and vulnerability appears to be completely inadequate, as many children reported being registered as adults (see A/HRC/16/52/Add.4, paras. 68-73 and CAT/C/USA/CO/3-5, para. 19).

60. Many child migrants witness or suffer harsh physical abuse while detained. Reports indicate that children in immigration detention have been tied up or gagged, beaten with sticks, burned with cigarettes and given electric shocks, and that the use of solitary confinement of children in immigration detention is common around the globe. In other instances, migrant children have suffered from severe anxiety and mental harm after having witnessed sexual abuse and violence against other detainees. In some countries, encampment policies have led to the kidnapping, captivity and torture of child refugees. Child migrant detainees too often face lengthy detention.<sup>21</sup>

61. In addition, many child migrants suffer appalling and inhuman conditions while detained including overcrowding, inappropriate food, insufficient access to drinking water, unsanitary conditions, lack of adequate medical attention, and irregular access to washing and sanitary facilities and to hygiene products, lack of appropriate accommodation and other basic necessities. In some cases, detention centres refuse to keep migrant children with their families also being detained, and have denied migrant children's right to communicate with their families. Such practices effectively isolate child detainees from social support groups.

62. According to the European Court of Human Rights, even short term detention of migrant children is a violation of the prohibition on torture and other ill-treatment, holding a child's vulnerability and best interests outweigh the Government's interest in halting illegal immigration.<sup>22</sup> The Inter-American Court of Human Rights further noted that, when assessing the possibility to return, expel, deport, repatriate, reject at the border, or not to admit or in any way transfer or remove a child to a State, the best interests of the child must

<sup>19</sup> Information received from the International Detention Coalition on 2 February 2015.

<sup>20</sup> International Detention Coalition, *Captured Childhood*, Melbourne, Australia, 2012.

<sup>21</sup> See Human Rights Watch, *Barely Surviving: Detention, Abuse and Neglect of Migrant Children in Indonesia*, 2013, pp. 4, 34-36; MaryBeth Morand et al., *The Implementation of UNHCR's Policy on Refugee Protection and Solutions in Urban Areas, Global Survey – 2012*, UNHCR, April 2013, p. 5; and Amnesty International, "Egypt/Sudan: Refugees and asylum seekers face brutal treatment, kidnapping for ransom and human trafficking", 2013, paras. 6, 8.

<sup>22</sup> *Popov v. France*, judgement of 19 January 2012; *Rahimi v. Greece*, judgement of 5 April 2011; *Mubilanzila Mayeka and Kaniki Mitunga v Belgium*, judgement of 12 October 2006.



be determined, which also incorporate the component of adequate development and survival of the child.<sup>23</sup>

### C. Training, complaint mechanisms and monitoring

63. An essential safeguard against torture and other forms of ill-treatment is the availability of multidisciplinary and qualified staff working in children's institutions. Inside the law enforcement, institution and migration systems, children are more vulnerable to human rights violations than adults because of the manner in which judicial and other officials deal with children.

64. A significant number of States lack an independent mechanism to monitor human rights violations not only in detention facilities but also in medical and social care institutions. Moreover, even when legislation exists to provide for the monitoring of such institutions, inadequate human and financial resources and weak legal enforcement mechanisms are no excuse for failure to prevent abuse.

65. Article 25 of the Convention on the Rights of the Child provides for the right of a child who has been placed by the competent authorities for the purposes of care, protection or treatment of his or her physical or mental health to a periodic review of the treatment provided to the child and all other circumstances relevant to his or her placement. In this context, the Special Rapporteur recalls that the possibility of release should be realistic and regularly considered (CRC/C/GC/10, para. 77). He also observes that, in practice, many States fail to apply these rights. Acts of torture and other cruel, inhuman or degrading treatment or punishment are more widespread than they appear owing to the greater vulnerability of children and their lack of capacity to articulate complaints and seek redress (see A/HRC/25/35, paras. 13-17).

66. Effective complaint procedures are an important safeguard against torture and other ill-treatment in all places of detention for children. According to article 37 (d) of the Convention on the Rights of the Child, children, including migrant children, have the right to prompt access to legal aid and other appropriate assistance, as well as the right to challenge the legality of the deprivation of their liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

67. With regard to migrant children, authorities routinely impede their access to lawyers, non-governmental organizations, service providers, interpreters and other sources of information and protection. Furthermore, children often never meet with their appointed guardian because they are deported before their representative arrives. In some cases, the report of a child's ill-treatment is routinely ignored by the official guardians. States have similarly failed to implement a legal right to representation for children detained in health-care settings. Even when States provide a legal right to review, it generally does not cover children placed with parental consent.

68. In January 2014, the Committee on the Rights of the Child, at its sixty-fifth session, adopted a recommendation that the General Assembly request the Secretary-General to conduct an in-depth international study on the issue of children deprived of liberty (A/69/41, annex II). The Special Rapporteur therefore welcomes General Assembly resolution 69/157, in which the Assembly invited the Secretary-General to commission an in-depth global study on children deprived of liberty.

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<sup>23</sup> *Rights and guarantees of children in the context of migration and/or in need of international protection*, Advisory Opinion of 19 August 2014, paras. 222 and 231-233.

## IV. Conclusions and recommendations

### A. Conclusions

69. Owing to their unique physiological and psychological needs, which render them particularly sensitive to deprivation and treatment that otherwise may not constitute torture, children are more vulnerable to ill-treatment and torture than adults. The detention of children, including pretrial and post-trial incarceration as well as institutionalisation and administrative immigration detention, is inextricably linked – in fact if not in law – with the ill-treatment of children, owing to the particularly vulnerable situation in which they have been placed that exposes them to numerous types of risk. Moreover, the response to address the key issues and causes is often insufficient.

70. In determining the seriousness of acts that may constitute ill-treatment or torture, due consideration must be given to physical and mental effects and the age of the victim. In the case of children, higher standards must be applied to classify treatment and punishment as cruel, inhuman or degrading. In addition, the particular vulnerability of children imposes a heightened obligation of due diligence on States to take additional measures to ensure their human rights to life, health, dignity and physical and mental integrity.

71. There is widespread agreement among experts that the institutionalization of children contributes to physical underdevelopment, abnormalities in brain development, reduced intellectual abilities and development, delays in speech and language development, and diminished social skills. Inappropriate conditions of detention exacerbate the harmful effects of institutionalization on children. The Special Rapporteur observes that one of the most important sources of ill-treatment of children in those institutions is the lack of basic resources and proper government oversight.

72. The deprivation of liberty of children is intended to be an *ultima ratio* measure, to be used only for the shortest possible period of time, only if it is in the best interests of the child, and limited to exceptional cases. Failure to recognize or apply these safeguards increases the risk of children being subjected to torture or other ill-treatment, and implicates State responsibility. Therefore, States should, to the greatest extent possible, and always using the least restrictive means necessary, adopt alternatives to detention that fulfil the best interests of the child and the obligation to prevent torture or other ill-treatment of children, together with their rights to liberty and family life, through legislation, policies and practices that allow children to remain with family members or guardians in a non-custodial, community-based context. Alternatives to detention must be given priority in order to prevent torture and the ill-treatment of children. This includes access to counselling, probation and community services, including mediation services and restorative justice. Furthermore, if circumstances change and the reclusion of children is no longer required, States are required to release them, even when they have not completed their sentences.

73. With regard to children deprived of their liberty within the context of the criminal justice system, the Special Rapporteur recalls that children should be charged, tried and sentenced within a State's system of juvenile justice, affording them adequate forms of protection, and never within the adult criminal justice systems. In addition, laws, policies and practices that allow children to be subjected to adult sentences are inherently cruel, inhuman or degrading because they fail to

consider any of the special measures of protection or safeguards that international law requires for children. Children should never be treated as if they were adults. Because children are less emotionally and psychologically developed, they are less culpable for their actions and their sentencing should reflect the principle of rehabilitation and reintegration.

74. In this context, the Special Rapporteur recalls that the death penalty for children amounts to a violation of the prohibition of torture and other ill-treatment. Other punishments considered grossly disproportionate also amount to cruel, inhuman or degrading treatment or punishment. Life imprisonment and lengthy sentences, such as consecutive sentencing, are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child. Life sentences or sentences of an extreme length have a disproportionate impact on children and cause physical and psychological harm that amounts to cruel, inhuman or degrading punishment. Similarly, the Special Rapporteur finds that mandatory sentences for children are similarly incompatible with the State's obligation regarding children in conflict with the law and the prohibition of cruel, inhuman or degrading punishment. Mandatory minimum sentences may result in disproportionate punishments that are often overly retributive in relation to the crimes committed, particularly in relation to the child's individual circumstances and the opportunity for rehabilitation. In the light of the unique vulnerability of children, including the risk of torture or ill-treatment in detention and States' obligation of due diligence to afford children heightened measures of protection against torture and other forms of ill-treatment, children must be subject to sentences that promote rehabilitation and re-entry into society.

75. The Special Rapporteur believe that there should be a formal obligation to notify a relative or another adult trusted by the child about his or her detention regardless of whether the child has so requested, except if this would not be in the best interests of the child. Parents or adults trusted by the child should furthermore be allowed to be present with the child during interrogation and any court appearances. An essential issue is the manner in which children are questioned. Interrogation should be age-sensitive and individualized, and undertaken by authorities that are skilled in interviewing children. Video recording should be given due consideration in certain circumstances, to avoid causing distress to children because of repeated questioning, and numerous visits to courts. Children should also have immediate access to a lawyer and a health professional. A specific information sheet setting out the above-mentioned safeguards should be given to all children taken into custody immediately upon their arrival at a law enforcement establishment, and this information should be verbally explained to children in terms that they understand.

76. Children should be appropriately separated in detention, including but not limited to children in need of care and those in conflict with the law, children awaiting trial and convicted children, boys and girls, younger children and older children, and children with physical and mental disabilities and those without. Children detained under criminal legislation should never be detained together with adult detainees. The Special Rapporteur also notes that the permitted exception to the separation of children from adults provided for in article 37 (c) of the Convention on the Rights of the Child should be interpreted *sensu stricto*. The best interests of the child should not be defined in accordance to the convenience of the State. Children in conflict with the law should be held in detention centres specifically designed for persons under the age of 18 years, offering a non-prison-like environment and regimes tailored to their needs and run by specialized staff, trained in dealing with children. Such facilities should offer ready access to natural light and adequate ventilation, access to sanitary facilities that are hygienic and respect privacy and, in principle, accommodation in individual bedrooms. Large dormitories should be avoided.

77. An important safeguard against torture and other forms of ill-treatment is the support given to children in detention to maintain contact with parents and family through telephone, electronic or other correspondence, and regular visits at all times. Children should be placed in a facility that is as close as possible to the place of residence of their family. Any exceptions to this requirement should be clearly described in the law and not be left to the discretion of the competent authorities. Moreover, children should be given permission to leave detention facilities for a visit to their home and family, and for educational, vocational or other important reasons. The child's contact with the outside world is an integral part of the human right to humane treatment, and should never be denied as a disciplinary measure.

78. Children in detention should be provided throughout the day with a full programme of education, sport, vocational training, recreation and other purposeful out-of-cell activities. This includes physical exercise for at least two hours every day in the open air, and preferably for a considerably longer time. Girls should under no circumstances receive less care, protection, assistance and training, including equal access to sport and recreation.

79. The Special Rapporteur recalls that detention and forced labour programmes for children who use drugs are not a legitimate substitute for evidence-based measures, such as substitution therapy, psychological intervention and other forms of treatment given with full, informed consent (A/65/255, para. 31). Drug dependence as a "multi-factoral health disorder" requires a health response rather than recourse to detention.

80. Within the context of administrative immigration enforcement, it is now clear that the deprivation of liberty of children based on their or their parents' migration status is never in the best interests of the child, exceeds the requirement of necessity, becomes grossly disproportionate and may constitute cruel, inhuman or degrading treatment of migrant children. Following the advisory opinion of the Inter-American Court of Human Rights on the rights and guarantees of children in the context of migration and/or in need of international protection in 2014, the Special Rapporteur recalls the different procedural purposes between immigration and criminal proceedings, and that, in the words of the Court, "the offenses concerning the entry or stay in one country may not, under any circumstances, have the same or similar consequences to those derived from the commission of a crime." The Special Rapporteur therefore concludes that the principle of *ultima ratio* that applies to juvenile criminal justice is not applicable to immigration proceedings. The deprivation of liberty of children based exclusively on immigration-related reasons exceeds the requirement of necessity because the measure is not absolutely essential to ensure the appearance of children at immigration proceedings or to implement a deportation order. Deprivation of liberty in this context can never be construed as a measure that complies with the child's best interests. Immigration detention practices across the globe, whether de jure or de facto, put children at risk of cruel, inhuman or degrading treatment or punishment. Furthermore, the detention of children who migrate to escape exploitation and abuse contravenes the duty of the State to promote the physical and psychological recovery of child victims in an appropriate environment.<sup>24</sup> Therefore, States should, expeditiously and completely, cease the detention of children, with or without their parents, on the basis of their immigration status. States should make clear in their legislation, policies and practices that the principle of the best interests of the child takes priority over migration policy and

<sup>24</sup> Convention on the Rights of the Child, arts. 34 and 39.

other administrative considerations. Also, States should appoint a guardian or adviser as soon as the unaccompanied or separated child is identified, and maintain such guardianship arrangements until the child has either reached the age of majority or has permanently left the territory and/or jurisdiction of the State (A/HRC/20/24, para. 41). While the Special Rapporteur acknowledges that, in certain circumstances it is possible for States to place children in a shelter or other accommodation when it is based on the purpose of child care, protection and support, this should not become a proxy for expanded unnecessary restrictions to the liberty of child migrants and families. States are required to favour measures that promote the care and well-being of the child rather than the deprivation of liberty. Facilities that grant accommodation for migrant children should have all the material conditions necessary and provide an adequate regime to ensure comprehensive protection from ill-treatment and torture, and allow for their holistic development. Migrant children should be separated from children who have been accused or convicted of criminal offences and from adults. The Special Rapporteur notes, however, that separating child migrants from unrelated adults can sometimes itself result in harm by depriving children of important interactions; ample opportunities for broader human interaction and physical activity must therefore be given to unaccompanied migrant children. When children are accompanied, the need to keep the family together is a not sufficient reason to legitimize or justify the deprivation of liberty of a child, given the prejudicial effects that such measures have on the emotional development and physical well-being of children. The Special Rapporteur shares the view of the Inter-American Court of Human Rights that, when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents, and requires the authorities to choose alternative measures to detention for the entire family.

81. The Special Rapporteur recommends that States adopt child-friendly administrative and criminal court procedures and train police officers, border guards, detention staff, judges and others who may encounter children deprived of their liberty in child protection principles and a better understanding of the vulnerabilities of children to human rights violations, such as torture and other forms of ill-treatment. Special mention should be made of girls, who are particularly vulnerable, and to special groups of children, such as minorities, disabled children and migrants.

82. Children deprived of their liberty and their parents or legal representatives should have avenues of complaint open to them in administrative systems, and should be entitled to address complaints confidentially to an independent authority. Upon admission, children should be given information on lodging a complaint, including the contact details of the authorities competent to receive complaints, as well as the address of any services that provide legal assistance. In this context, the Special Rapporteur welcomes the establishment of independent, local, socio-legal defence centres that provide children with the effective opportunity to have access to justice and subsequently to obtain remedies and advocate for systematic training in children's rights for professionals.

83. Regular and independent monitoring of places where children are deprived of their liberty is a key factor in preventing torture and other forms of ill-treatment. Monitoring should be conducted by an independent body, such as a visiting committee, a judge, the children's ombudsman or the national preventive mechanisms with authority to receive and act on complaints and to assess whether establishments are operating in accordance with the requirements of national and international standards. Independent monitoring mechanisms should draw on professional knowledge in a number of fields, including social work, children's rights, child psychology and psychiatry, in order to address the multiple vulnerabilities of children

deprived of their liberty and to understand the specific normative framework and overall system of child protection.

## **B. Recommendations**

84. With regard to legislation, the Special Rapporteur calls upon all States:

(a) To investigate all allegations of torture or other ill-treatment of children deprived of their liberty in accordance with the absolute prohibition of torture and other cruel, inhuman or degrading treatment or punishment, as codified in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, to prosecute and punish those responsible, and to act in accordance with the heightened obligation of due diligence of States to prevent the torture and ill-treatment of children;

(b) To expedite the ratification of the Convention of the Rights of the Child and the optional protocols thereto, and the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;

(c) To adhere to the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty and the United Nations Guidelines for the Prevention of Juvenile Delinquency.

85. With regard to the vulnerability of children deprived of their liberty and policy reform, the Special Rapporteur calls upon all States:

(a) To ensure that deprivation of liberty is used only as a measure of last resort only in exceptional circumstances and only if it is in the best interests of the child;

(b) To ensure that child-appropriate age determination procedures are in place, and that the person is presumed to be under 18 years of age unless and until proven otherwise;

(c) To promote preventive mechanisms, such as diversion and early identification and screening mechanisms, and to provide for a variety of non-custodial, community-based alternative measures to the deprivation of liberty;

(d) To ensure that paediatricians and child psychologists with trauma-informed training are available on a regular basis to all children in detention, and to establish specialized medical screenings inside places of deprivation of liberty to detect cases of torture and ill-treatment, including access to forensic evaluation;

(e) To provide mandatory training to all persons dealing with children, including training on the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the detection, documentation and prevention of torture and ill-treatment;

(f) To ensure that children in conflict with the law are charged, tried and sentenced within a State's juvenile justice system, never within the adult criminal justice system;

(g) To set the minimum age of criminal responsibility to no lower than 12 years, and to consider progressively raising it;

(h) To prohibit laws, policies and practices that allow children to be subjected to adult sentences and punishments, and to prohibit the death penalty and life imprisonment in all its forms;

(i) To provide additional training to the judiciary so that bail, probation and alternative measures to detention are considered;

(j) To establish clear guidelines for law enforcement agencies dealing with children; in particular, not to detain children in law enforcement establishments for more than 24 hours; to establish a formal obligation to notify a relative or caregiver about his or her detention regardless of whether the child requests that this be done, except if not in the best interest of the child; to ensure access to a lawyer and a medical doctor; and never to subject children to police questioning without the presence of a lawyer and, in principle, his or her caregiver;

(k) Not to detain children in law enforcement establishments for more than 24 hours, and only in child-friendly environments;

(l) To amend legislation to require a presumption of community living, with support, as the favoured policy, for children with disabilities;

(m) To ensure that immigration detention is never used as a penalty or punishment of migrant children, including for irregular entry or presence, and to provide alternative measures to detention that promote the care and well-being of the child;

(n) To prohibit the use of immigration detention as a method of control or deterrence for migrant children;

(o) To ensure that unaccompanied migrant children are immediately provided with guardianship arrangements;

(p) To take into consideration any trauma or exposure to torture or other forms of ill-treatment that child migrants have experienced prior to being detained;

(q) To establish appropriate and confidential complaint mechanisms for all children deprived of their liberty, to provide all necessary support, including legal aid, information, representation and assistance, to guarantee access to justice for children who have been tortured or ill-treated while deprived of their liberty, and to ensure the safety and security of all children who file a complaint;

(r) To establish independent monitoring mechanisms at all places of deprivation of liberty, including places run by private actors, through regular and unannounced visits, and to include civil society organizations in the monitoring of places of deprivation of liberty;

(s) To transfer the oversight of all places of deprivation of liberty of children from justice, law enforcement or border management authorities to those responsible for child protection;

(t) To collect quantitative and qualitative data on children deprived of their liberty, and to elaborate and publish the State's plans for children deprived of liberty;

(u) To support the global study on children deprived of their liberty, prepared pursuant to General Assembly resolution 69/157, and the appointment of an independent expert to lead the study.

86. With regard to conditions during detention, the Special Rapporteur calls upon all States:

- (a) To separate children and adults in all places of detention and, when in the best interests of the child, to hold children and adults together during daytime, and only under strict supervision;
  - (b) To consider case-by-case assessment to decide whether it is appropriate for a particular inmate to be transferred to an adult institution after reaching the age of majority;
  - (c) To provide children deprived of their liberty with appropriate nutrition, health and other basic services, including ready access to natural light and adequate ventilation, access to sanitary facilities that are hygienic and respect privacy and, in principle, accommodation in individual bedrooms;
  - (d) To prohibit solitary confinement of any duration and for any purpose;
  - (e) To prohibit corporal punishment;
  - (f) To use restraints or force only when the child poses an imminent threat of injury to himself or herself or others, only for a limited period of time and only when all other means of control have been exhausted, and not to perform strip searches without reasonable suspicion;
  - (g) To respond to the specific needs of groups of children that are even more vulnerable to ill-treatment or torture, such as girls, lesbian, gay, bisexual, transgender and intersex children, and children with disabilities;
  - (h) To facilitate contact to the outside world, in particular with families and legal representatives;
  - (i) To provide educational, vocational and recreational age-appropriate opportunities and green spaces for children;
  - (j) To maintain an individualized case-management file for each child in detention (such as information on education and medical history), subject to careful data protection and privacy protection, including digital privacy, to ensure that the file is shared only with staff that requires such information.
  - (k) To ensure appropriate resources and staffing for all places of deprivation of liberty.
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*Protecting Children against Torture in Detention: Global Solutions for a Global Problem* brings together contributions by more than thirty international children's rights experts in response to former United Nations Special Rapporteur on Torture Juan E. Méndez's groundbreaking thematic report on torture of children deprived of liberty.

Each piece in this unique volume provides novel insights into timely topics at the intersection between children's rights and the international human rights law prohibition of torture and other ill-treatment, whilst addressing situations facing children in a variety of key contexts, ranging from criminal justice systems and armed conflict situations, to institutionalization and detention in the context of migration. The questions raised by the former Special Rapporteur's report and the array of innovative perspectives offered in response by the contributing authors to this volume illustrate a profound commitment to tackling the ongoing challenge of protecting the fundamental human rights of children everywhere.