CHAPTER 3

IMPLICATIONS OF INTERNATIONAL HUMAN RIGHTS LAW AND STANDARDS REGARDING DEPRIVATION OF LIBERTY OF CHILDREN

3.1 INTRODUCTION

The previous chapter has made clear that International Human Rights Law is relatively young. The recognition of the (legal position of the) individual deprived of liberty by the international community is even younger. The position of the incarcerated child was addressed for the first time in 1985 in the Beijing Rules and more thoroughly in 1989 and 1990, in the CRC and JDLs, respectively. Since then a number of initiatives have been developed elaborating further on the implications of the provisions of the CRC and the relevant UN resolutions, such as the 2006 UN Study on Violence against Children and the General Comment on juvenile justice (GC No. 10) adopted in 2007 by the CRC Committee. The previous chapter also showed that at the regional level the CRC structure and content is used as a framework of reference regarding children, including children deprived of their liberty.

One of the main objectives of this study is to address the implications of International Human Rights Law and Standards for children (potentially) deprived of their liberty (see Chapter 1). This chapter will systematically explore and analyze the various implications and arrange them according to subject.

In this regard, it is important to reiterate that this study primarily focuses on deprivation of liberty as part of the juvenile justice system. There are however multiple contexts in which children can be (and de facto are) deprived of their liberty; hence, the broad approach of article 37 CRC (see para. 2.7.3.4; see also chapter 1). The differences in context may have different implications. At the same time there may be consequences that affect children deprived of their liberty regardless of the context. In order to facilitate a better understanding of contextual differences and common characteristics, paragraph 3.2 will describe the most common contexts of deprivation of liberty first, followed by an analysis of the definition of deprivation of liberty under International Human Rights Law and Standards: when is a child deprived of his liberty or when is he merely limited in his freedom of movement? Finally, this section will pay attention to the common characteristics of deprivation of liberty, despite the differences in context. It is important to elucidate these common characteristics, because it may make this chapter (also) useful for the future determination of the implications of International
Human Rights Law for forms of deprivation of liberty outside the context of juvenile justice.

This chapter continues by addressing the implications of the general and specific principles of the CRC for the administration of juvenile justice and deprivation of liberty as part of it (para. 3.3). Subsequently, paragraph 3.4 addresses the relevant legal requirements concerning deprivation of liberty of children, primarily embodied in article 37 (b) and (d) CRC (para. 3.4). The legal requirements, such as the requirement of lawful and non-arbitrary deprivation of liberty, can be considered one of the main issues in the analysis of implications of International Human Rights Law and Standards. Paragraph 3.4 will also pay attention to procedural safeguards that are particularly relevant to the implementation of the legal requirements, such as the right to legal and other appropriate assistance and the right to challenge the legality of the deprivation of liberty.

The second main issue is the quality of treatment of children deprived of their liberty addressed in paragraph 3.5ff. This affects the legal status of children during their arrest, detention or imprisonment and revolves around the right to be treated with humanity, with respect for the child’s inherent dignity as a human being and in a manner that takes into account his specific needs as a child (art. 37 (c) CRC). After the introductory paragraph 3.5, paragraph 3.6ff will comprehensively analyze the legal status of the child deprived of his liberty under International Human Rights Law and Standards. This includes different aspects: the prohibition of torture and other forms of ill-treatment or ill-punishment (para. 3.6), some issues regarding separation of different categories of individuals deprived of liberty, including separation of children from adults (para. 3.7), administrative aspects of placement (para. 3.8), the (minimum) quality of and enjoyment of rights during deprivation of liberty (i.e. minimum living conditions of deprivation of liberty; para. 3.9) and the possibility of imposing disciplinary and other measures (of force or restraint) limiting the rights of a child deprived of his liberty significantly (i.e. measures to maintain order; para. 3.10). Paragraph 3.11 will subsequently address legal safeguards and remedies, such as the right to file complaints and submit requests, and inspection and monitoring of youth institutions.

After having addressed the quality of treatment of children deprived of their liberty, paragraph 3.12 will briefly focus on the realization of the objectives of deprivation of liberty as part of the juvenile justice system. This paragraph is strongly linked to paragraph 3.3 and aspects of daily life in the institutions (e.g. education; para. 3.9), but also addresses the means of reintegration specifically provided for by International Human Rights Standards.

Finally, after some additional remarks on States Parties’ actions and obligations in general regarding the implementation of International Human Rights Law and Standards at the domestic level (para. 3.13), this chapter will end with some general remarks (para. 3.14).
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

Throughout this chapter, the CRC framework (i.e. the CRC flanked by the Beijing Rules and JDLs) serves as the crucial source of Human Rights Law and Standards governing deprivation of liberty of children. The other general (non-child-specific) provisions of International Human Rights Law and Standards will play an important role in exploring the meaning and implications of the CRC provisions and related standards. Regional Human Rights Law and Standards will serve as supplementary points of reference and comparison.

3.2 Deprivation of Liberty of Children; Contexts, Definitions and Common Characteristics

3.2.1 Introduction

Deprivation of liberty of children is a general term for the limitation of a child’s fundamental right to liberty of the person, embodied in the general human rights conventions. As can be derived from the broad approach under article 37 CRC and other relevant provisions of International and Regional Human Rights Law and Standards (see paras. 2.7 and 2.8), there are different reasons for which children can be deprived of their liberty. The different reasons for deprivation of liberty, legitimate or not, are linked to different (legal) systems with different backgrounds, objectives and (legal) grounds. Contrary to popular thought, deprivation of liberty is not limited to the context of (juvenile) criminal justice only. Consequently, there are different forms of deprivation of liberty.

This paragraph will first pay attention to the different contexts in which children can be deprived of their liberty and regarding which International Human Rights Law and Standards may have implications (para. 3.2.2). Despite the focus of this study on deprivation of liberty in the context of juvenile justice, it is important to provide information regarding the other contexts, which also involve a substantial number of children globally. This can contribute to a better understanding of the scope of the implications presented in this chapter (see e.g. para. 3.7 regarding separation issues). In addition, it is of significance because the different systems in which deprivation of liberty takes place are often strongly related (e.g. juvenile justice, child protection and mental health care) and the distinctions are not always that clear; they are also connected by the substantial underlying issues, such as poverty, discrimination or social exclusion (see Chapter 1).

Paragraph 3.2.3 subsequently addresses the definition of deprivation of liberty under International Human Rights Law and Standards and tries to answer the questions of what constitutes deprivation of liberty (regardless of the context) and

1 Art. 9 (1) ICCPR; cf art. 5 ECHR, art. 7 ACHHR and art. 6 ACHPR. Note that the CRC does not mention the right to liberty of the person explicitly, but protects it through art. 37 CRC.
2 See, e.g. Cappelaere, Grandjean & Naqvi 2005, p. 34ff. See also Chapter 1.
when States are compelled to live up to the legal requirements set by international human rights treaties in conjunction with human rights standards and grant children the quality of treatment to which they are entitled.

Finally, this paragraph will provide an analysis of the common characteristics of all forms of deprivation of liberty of children, resulting in common implications and justifying the broad approach generally present in CRC and other human rights instruments (see para. 3.2.4).

3.2.2 Different Contexts of Deprivation of Liberty of Children

The first context in which deprivation of liberty can take place is juvenile justice. The most common types are (temporary) measures, arrest, police custody and pre-trial detention, or measures of disposition, such as imprisonment or other custodial sentences. Article 37 (b) CRC refers to these as ‘arrest, detention and imprisonment’. There are many forms of deprivation of liberty within the juvenile justice system, like police custody, house arrest (with or without electronic monitoring), placement in reform or training schools, boot or work camps, detention centres or (adult) prisons. The administration of juvenile justice is primarily governed by article 40 CRC, which has the preservation of public safety as its legitimate aim, while guaranteeing each (accused or sentenced) child with (due process) rights and taking into account the child’s specific needs. Arrest, detention or imprisonment should only take place in the context of this provision (see further para. 3.3).

The second context is the context of child protection in which deprivation of liberty can be a form of alternative care (art. 20 CRC). Article 20 CRC provides that if a child in its ‘own best interests’ cannot be allowed to remain in his family environment, he has the right ‘to special protection and assistance provided by the State’. The State responsibility in this regard implies that ‘alternative care’ must be ensured ‘in accordance with their national laws’. This can include ‘if necessary placement in suitable institutions for the care of children’. One of the elements that is relevant in this regard is the ‘desirability of continuity in a child’s upbringing’. Although, institutional care has not been defined, it is neither excluded nor is it

---

3 As mentioned in Chapter 1 this (unless stated otherwise) also covers children who should fall under the juvenile justice system (art. 40 CRC), but who are treated under the (general or adult) criminal justice system.

4 Cf art. 9 (1) CRC and art. 3 (2) CRC according to which ‘States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents (…) and, to this end, shall take all appropriate legislative and administrative measures’. One of these measures is alternative care.

5 The use of the verb ‘to ensure’ here implies that States Parties are under a positive obligation; Doek 2006, p. 28 with reference to the HRC GC No. 31.

6 Art. 20 (3) CRC mentions ‘foster placement, kafalah of Islamic law or adoption’ as other forms of alternative care.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

mentioned explicitly that institutional care may amount to deprivation of liberty. For example, the Dutch child protection law permits placement in a closed institution if required for the care and upbringing of the child, and if the child has serious behavioural problems, constituting a form of deprivation of liberty comparable to deprivation of liberty of children in conflict with the law. Additionally, the ECHR explicitly permits deprivation of liberty of a minor ‘by lawful order for the purpose of educational supervision’ (art. 5 (1) (d) ECHR). The other international and regional human rights conventions do not contain specific provisions for deprivation of liberty as a form of alternative care, which could imply that they considered these forms of deprivation of liberty as inappropriate. However, it is more likely that they do not prohibit them as long as they are lawful and not arbitrary (see, e.g. art. 9 (1) ICCPR and below).

There is a third context in which deprivation of liberty of children takes places: the context concerning child refugees or asylum seeking children. Children with such a status can for example be detained pending deportation or expulsion. There is no specific CRC provision addressing detention of these children, unlike for example the ECHR, which permits in article 5 (1) (f) deprivation of liberty 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’. Nevertheless, children who are refugees or seeking asylum fall under the protection of article 22 CRC and under the (general) protection of articles 37 CRC and 9 (1) ICCPR. They imply, _inter alia_, that this (temporary) detention must have a foundation in domestic law and may not be arbitrary. Based on article 2 CRC, States Parties must respect and ensure the rights of these children when they are within their jurisdiction and without discrimination of any kind. In particular, these children are entitled to ‘appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the [CRC] and in other international human rights and humanitarian instruments’ (art. 22 (1) CRC). Unaccompanied children are entitled to ‘the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the [CRC]’ (art. 22 (2) CRC). The CRC Committee has made the following remarks in its General Comment on unaccompanied or separated children: ‘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.

---

7 See art. 1:261 (1) jo. (5) Dutch Civil Code and Chapter 4.
8 _Cf_ Detrick 1999, p. 67ff.
9 _Cf_ art. 9 and 20 CRC.
and only to be used as a measure of last resort and for the shortest appropriate period of time.10

Accompanied immigrant children (for example by their family) fall under the protection of articles 9 and 20 as well. Their best interests and the continuity of their upbringing may require that they should be placed in alternative care, which, as mentioned before, may amount to deprivation of liberty. In essence, they are entitled to the same protection as any other child within a State Party’s jurisdiction.11

Another context of deprivation of liberty may be placement in institutions for (mental) health reasons, such as psychiatric problems, substance abuse, or (other) behavioural problems. Deprivation of liberty in this context could be a form of alternative care falling within the scope of article 20 CRC or a form of health care.12

The CRC does not specifically recognize the deprivation of liberty of this group of children, unlike for example the ECHR which provides for an explicit ground for deprivation of liberty of persons for health reasons, such as ‘the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants’ (art. 5 (1) (e) ECHR). The CRC contains two specific provisions on the mentally and physically disabled child and on the right of every child to enjoy the ‘highest attainable standard of health’ (art. 23 (1) CRC) and provides that ‘States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services’ (art. 24 (1) CRC). Regarding the first provision, explicit references are made to the dignity of these children, which implies that society may not ‘get rid of’ these children by placing them in closed institutions, and to the promotion of ‘self-reliance’ and to the ‘child’s active participation in the community’. These aspects must always be taken into account, including an assessment regarding the need for placement in a custodial setting.

Finally, the group of political child prisoners should be mentioned here – deprivation of liberty in a political context. There are children detained for political reasons, either directly or indirectly (e.g. related to political views and/or activities of their parents or family). Detention or imprisonment of children related to counter-terrorism activities could also be regarded as part of this context.13 Political child prisoners are often fully abandoned to the mercy of the public authorities. The detention or imprisonment of this group of children often is pragmatic, arbitrary or

10 GC No. 6, para. 61; see also para. 2.7.3.4. Cf GC No. 6, paras. 39 and 40 on care and accommodation arrangements (art. 20 and 22 CRC).
11 Art. 2 (1) CRC. This also has implications for the situation in which a child who is a refugee or seeking asylum is detained together with his family.
12 There are jurisdictions that allow deprivation of liberty of children under a treatment order, as a penal measure (e.g. in the Netherlands; Chapter 4).
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

unlawful and frequently leads to uncertainty for the children and their families. Moreover, the specific needs of these children are often disregarded. There is a strong connection between deprivation of liberty of children in this political context and that under the justice system. As long as the political reasons for their deprivation of liberty fall within the scope of the justice system, their confinement should be controlled by the international legal provisions regarding juvenile justice.

Despite the different contexts, deprivation of liberty is often approached exclusively in relation to the juvenile justice system. At least, it is in this context that deprivation of liberty of children has been given the most attention. This is also visible in provisions of International Human Rights Law or Standards. It can neither be regarded as surprising nor inappropriate taking into account that deprivation of liberty within the scope of juvenile justice is easier to recognize (i.e. arrest, detention and imprisonment) and generally is regarded (and accepted) as a form to combat (juvenile) delinquency and secure public safety. This is unlike the large variety of other forms of institutional placements, the characteristics of which are not always clear and often take place in a (presumed) child welfare context. However, these forms of institutionalization may very well amount to deprivation of liberty and affect large numbers of children as well, youths whose rights are not always fully respected (see, e.g. the UN Violence Study as highlighted in Chapter 1). In light of the broad approach of article 37 CRC, this is hard to accept. The protection of these children starts with the recognition that they, too, are deprived of liberty.

---

14 See, e.g. claims made by Defence for Children International, Palestine Section before the CRC Committee on 29 September 2006, concerning *inter alia* 4000 Palestinian children arrested by the Israeli army in six years, since the beginning of the second intifada in 2000 (www.dci-pal.org - last visited 1 June 2008); cf Cook, Hanieh & Kay 2004.

15 The presented list is not meant to be exhaustive. A related issue is the issue of children of imprisoned parents.

16 It is, e.g. argued that the CRC Committee strongly leans to the juvenile justice context when it comes to deprivation of liberty; Schabas & Sax 2006, p. 61. Indeed, the CRC Committee has, e.g. prepared a general comment on juvenile justice including deprivation of liberty, while it initially intended to draft two separate comments on both issues.

17 See, e.g. art. 37 (b), second sentence, CRC as discussed in para. 2.7.3.4. Cf e.g. art. 9 and art. 10 ICCPR that start with a broad scope but limit it in the following paragraphs to the criminal justice system. See also the JDLs which represent a broad approach according to its definition of deprivation of liberty, but still have strong ‘juvenile justice flavour’; see, e.g. rule 1: ‘The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort’; see also e.g. rules 2 and 5 and 66 JDLs.
3.2.3 Definition of Deprivation of Liberty

3.2.3.1 Introduction

Taking into account the potential contextual differences regarding deprivation of liberty of children and the intention of the international community to protect all children deprived of liberty, it is important to address the question when detention, imprisonment or any other form of custodial placement amounts to the child’s deprivation of liberty. What are the crucial elements of deprivation of liberty and when is a child entitled to the protection provided by article 37 CRC and the other relevant instruments of Human Rights Law and Standards?

In an attempt to answer these questions the following subparagraphs will analyze the relevant human rights instruments on how deprivation of liberty is defined (explicitly or implicitly) and which elements constitute deprivation of liberty.

3.2.3.2 ICCPR

Under the ICCPR the right to liberty of the person (art. 9 ICCPR) must be interpreted narrowly and it must be distinguished from the right to liberty in general. The latter covers a much broader set of rights, including the right to liberty of the person, but also for instance freedom from slavery or freedom of movement. The right to liberty of the person under article 9 ICCPR ‘relates only to a very specific aspect of human liberty: the freedom of bodily movement in the narrowest sense’.

Article 9 ICCPR permits arrest or detention (i.e. forms of deprivation of liberty) provided that it is not unlawful or arbitrary. Article 10 (1) ICCPR provides that all individuals deprived of their liberty are entitled to be treated with humanity and with respect for their inherent dignity. As mentioned in Chapter 2, the HRC has chosen a broad approach concerning article 9 ICCPR. In its HRC GC No. 8 it has pointed out that article 9 generally ‘applies to all persons deprived of their liberty by arrest or detention’ and ‘to all deprivations of liberty, whether in criminal cases or other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc’ (para. 1). According to Nowak the HRC stands for ‘a relatively broad scope of applicability’ of the right to liberty of the person as embodied in article 9 ICCPR. The same broad approach applies to the scope of article 10 (1) ICCPR.

The ICCPR does not define the terms deprivation of liberty, arrest or detention. Joseph, Schultz & Castan conclude with reference to HRC’s communications
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

Celepli v. Sweden (No. 456/1991) and Karker v. France (No. 833/1998) that ‘[i]t seems that article 9 (…) applies only to severe deprivations of liberty, such as incarceration within a certain building (e.g. one’s home, prison, psychiatric institution, immigration detention center), rather than restrictions on one’s ability to move freely around a State, or an even smaller locality’.22

Nowak argues that ‘[a]n interference with personal liberty results only from the forceful detention [Italic – tl] of a person at a certain narrowly bounded location [Italic – tl], such as a prison or some other detention facility, a psychiatric facility, a re-education, concentration or work camp, or a detoxification facility for alcoholics or drug addicts, as well as an order of house arrest’. He adds that ‘[a]ll less grievous restrictions on freedom of bodily movement, such as limitations on domicile or residency, exile, confinement to an island or expulsion from State territory, do not fall within the scope of the right to personal liberty but instead under freedom of movement pursuant to [a]rts. 12 and 13’.23

Thus, there seems to be a gradual difference between deprivation of liberty (covered by arts. 9 and 10 ICCPR) and freedom of movement (covered by arts. 12 and 13 ICCPR), in terms of a limitation to leave a certain fixed (and arguably smaller) location. Determining factors for the assumption of deprivation of liberty are the fact that an individual is forced to stay in a strict bound location. Forced detention seems to imply that the detention must be ordered against or regardless of the individual’s will; a strict bound location seems to aim at an environment limited in size and clearly demarcated, for example but not necessarily because it is secured and fenced off. It does not seem to exclude a (semi-) open institution from being a place where someone can be deprived of his liberty.24

3.2.3.3 ECHR

The ECHR embodies the right to liberty in article 5, referring to the physical liberty of the person, the ‘individual liberty in its classical sense’25 and provides for an exhaustive list of permitted limitations, related to different contexts. The ECtHR has developed jurisprudence on the question what constitutes deprivation of

21 In its General Comment No. 28, Equality of rights between men and women (article 3), 29/03/2000, CCPR/C/21/Rev.1/Add.10, (HRC GC No. 28), para. 14 the HRC urges States Parties, with regard to art. 9 ICCPR, to ‘provide information on any laws or practices which may deprive women of their liberty on an arbitrary or unequal basis, such as by confinement within the house’ with reference to HRC GC No. 8, para. 1.
24 The Standard Minimum Rules do not provide for more clarity. They do not contain a definition of deprivation of liberty; the applicability is essentially determined by categories of prisoners (see rules 4 and 5).
When do limitations of the fundamental right to liberty of the person amount to deprivation of liberty and consequently fall within the protection of article 5 ECHR?27

The question whether a person is deprived of his liberty is determined by the individual’s concrete situation and ‘account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question’.28 In addition, the possibilities to maintain social contacts with family, other inmates or staff are relevant.29 In the case H.L. v. UK the ECtHR found decisive (‘key factor’) ‘that the health care professionals treating and managing the applicant exercised complete and effective control over his care and movements from the moment he presented acute behavioural problems’.30

In essence, the difference between deprivation of liberty and restriction upon liberty (governed by art. 2 of the Protocol No. 4 to the ECHR) is ‘merely one of degree or intensity, and not one of nature or substance’.31

As is the case under the ICCPR, it is difficult to draw a sharp line between deprivation of liberty under article 5 ECHR and mere restriction of liberty or freedom of movement. The ECtHR assumes there merely is a gradual difference, not a natural or substantive difference. The ECtHR has provided for a number of factors (sort, duration, effects, manner of execution/implementation, degree of supervision, possibilities to keep social contact, order or sentence that are of relevance for judging whether a person is deprived of liberty under article 5 ECHR and it must be based on the circumstances of the case. As a consequence, placement
in a (semi-)open institution can also amount to deprivation of liberty if the regime inside or length of placement give reason to. However, a clear definition cannot be found under article 5 ECHR. It remains unclear which factors are decisive, although the ECtHR seems to have attributed significant value to the degree of control that can be executed over an individual.

One could argue that the more the nature of deprivation of liberty is involuntary, the more it is likely that it will amount to deprivation of liberty (cf the element of ‘force’ recognized as relevant under the ICCPR). However, according to the jurisprudence under the ECHR, a placement with consent of the individual concerned may amount to deprivation of liberty protected by article 5 ECHR. According to the ECtHR, ‘the right to liberty is too important in a “democratic society” within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention’ and that ‘[d]etention might violate Article 5 (…) even although the person concerned might have agreed to it’. That the right to liberty is too important in democratic society is especially relevant ‘when it is not disputed that [a] person is legally incapable of consenting to, or disagreeing with, the proposed action [read: placement in a hospital for treatment]’. This can be regarded as particularly relevant to deprivation of liberty of children (cf arts. 5 and 12 CRC), but the jurisprudence of the ECtHR provides for little child-specific guidance in this regard.

In general, this raises the question regarding the competence of the parents of the child under their parental rights. For example, can a parent consent with (or even take the initiative to) a placement of his or her child in an institution, resulting in the child’s deprivation of liberty? This issue was addressed by the ECtHR in Nielsen v. Denmark. In this case a twelve year old boy was admitted by his mother to the Child Psychiatric Ward of a State hospital. He stayed in this hospital for 5 and a half months to receive therapy for his ‘neurosis’, while he was not mentally ill. The boy challenged this placement, but the ECtHR found article 5 ECHR not applicable. The ECtHR ruled that the child’s placement was ordered by his mother, who was the holder of parental rights (protected under article 8 ECHR), and could therefore not be regarded as a State’s responsibility, a general requirement for the applicability of article 5. The second reason for the inapplicability of article 5 was that the ECtHR found that the placement did not amount to deprivation of liberty;

---

32 ECtHR, Judgment of 18 June 1971, Series A. No. 12 (De Wilde, Ooms and Versyp (‘vagrancy’) v. Belgium), para. 65.
35 ECtHR, Judgment of 28 November 1988, Series A. No. 144 (Nielsen v. Denmark); cf e.g. KilKelley 1999, p. 34ff.
Chapter 3

the restrictions were ‘not much different from those which might be imposed on a child in an ordinary hospital’ (para. 70). Thus, the ECtHR held that both the fact that the child’s (custodial) placement was ordered by his mother and the judgment that the placement did not constitute deprivation of liberty, led to the conclusion that the hospitalization did not fall within the scope of article 5 (para. 73).

In this case the European Commission disagreed with the ECtHR *inter alia* about the nature of the detention. It concluded that the boy’s placement constituted deprivation of liberty within the scope of article 5, because the police were used to track down the boy and bring him back to the hospital after his disappearance. The Commission also took another position than the ECtHR on the question whether the placement fell under the State responsibility or not. The Commission argued that the State was responsible for the placement because it was the Chief Physician of the Child Psychiatric Ward, a State hospital, who had given the decisive consent that led to the admission of the boy and determined the conditions under which he was placed, a position the ECtHR explicitly declined. Furthermore, the Commission argued in this specific case, in which the child in question was ‘a normally developed 12 year old child who was capable of understanding his situation and to express his opinion clearly’, that the parental consent could not dismiss the State of its responsibilities under article 5 ECHR. In light of this, the Commission explicitly paid attention to the right of minors to give their opinion in matters like these. It stressed that, as a principle, greater weight must be attributed to the opinion of the child as he grows older and matures. The ECtHR did not share the Commission’s opinion and found that this child ‘was still of an age at which it would be normal for a decision to be made by the parent even against the wishes of the child’. Unsurprisingly, the Court’s approach to this case to a large extent aimed at analyzing the implications of the mother’s parental authority and family life as protected by article 8 ECHR.

Although, the ECtHR held that the child’s (custodial) placement in the psychiatric ward did not constitute deprivation of liberty and therefore did not fall within the scope of article 5 ECHR, it failed to point out which factor (the mother exercising her parental authority and/or the placement not amounting to deprivation of liberty) was decisive or whether both factors should be seen as cumulative.

---

37 Kilkelly 1999, p. 36 with reference to European Commission, *Ibid.*, para. 125-126. This concept was adopted later in the CRC.
39 Kilkelly states that ‘[t]he seven judges who shared the minority view concluded that the nature of the detention, including the fact that the applicant, who was not mentally ill, had been placed in a psychiatric ward, was decisive in relation to whether the deprivation of liberty fell within the scope of Article 5’; Kilkelly 1999, p. 37.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

The *Nielsen* judgment does not rule out the possibility that parents can deprive their child of their liberty (under art. 5 ECHR) by exercising their parental authority. In addition, the ECtHR attributed particular weight to the mother’s considerations and reasons for placement and refused to take into account the express wishes of the twelve year old child, who was capable of understanding the situation and expressing his views, at least according to the European Commission. However, it does not mean that such placement under parental authority cannot fall under the protection of article 5 ECHR either. On the contrary the ECtHR seems to leave open the option that a child’s placement by his parents can fall under the protection of article 5 (para. 64). Particularly, in conjunction with earlier jurisprudence, (see *De Wilde, Ooms & Versyp v. Belgium* and *H.L. v. UK*) the conclusion seems to be justified that if an individual is legally incapable, such as a young or immature child (art. 5 and 12 CRC), the threshold for the assumption that he is deprived of his liberty should not be too high, and in any case lower than for an individual who is legally capable.

3.2.3.4 CPT and EPR

The CPT provides a more practical approach regarding the assumption of deprivation of liberty, although it actually is, in light of the scope of its mandate (art. 1 European Convention for the Prevention of Torture), bound by the approach

---

40 The position of the ECtHR led to a critique by *inter alia* Van Bueren who argues that ‘[t]he majority decision of the ECtHR in *Nielsen* leaves children who are deprived of their liberty at the wishes of one or both parents, but against their own, wholly unprotected’; Van Bueren 1995, p. 213. According to Van Bueren the Nielsen case shows that ‘[a] lack of awareness of the rights of children deprived of their liberty (…) is evident at the European regional level’; Van Bueren 1995, p. 212. Kilkelly argues that ‘it is arguably of greatest concern that parental consent to detention, in the face of complete opposition by a child, can cancel out the protection which Article 5 offers’; Kilkelly 1999, p. 37. She also points at the fact that the ECtHR did, however, warn that the parental responsibility was not unlimited. It was considered to be the State’s responsibility to provide children with protection against potential abuse of parental authority. Furthermore, the ECtHR raised questions regarding the length of the placement of five and a half months, given the fact that the child was not mentally ill; Kilkelly 1999, p. 37. Murdoch also uses this case as an example of ‘excessive recognition’ of ‘parental interests in determining the upbringing of a child’ must play some part in assessing complaints brought by children’. More in general he remarks that ‘there is (…) a strong sense in the case law of the former Commission and of the [ECtHR] that these bodies have for long adopted an interpretation which looks at [ECHR] guarantees through adult eyes rather than from the perspective of the child, particularly in relation to what may be described as “quasi-detention”, situations in which children are told that they have not been strictly deprived of their liberty within the meaning of Article 5, but which nevertheless appear to them to have involved a loss of freedom’; Murdoch 2006, p. 314. See also European Commission, Decision of 20 May 1996, Appl. No. 23558/94 (*A.L.H., E.S.H., D.C.L., B.M.L. and M.E. v. Hungary*); in this case children were placed in a children’s home, given up by their natural mother for adoption, but were not regarded as being deprived of their liberty, even though it was the public authorities that had taken action in order to protect the children’s welfare; see Murdoch 2006, p. 315.
of the ECtHR under article 5 ECHR. Murdoch argues that the CPT ‘takes a less technical approach in determining whether an individual is deprived of liberty: visits to places of detention proceed upon the basis that individuals are held there against their will [Italics – tl], and if doubt arises in this regard, the matter is tested by reference not to legal status but to practical reality’.41 ‘The CPT’s mandate refers to persons deprived of liberty rather than to places of detention’, according to Murdoch.

The EPR do not provide for a definition of deprivation of liberty. Their applicability is essentially determined by the location where prisoners are accommodated. As mentioned in Chapter 2, their scope is in principle limited to individuals (prisoners) remanded in custody or sentenced to imprisonment and placed in prisons, that is the appropriate institution for these categories of prisoners (rules 10.1 and 10.2). In addition, the EPR are applicable to the categories of prisoners that are not placed in prisons and to other individuals deprived of liberty in prisons for other reasons (rule 10.3).42

3.2.3.5 ACHR, Banjul Charter and ACRWC

The jurisprudence of the Inter-American Court and Commission does not provide much guidance concerning the question what constitutes deprivation of liberty under article 7 ACHR and articles I and XXV of the American Declaration. Clear however is that the scope of these articles is not limited to deprivation of liberty under the criminal justice system. It includes detention of individuals who are mentally ill or have infectious diseases. In addition, these provisions are meant to protect individuals against deportation and extradition, which extends the scope of the provisions considerably.43

In the African Human Rights System neither the Banjul Charter, nor the ACRWC provide for definitions of deprivation of liberty, although article 17 (2) (a) ACRWC prohibits torture and other forms of inhuman or degrading treatment or punishment of a child ‘who is detained or imprisoned or otherwise deprived of his/her liberty’, which represents a broad scope of the concept of deprivation of liberty. The Special Rapporteur on Prisons and Conditions of Detention in Africa has a mandate similar to that of the CPT, that is ‘to examine the situation of persons deprived of their liberty’. It stands to reason that the Special Rapporteur follows a similar ‘practical approach’ regarding the assumption of deprivation of liberty. According to Viljoen the mandate of the Special Rapporteur ‘clearly extends to

41 Murdoch 2006, p. 79
42 E.g. immigration detainees placed in prisons or pre-trial detainees or prisoners (temporarily) housed in a police station or participating in activities outside the prison; see commentary to rule 10 (see para. 2.8.2).
43 Davidson 1998, p. 234 with further reference to inter alia Inter-American Court, Judgment of 29 July 1988, Series C. No. 4 (Velásquez Rodríguez). Davidson blames the court’s and commission’s jurisprudence to be ‘not fully reasoned nor fully analytical’.
other detention centers [than prisons], such as reform schools, police “holding cells”, and clandestine detention centers’.

Nevertheless, it is unclear how deprivation of liberty should be defined under both the African and Inter-American human rights instruments.

3.2.3.6 CRC and JDLs

The CRC does not explicitly mention the right to liberty of the person. Neither can a definition of deprivation of liberty (nor of arrest, detention or imprisonment as used in art. 37 (b) CRC) be found in the CRC. Since article 37 CRC is closely related to article 9 ICCPR, it seems defensible to connect it with the position of the HRC (see above).

The JDLs, however, do provide for a definition of deprivation of liberty of children – a definition to which the CRC Committee has explicitly referred in its Guidelines for Periodic Reports as the definition that should be used under article 37 (b) ff CRC. According to rule 11 (b) JDLs, 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 this person is not permitted to leave at will [Italic – tl], by order of any judicial, administrative or other public authority [Italic – tl]”. As mentioned in Chapter 2, this is a broad definition of deprivation of liberty, which covers the (custodial) placement of children in all kinds of different facilities, such as homes for child offenders, residential facilities for victims of drug abuse, detention centres, closed or semi-open facilities for children in need of supervision or protection, and detention centres for immigrants.

In addition, rule 30 JDLs provides that open detention facilities (i.e. with no or minimal security measures) should be established, which indicates that placement of children in such facilities are covered by the JDLs as well.

Thus, it is neither the level of security (closed rather than (semi-)open), nor the regime of the facility that determines whether a child is deprived of liberty or not. It is the public instruction (an explicit order) that a child should stay in the facility and that he is not permitted to leave if he wants. This definition corresponds with key elements of the approach recognizable under the ICCPR and ECtHR. Compared to deprivation of liberty under article 5 ECHR, there are, however, two significant differences. First, the JDLs do not make the definition of deprivation of liberty dependent on various factors related to the regime or the level of dependency. Second, placements in an institution on the basis of a non-public order (e.g. by the child’s parents) are not covered by the JDLs definition, while under the ECtHR’s

---

44 Viljoen 2005, p. 132.
45 General Guidelines for Periodic Reports, CRC/C/58, para. 138.
46 Defence for Children International 1990, p. 15; see earlier para. 2.7.3.5.
47 This dependency on will presumes that the child is (made) aware of the fact that he is not permitted to leave.
According to Schabas & Sax ‘a closer examination of the [CRC] Committee’s practice shows a wide range of cases falling under the scope of deprivation of liberty’. They provide examples from the Committee’s Concluding Observations, such as the arrest and detention of street children, preventive detention of children or protective custody of children under twelve, placement of children in corrective labour institutions, detention of children at the Majesty’s or the President’s pleasure, children institutionalized for behavioural problems, secure training orders and ‘correction paternelle’, which is the placement of children in prison upon parental request. In particular, the last form of deprivation of liberty could indicate that the CRC Committee finds the JDLs definition too restrictive, that is that it should apply to institutionalization initiated by the child’s parents as well.

3.2.3.7 Conclusion

Finding a clear and unambiguous definition of deprivation of liberty under International Human Rights Law and Standards is not an easy task. None of the human rights treaties, nor their monitoring or judicial bodies provide for clear guidance on the decisive elements of deprivation of liberty. The JDLs are the only human rights instrument that does provide a definition. It considers any arrest, detention, imprisonment or any other custodial placement of a child in a particular (private or public) setting as a form of deprivation of liberty, provided that this placement is based upon an order of a public authority and that the child is not permitted to leave at will. The level of security (closed or (semi-)open), the regime and the level of dependency are irrelevant. The CRC Committee has referred to the JDLs definition as the guiding definition under article 37 CRC and its elements generally correspond with the approaches recognizable under the ICCPR and ECHR; the other relevant instruments provide no guidance at all.

The JDLs thus provide useful guidance regarding the definition of deprivation of liberty of children. Crucial in this definition is that the order must be issued by

---

49 Schabas & Sax argues that the fact that the CRC Committee criticized Haiti for permitting the imprisonment of children under the ‘correction paternelle’ without a court order (under art. 37 (d) CRC), implies that it stretched the scope of deprivation of liberty to include custodial placement orders by parents (i.e. private actors), which are not covered by the JDLs’ definition. They support this approach by arguing that ‘[e]ven cases of restriction of liberty within the family context (e.g. as a disciplinary measure) should fall under the scope of safeguards for deprivation of liberty, including the prohibition of arbitrariness and the principle of last resort’; Schabas & Sax 2006, p. 62-63.
50 As mentioned in para. 2.8.2.6, the draft European Rules for Juvenile Offenders Subject to Sanctions or Measures link up with the JDLs definition (see draft rule 21.5). Although the scope of these draft rules is limited to juvenile offenders, it has been broadened by including non-penal
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

a public authority, which in principle rules out that a custodial placement instigated by the child’s parents or another private actor (not acting in public service) is protected by the JDLs. This is a limited approach, which may not sufficiently protect children against their parents’ intention to institutionalize them. In this regard it is interesting to note that there are indications that the CRC Committee is in favour of bringing these forms of institutionalization within the scope of the definition as well.51

Despite the unclear position of deprivation of liberty it is certain that deprivation of liberty of children must be interpreted broadly to cover different forms with different contexts. Regarding arrest, detention or imprisonment as part of the juvenile justice system there will hardly be any debate regarding the question whether a child is deprived of his liberty (as protected by International Human Rights Law). This may be different regarding other forms of institutional placement. Still, the intention of International Human Rights Law is clear: the deprivation of liberty of a child should not be taken lightly and should not deprive children of the legal protection to which they are entitled.

3.2.4 Three Common Characteristics of Deprivation of Liberty

Despite the differences in context, for the constitution of deprivation of liberty the context is not decisive. The instruments of International Human Rights Law and Standards, as analyzed in this study, can have different implications for deprivation of liberty in the context of juvenile justice than for, for example, deprivation of liberty as a measure of child protection. Still, all deprivations of liberty concerning children, regardless of their background, have a number of characteristics in common (i.e. consequences of the decision to deprive a child of his liberty regardless of the context). These are: 1. placement in a setting that prevents the child from leaving at will, 2. separation from the family, particularly parents, and 3. deprivation of liberty being a State intervention infringing the child’s individual rights and the rights of his family, which places the State under specific positive obligations.

1. Prevention from Leaving at Will

First, an institution where a child is deprived of his liberty is generally designed to keep the child there and to prevent him from escaping or evading, and to provide for a secure environment to protect both society and the child, preferably, but not always both. Often this environment is created and upheld by the use of bars, high

institutions where juvenile offenders are deprived of their liberty in the context of juvenile justice (i.e. welfare or mental health institutions).

Note that the ECtHR, despite its reluctant position regarding the recognition of custodial placement of a child by his parents as deprivation of liberty under art. 5 ECHR, has not fully excluded that a child in such situation is protected by this provision.
walls, barbed wire, cameras and locked doors. Due to all these precautions a (closed) institution lacks transparency. Thus, a child deprived of liberty finds himself in a situation that is not transparent to the outside world and which makes him dependent upon the administration and the regime in the institution, a dependency which makes the child particularly vulnerable to abusive practices. Other institutions may be more open, but may lock the doors or will inform the police as soon as a child leaves without permission or does not return after an excursion or visitation outside the institution. Furthermore, the placement in an open setting can be made dependent on certain conditions, violation of which will result in placement in or transfer back to a closed facility. While it is likely that an open institution is more transparent, this certainly is not guaranteed. Moreover, the child’s particular dependency remains, along with its vulnerable position.

2. Separation from Family and Parents
Second, a child deprived of liberty is in principle separated from its parents (and/or family). This implies a significant infringement upon a child’s (and family’s) right to family life, protected by articles 16 CRC and 9 CRC.52 According to article 9 CRC every child has the right not to be separated from his or her parents against their will.53 The one and only exception is ‘when the competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that separation is necessary for the best interests of the child’ (art. 9 (1) CRC). Article 9 CRC provides two examples which may require separation, namely separation in the case that the child is or has been abused or neglected by the parent(s) or in a case where its parents are living separately and a decision regarding the child’s place of residence must be made. Deprivation of liberty as a form of alternative care undoubtedly falls within the scope of article 9 CRC. There is however no reason to believe that other forms, like for example arrest, detention or imprisonment as part of the juvenile justice system do not.54 The child’s separation from his parents places States Parties under the obligation to protect and facilitate the child’s right to maintain personal relations and direct contact with his parents (art. 9 (3) and art. 37 (c) CRC) and to provide information on their reciprocal whereabouts.55

52 See also, e.g. art. 8 ECHR.
53 According to Doek ‘[t]he text does not seem to cover a separation against the will of the child alone’, however that ‘it can be concluded [based on his observations of the drafting process] that States Parties should provide for an adequate remedy for the child in case he or she is – as the result of a decision of her/his parents – separated from her/his parents against her/his will’; Doek 2006, p. 22. One can think, e.g. of the situation in which parents agree that their child should be placed in an institution. Cf art. 19 ACRWC.
54 This presumption is supported by art. 9 (4), which mentions detention and imprisonment on behalf of the State explicitly in light of the State’s obligation to provide both the child and parents with information on their whereabouts; cf art. 37 (c) CRC and Doek 2006, p. 30-31. Cf rule 18.2 Beijing Rules.
55 See earlier para. 2.7.4.4.
3. States Parties’ Obligations

Finally, the third common characteristic of deprivation of liberty is that it places States Parties under certain obligations. The first obligation that should be mentioned is the obligation ‘to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislation and administrative measures’ (art. 3 (2) CRC). This duty of care placed upon States Parties has general implications for the care and protection of all children within their jurisdictions (art. 2 CRC). However, it also has implications for the care and protection of children in specific situations such as children in institutions, being deprived of their liberty. This general duty of care includes a number of more specific implications which will be addressed further below (see also para 3.13). However, it is important to stress that this general duty of care is placed upon States Parties because they are obliged to take care of all children within their jurisdiction.

In addition, States Parties must ‘ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision’ (art. 3 (3) CRC).56 The latter obligation is of particular importance regarding the institutions in which children are deprived of liberty. The State must provide safe and healthy conditions in which the care and protection of the child can be guaranteed. It must also ensure that an institution has a sufficient number of well trained and qualified staff and that the daily practice in institutions is supervised by a competent body (see also para. 3.11).

Finally, it is important to stress, that despite the many different contexts in which there may be reasons to deprive children of their liberty, these children still fall under the responsibility of the State.57 The State has a general duty of care implying that it must uphold and serve the general principles of the CRC, and acknowledge that a child deprived of liberty still is entitled to all rights under the CRC. It must guarantee that the enjoyment of these rights is only limited as far as necessary by the special condition the child is in, and in full accordance with the principle of the best interests of the child. In addition, there are more specific (positive) obligations of the State, such as education and health care services, which will be addressed in the following paragraphs of this chapter.

56 Cf Detrick 1999, p. 94-95.
57 Regardless of who or which (privatized) organization is responsible for the implementation of the order of the public authority that leads to deprivation of liberty.
3.2.5 Conclusion

This paragraph has addressed the variety of contexts in which children can be (and de facto are) deprived of their liberty. Not without limitation, the following groups can be identified: deprivation of liberty in a juvenile justice context, a context of child protection (i.e. alternative care), a context of immigration policies and asylum procedures, a (mental) health context and, finally, a political context (including the context of counter-terrorism activities). The different contexts of deprivation of liberty have different backgrounds and different objectives. Consequently, International Human Rights Law and Standards have to a certain extent different implications. At the same time the distinctions between the different contexts are not always clear; some are strongly interrelated.

This paragraph also addresses the question as to what constitutes deprivation of liberty. The answer to this question is not easy. International and regional human rights law has generally opted for a broad scope of applicability, but for a restrictive and classical interpretation of the definition of deprivation of liberty. In particular, under article 5 ECHR the distinction between deprivation of liberty and mere restriction of liberty is dependent on various factors: which does not provide for a clear answer in general. Furthermore, the ECtHR has proven to be reticent regarding the situation in which a child is deprived of liberty by (consent of) his parents while exercising their parental rights.

However, regarding children in particular, a clear definition can be found in the JDLs, which must be used for the interpretation of article 37 CRC. According to rule 11 (b) JDLs 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 this person is not permitted to leave at will, by order of any judicial, administrative or other public authority’. This definition should be regarded as particularly useful regarding deprivation of liberty of children.

Besides a general definition, the different categories of deprivation of liberty share three general characteristics: three consequences of the deprivation of a child’s liberty, regardless of the reason or context. First, a child deprived of liberty finds himself in a situation that is not transparent to the outside world and which makes him dependent upon the administration and the regime in the institution, a dependency which makes the child particularly vulnerable to abusive practices. Second, deprivation of liberty of the child implies the child’s separation from his parents and family. It significantly limits his (and his family’s) right to family life and to parental care. Finally (and consequently), deprivation of liberty of a child places States Parties under (positive) obligations, revolving around both the objectives of the deprivation of liberty and the State’s general duty of care for children placed in institutions on the basis of an order of a public authority. The
implications of these general (common) characteristics will be addressed in the following paragraphs of this chapter.

Despite the broad definition and variety of contexts of deprivation of liberty, this study focuses on deprivation of liberty of children in the context of juvenile justice. The key forms of deprivation of liberty in the context of juvenile justice are: arrest, police custody, pre-trial detention and imprisonment.58

3.3 Deprivation of Liberty of Children in the Context of Juvenile Justice: General and Specific Principles

3.3.1 Introduction

When addressing the implications of International Human Rights Law and Standards for deprivation of liberty of children in the context of juvenile justice one should first look at the general principles of the core legal instrument, the CRC, as well as at the specific provision governing the administration of juvenile justice (art. 40 (1) CRC) and deprivation of liberty (art. 37 (b) and (c) CRC).

As mentioned in Chapter 2, the CRC Committee has identified four general CRC principles, embodied in four articles of the CRC (GC No. 5, para. 12): the principle of non-discrimination (art. 2 CRC), the principle that every child has the inherent right to life, survival and development (art. 6 CRC), the principle of every child’s right to participation (art. 12 CRC) and the principle of the best interests of the child (art. 3 CRC). These principles in conjunction with article 40 CRC serve as the foundation for the treatment of children within the juvenile justice system and consequently affect deprivation of liberty as part of it.59 According to the CRC Committee, the overall aim of juvenile justice system, namely ‘the preservation of public safety’ is best served ‘by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in the CRC’ (GC No. 10, para. 14).

This paragraph explores the implications of both the CRC principles (para. 3.3.2) and article 40 CRC (para. 3.3.3) and serves as an introduction to the other more specific paragraphs of this chapter. It will also pay particular attention to the minimum age of criminal responsibility, which in essence determines the minimum age for deprivation of liberty (para. 3.3.4).

58 For definitions see Chapter 1.
59 See also the CRC Committee in GC No. 10, para. 5.
3.3.2 General Principles

3.3.2.1 Non-discrimination

The principle of non-discrimination (art. 2 CRC) calls for equal treatment of children in conflict with the law. States Parties are under the (positive) obligation to take ‘all necessary measures to ensure’ this equal treatment and particular attention must be given to ‘de facto’ discrimination and disparities, which may be the result of a lack of a consistent policy and involve vulnerable groups of children, such as street children, children belonging to racial, ethnic, religious or linguistic minorities, children who are indigenous, girl children, children with disabilities and children who are repeatedly in conflict with the law (recidivists)’ (GC No. 10, para. 6). This remark is of particular importance for deprivation of liberty of children, since arrest and detention have proven to be used as measures to clean streets and to restore public order, while affecting the above mentioned groups disproportionately.

The prevention and combating of discrimination in this regard requires for example appropriate training of professionals (e.g. police and law enforcement personnel) and ‘the establishment of rules, regulations or protocols which enhance equal treatment of child offenders and provide redress, remedies and compensation’ (GC No. 10, para. 6).

The CRC Committee points to the discriminatory consequences that the juvenile justice system can have, such as discrimination regarding access to education or the labour market (para. 7). These have implications for the support a child should receive when re-entering society (cf art. 40 (1) CRC; see also rules 79 and 80 JDLs).

Furthermore, the CRC Committee strongly recommends the abolition of ‘status offences’, offences often related to children’s psychological or socio-economic problems, resulting in vagrancy, truancy or runaways and particularly affecting girls and street children. These offences would not be considered as an offence if committed by adults, but often lead to widening the net of the juvenile justice system, including arrest, detention and imprisonment. The CRC Committee considers this a form of discrimination between children and adults, which should be abolished (GC No. 10, para. 8). In conjunction with the assumed relation

---

60 See GC No. 10, paras. 6-13.
61 See, e.g. Inter-American Commission, Case 11.491, Report No. 41/99, 10 March 1999 (Minors in Detention v. Honduras). See also Hinton Hoytt et al. 2002 on racial disparities in juvenile detention in the US, also referred to as Disproportionate Minority Confinement (DMC). Cf the Concluding Observations of the Committee on the Elimination of Racial Discrimination regarding the US, in particular para. 20ff; CERD/C/USA/CO/6 (8 May 2008).
62 This also implies that States should conduct ‘public campaigns emphasizing [these children’s] right to assume a constructive role in society’ (GC No. 10, para. 7).
between the juvenile justice system and stigmatization, victimization and criminalization of the child, the CRC Committee refers to article 56 of the Riyadh Guidelines which calls for an abolition of status offences in order to prevent this negative impact of the justice system. These remarks are also of significance for the requirement of the use of arrest, detention or imprisonment as measures of last resort (art. 37 (b) CRC; see para 3.4). Furthermore, the CRC Committee considers that behaviour such as vagrancy, roaming the streets and runaways should be dealt with outside the juvenile justice system, but through the implementation of child protective measures (including effective parental support), addressing the ‘root causes’ of the behaviour (GC No. 10, para. 9).

The principle of non-discrimination also has implications for the treatment of children deprived of their liberty. As mentioned earlier, this principle implies that no distinction must be made between children related to status (e.g. between children in liberty and children deprived of liberty). Consequently, every child deprived of liberty should be entitled to all rights under the CRC, unless restriction of the enjoyment of these rights is required by the (objectives of the) deprivation of liberty. This particularity of the principle of non-discrimination is supported by article 37 (c) CRC which places States Parties under the obligation to guarantee the right of every child deprived of liberty to be treated with humanity and with respect for the child’s inherent dignity as a human being.

3.3.2.2 Best Interests of the Child

The best interests of the child principle (art. 3 CRC) implies that the specific differences between children and adults must be taken into account. These differences are the child’s physical and psychological development, and his emotional and educational needs, which in addition affect the child’s assumed ‘lesser culpability’ (GC No. 10, para. 10). These differences require a child-specific approach resulting in a separate juvenile justice system and separate treatment of the child suspect and child offender. The CRC Committee explicitly elaborates on the impact of the best interests of the child principle for the objectives of the juvenile justice system (GC No. 10, para. 10): ‘The protection of the best interests of the child means, for instance, 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. This can be done in concert with attention to effective public safety.’

This also has implications for arrest, detention and imprisonment of children. Article 37 (c) CRC requires that each child must be treated in a manner that takes into account the fact that he is a child with specific needs compared to adults. In

---

63 One should note that this could lead to deprivation of liberty as part of the child protection system, but should preferably not.
conjunction with article 2 CRC the child may only be limited in the enjoyment of his rights if his best interests are being given full weight. In light of this, article 37 (c) explicitly provides for two particularities: a child deprived of his liberty must be separated from adults, and is entitled to maintain contact with his family through correspondence and visits, which may only be set aside if required by the child’s best interests.

3.3.2.3 Right to Life, Survival and Development

The child’s inherent right to life, survival and development (art. 6 CRC), the third general CRC principle, has implications for the juvenile justice system in terms of prevention and response to juvenile delinquency inter alia through deprivation of liberty. In this regard, it is important to reiterate that the children involved in the juvenile justice system generally are adolescents.64 The CRC Committee points to the ‘very negative consequences’ of deprivation of liberty for the child’s development and his chances to reintegrate successfully into society (GC No. 10, para. 11). The UN Violence Study also stressed that ‘[t]he impact of institutionalization goes beyond the experience by children of violence’ and that ‘[l]ong-term effects can include severe developmental delays, disability, irreversible psychological damage, and increased rates of suicide and recidivism’.65 Therefore, article 37 (b) CRC’s principles of the use of arrest, detention and imprisonment as measures of last resort and for the shortest appropriate period of time only must be respected in order to ensure and respect the child’s right to development. In addition, deprivation of liberty should serve the (continuing) development of the child.66

3.3.2.4 Right to Participation

Finally, the fourth general principle, the right to participation (art. 12 CRC), has implications for the entire juvenile justice process. Regarding all decisions, and thus those related to deprivation of liberty, the right of the child to express his views freely must be fully respected and implemented. Regarding deprivation of liberty, this general principle has implications for inter alia the decisions that lead to deprivation of liberty, that follow upon the challenge of legality (art. 37 (d) CRC), or that lead to the child’s placement. It also has implications for decisions affecting the child’s legal status during deprivation of liberty, such as (further) limitations of the child’s human rights and fundamental freedoms, treatment

---

64 As mentioned in Chapter 1, recent brain research learned that children (including adolescents) are ‘categorically lesser culpable’; see Baer et al. 2008, p. 15-17 with reference to the synopsis of relevant human brain research provided in the Brief of the American Medical Association et al. as Amici Curiae Supporting Respondent, Roper v. Simmons, 543 U.S. 551 (2005) (03-633).
65 UN Violence Study 2006, p. 16.
66 Cf art. 20 (3) CRC regarding deprivation of liberty as a form of alternative care; see para. 2.7.4.4.
programmes, reintegration schemes, and his right to remedy unlawful or arbitrary treatment, for example through the right to file complaints. According to the CRC Committee ‘the voices of children involved in the juvenile justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfillment of their rights’ (GC No. 10, para. 12).

3.3.3 Specific Principles

3.3.3.1 Introduction

The administration of juvenile justice, and deprivation of liberty as part of it, is specifically governed by article 40 CRC, a human rights provision that, inspired by the Beijing Rules, sets out the specific principles and objectives of juvenile justice. As mentioned in Chapter 2, article 40 (2) CRC sets out, like its equivalents in other human rights treaties, the core principles of fair trial. Some of these principles are particularly relevant to children deprived of liberty, such as the presumption of innocence (see para. 3.7) and trial before a competent, independent, and impartial authority or judicial body without delay (see para. 3.4). In addition, it proclaims a child-specific approach regarding children in conflict with the law. By this pedagogical approach article 40 CRC can be distinguished from the corresponding provision in the general human rights treaties, such as article 14 ICCPR. The following child-specific principles are relevant to deprivation of liberty as part of the juvenile justice system.

3.3.3.2 Specialized Juvenile Justice System

Article 40 (3) CRC stipulates that States Parties must ‘seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children’. This provision, although rather non-committal through the wording ‘shall seek’, calls for the administration of a specialized juvenile justice system. In General Comment No. 10, paragraphs 90-95, the CRC Committee provides for the requirements of the basic provisions of these laws and procedures, authorities and institutions. The CRC Committee inter alia states that ‘[a] comprehensive juvenile justice system (...) requires the establishment of specialized units within the police, the judiciary, the courts system, the prosecutor’s office, and the penal system, and the implementation of comprehensive programmes for children in conflict with the law…’.

Cf Van Bueren 2006 for a comparison of different international and regional human rights conventions in this regard.

Cf e.g. art. 14 (4) ICCPR which only requires that when it comes to juveniles that their age should be taken into account, as well as the desirability to promote their rehabilitation. Art. 5 (5) ACHR provides in firmer wording that ‘[m]inors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors’. Cf Van Bueren 2006, p. 7-10 for a comparison of different international and regional human rights conventions in this regard.

In addition every State Party has the discretion to include more and other provisions in the law and procedures of their juvenile justice system, in the form of their own choosing.
Chapter 3

69 States Parties must seek to set a minimum age of criminal responsibility (MACR) below which children shall be presumed not to have the capacity to infringe the penal law; art. 40 (3) (a) CRC; see below in para. 3.3.4. Regarding the upper age limit for juvenile justice, the CRC Committee has reminded State Parties that based on art. 40 the juvenile justice system must be applicable to every person under the age of eighteen years at the time of committing the alleged offence; this could be called the ‘crime date criterion’ (i.e. regardless of his age at the time of prosecution, trial, adjudication or execution; GC No. 10, para. 36ff). This rejects, e.g. the practice of (mandatory) waiving or transferring children to the adult criminal justice system (e.g. sixteen or seventeen year olds or children who committed severe or specified crimes). Note that art. 40 CRC refers to the child as defined in art. 1 CRC, which leaves room for deviation if the child has gained majority earlier under domestic law. Cf art. 37 (a) CRC that explicitly refers to the age of eighteen, without leaving room for deviation; see also art. 4 (5) ACHR. For more on the implications of the ‘crime date criterion’ for the applicability of art. 37 CRC, see para. 3.7.

3.3.3.3 Objectives of Juvenile Justice – ‘Dignity’ as the Driving Force

Article 40 CRC furthermore provides a set of fundamental principles specifically for ‘the treatment to be accorded to children in conflict with the law’. Based on article 40 (1) CRC, the CRC Committee has concentrated this set of principles around the concept of respect for the dignity of the child (GC No. 10, paras 13 and 14). States Parties must ‘recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law 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 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’ (art. 40 (1) CRC).

Respect for the child’s dignity and worth is a core principle of International Human Rights Law (see art. 1 UDHR and CRC’s preamble) and is regarded as the driving force behind the other principles and objectives of juvenile justice: reinforcement of the child’s respect for human rights and fundamental freedoms of others and promotion of the child’s reintegration, while taking into account the
child’s age and the assuming of a constructive role in society. It must be upheld throughout the entire process within the juvenile justice system ‘from the first contact with law enforcement agencies all the way through to the implementation of all measures for dealing with the child’ (GC No. 10 para. 13). This also implies that ‘all forms of violence in the treatment of children in conflict with the law must be prohibited and prevented’. In this regard the CRC Committee urges ‘States Parties to take effective measures to prevent (...) violence and to make sure that the perpetrators are brought to justice’.70 Because, as the CRC Committee rightfully wonders: ‘If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect these guarantees, how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others?’ (GC No. 10, para. 13.)

Respect for the child’s dignity and worth is vital regarding treatment that reinforces the child’s respect for the human rights and freedoms of others. In addition, the treatment and education of the child within the juvenile justice system, in line the UN Charter, must be directed to the development of respect for human rights and freedoms.71

The principle of treatment that takes into account the child’s age and promotes the child’s reintegration and the child’s assuming of a constructive role in society requires that all professionals involved in the administration of juvenile justice be knowledgeable about child development, the dynamic and continuing growth of children, what is appropriate to their well-being72, and the pervasive forms of violence against children’ (GC No. 10 para. 13).

Regarding the objective of the child’s reintegration in particular, Van Bueren points to a ‘revision of thought which had occurred since the adoption of [I]CCPR’ and remarks that ‘article 40 does not incorporate the concept of a child’s ‘rehabilitation’, which is defined as an aim of the administration of juvenile justice by Article 14(4) of the ICCPR’. Rehabilitation may be abused by States ‘as an undesirable form of social control’ and ‘the concept of rehabilitation implies that

---

70 GC No. 10, para. 13 with further reference to the UN Violence Study 2006.
71 GC No. 10 para. 13 with reference to art. 29 (1)(b) CRC and General Comment No. 1 (2001), The Aims of Education, CRC/C/GC/1, 17 April 2001 (GC No. 1).
72 The encouragement of the well-being of the child in conflict with the law is considered another pillar of the juvenile justice system; Van Bueren 2006, p. 11. Van Bueren argues that ‘one aspect of helping the child achieve this sense of well-being’ is the right of the child to maintain personal relations and contact with his parents; cf arts. 9 (3) and 37 (c) CRC. Both art. 40 (4) CRC and its predecessor the Beijing Rules enshrine this principle; Rule 5 Beijing Rules provides for the aims of juvenile justice by stating inter alia that ‘[t]he juvenile justice system shall emphasize the well-being of the juvenile’; see also para. 2.7.4.3.
A rehabilitative approach can also be recognized in article 10 (3) ICCPR, which provides that ‘the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation’. In this regard, the HRC provides that ‘[n]o penitentiary system should be only retributory; it should essentially seek the reformation and social rehabilitation of the prisoner’ (HRC GC No. 21, para. 10).

The just mentioned principles are of equal significance for the deprivation of liberty of children as part of the juvenile justice system. Article 37 (c) CRC’s requirement that each child deprived of liberty must be treated with humanity, with respect for his dignity and in a manner that takes into account the needs of persons of his age fits into the principles of article 40 (1) CRC. Furthermore, the child’s eventual reintegration should be served by the deprivation of liberty, which calls inter alia for specific educational programmes, reinforcing the child’s respect for the human rights and fundamental freedoms of others. The implications of these principles and requirements will be addressed in the following paragraphs.

73 Van Bueren 2006, p. 12. It is interesting that Van Bueren mentions the use of ‘boot camps’ in the US, a para-military style of rehabilitation programme, as an example of practice contrary to the objective of reintegration, which has ‘a different starting point’ and ‘rejects the assumption that the difficulties which children face are necessarily individual and considers the social environment of the child’. According to Van Bueren: ‘Children should be assisted within the community to develop a sense of responsibility which can only be accomplished if the child begins to develop a sense of belonging.’; Van Bueren 2006, p. 12. This point of departure representing a ‘revision of thought’ should have consequences for the HRC in the application of art. 14 ICCPR regarding children. In particular States that are party to both conventions are more likely to interpret rehabilitation in light of the objective that a child plays a constructive role in society; Van Bueren 2006, p. 13. Note that art. 17 (3) ACRWC refers to ‘reformation, re-integration into [the] family and social rehabilitation’ as the ‘essential aim’ of juvenile justice.

74 Joseph, Schultz & Castan argue that this emphasis in art. 10 (3) ICCPR fits with the “‘rehabilitation’ paradigm [that] was more prevalent, at least in Western criminal justice systems, when the ICCPR was adopted in 1966”. In addition they state that ‘in more recent times in many States, there has been a trend towards harsher penalties and prison conditions, evincing a shift towards the ‘retribution’ model of criminal sociology. It is possible that the ‘rehabilitation’ aspect of art. 10(3) was treated by State Parties as an anachronism at the beginning of the twenty-first century’; Joseph, Schultz & Castan 2004, p. 291. So far there has not been much jurisprudence on this rehabilitative aspect of art. 10 (3) ICCPR. Joseph, Schultz & Castan argue that the issue of social rehabilitation has been neglected by the HRC, ‘[h]owever, proper adherence to the other aspects of article 10, which have been vigorously monitored by the HRC, would result in a humane penitentiary system which would aid the reformation and rehabilitation of inmates’ (Joseph, Schultz & Castan 2004, p. 292). One example is HRC Comm. No. 878/1999 (Kang v. Republic of Korea), in which a person had been detained in solitary confinement for thirteen years. In this case the HRC found inter alia a breach of article 10 (3) ICCPR, which indicates that the length of stay in detention and the form of deprivation of liberty may infringe the essential aim of the penitentiary system, namely reformation and social rehabilitation; Joseph, Schultz & Castan 2004, p. 291-292. See also Nowak 2005, p. 254.
3.3.3.4 Proportionality

Another key-principle of juvenile justice is the principle of proportionality. Article 40 (4), supported by rule 5 Beijing Rules, embodies this principle which means that ‘[t]he response to young offenders should be based on the consideration not only of the gravity of the offence but also of personal circumstances’. On the one hand and most importantly this implies that a punitive reaction may not be based purely on repression or ‘just deserts’, but should also take into account inter alia the personality and social environment of the child. On the other hand the principle of proportionality plays an important role in protecting the child against a welfare approach that goes ‘beyond necessity and therefore infringe[s] upon the fundamental rights of the young individual’. Regarding the use of deprivation of liberty the principle of proportionality plays a significant role in light of the requirements that imprisonment must be used as a measure of last resort and for the shortest appropriate period of time (art. 37 (b) CRC; see para. 3.4).

3.3.3.5 Deprivation of Liberty as Part of a Comprehensive Juvenile Justice Policy

Finally, a juvenile justice system in conformity with the CRC requires a comprehensive policy with elements of prevention of juvenile delinquency, interventions through diversion or in the context of judicial proceedings and guarantees of a fair trial. Deprivation of liberty within the juvenile justice system, which includes pre-trial detention and imprisonment as a disposition, should be used only in conformity with the principles and objectives of this system and in conformity with the requirements under article 37 CRC. In addition, article 40 (4) CRC reveals that institutionalization within the juvenile justice system should not be the only available disposition: ‘A variety of dispositions, such as care, guidance and supervision orders; 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.’

3.3.4 Minimum Age for Deprivation of Liberty

According to article 40 (3) (a) CRC ‘States Parties shall seek to promote (…) [t]he establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law’. This provision is based on the indisputable assumption that children under that ‘minimum age of criminal responsibility’ (MACR) cannot be held responsible for their behaviour in a penal

---

75 Commentary to Rule 5 Beijing Rules.
76 Commentary to Rule 5 Beijing Rules.
77 Cf GC No. 10, part IV.
law procedure and that they cannot be formally charged.\textsuperscript{78} The establishment of an MACR affects deprivation of liberty of children in the context of the juvenile justice system: children cannot be deprived of their liberty for crimes (allegedly) committed while they (still) were of an age lower than the MACR. In other words the MACR automatically determines the minimum age for deprivation of liberty of children in the juvenile justice system. This does not exclude deprivation of liberty in another context.\textsuperscript{79} In this regard, it is significant to reiterate that rule 11 (a) JDLs calls upon States to set a specific minimum age for deprivation of liberty.\textsuperscript{80}

Although the CRC provision is formulated without obligation (‘shall seek’), the CRC Committee ‘understands this provision as an obligation for States Parties to set a minimum age of criminal responsibility’ (GC No. 10, para. 31). In addition, the CRC does not provide for a fixed MACR; neither do other international legal instruments. According to rule 4.1 of the Beijing Rules, the MACR ‘shall not be fixed at too low an age level, bearing in mind the facts of emotional, mental and intellectual maturity’\textsuperscript{81} and the HRC has stated that ‘States should indicate in their reports the age at which the child (…) assumes criminal responsibility’ and that in light of this the age ‘should not be set unreasonably low and that in any case a State Party cannot absolve itself from its obligations under the Covenant regarding persons under the age of 18, notwithstanding that they have reached the age of majority under domestic law.’\textsuperscript{82}

\textsuperscript{78} Cf GC No. 10, para. 31.

\textsuperscript{79} In some countries children under the MACR are dealt with through the child protection system, which may also lead to deprivation of liberty (sometimes even in similar institutions). E.g. in the Netherlands there used to be a minimum age of twelve years (similar to the Dutch MACR) for placement in closed institutions under child protection law. However, this prescription of a minimum age was deleted in 2001, which led to the presence of ‘under twelves’ in youth institutions; YCIA Evaluation 2004, p. 75-77; cf Chapter 4. Cipriani mentions such practice as one example of his assumption that the setting of an MACR does not necessarily guarantee the protection of the rights of children under the MACR; Cipriani 2002, p. 26-27.

\textsuperscript{80} According to Hodgkin & Newell: ‘The Committee on the Rights of the Child has expressed concern at the use of the restriction of liberty for young children and has emphasized that a minimum age for any restriction of liberty should be defined in legislation’ with reference to the Guidelines for Periodic Reports, CRC/C/58, para. 24, in which the CRC Committee asks State Parties for information on any legal minimum age defined in national legislation for the deprivation of liberty, ‘including by arrest, detention and imprisonment, inter alia in the areas of administration of justice, asylum seeking and placement of children in welfare and health institutions’; Hodgkin & Newell 2002, p. 550.

\textsuperscript{81} According to the commentary to rule 4 ‘[t]he [MACR] differs widely owing to history and culture’. This is mainly why the establishment of an international MACR has been highly controversial. Nevertheless the commentary states that '[e]fforts should (…) be made to agree on a reasonable lowest age limit that is applicable internationally’.

\textsuperscript{82} HRC GC No. 17, para. 4. The latter part is important because setting an MACR does not absolve States Parties from their responsibility to acknowledge the special status of a child; see also Cipriani 2008.
Thus, international law provides neither for a fixed MACR, nor for any specific guidance. One of the reasons for this is that the issue of the MACR is rather controversial. As the commentary to rule 4.1 of the Beijing Rules argues ‘the minimum age of criminal responsibility differs widely owing to history and culture’ and that [t]he modern approach would be to consider whether a child can live up to the moral and psychological components of criminal responsibility; that is, whether a child, by virtue of her or his individual discernment and understanding, can be held responsible for essentially antisocial behaviour’. The establishment of an age limit cannot be considered purely a legal issue.

Despite all this, the CRC Committee has decided to proclaim the lowest MACR based on its experiences derived from the CRC reporting procedure and its recommendations in that regard. The CRC Committee finds an MACR ‘below the age of 12 years (…) not to be internationally acceptable’ and it therefore recommends States Parties ‘to increase their lower MACR to the age of 12 years as the absolute minimum age’. This implies that no child under the age of twelve should be deprived of liberty within the context of the juvenile justice system.

Finally, there are countries that have a separate minimum age for deprivation of liberty, which may be higher than their MACR. Taking into account rule 11a JDLs’ call for a separate minimum age of deprivation of liberty, this would be particularly recommended when the domestic MACR is lower than the age of twelve, the proclaimed absolute minimum.

Finally, the setting of an MACR does not mean that children below that age cannot commit offences. The police can be confronted with children under the MACR.

---

83 See Cipriani 2008. Cipriani concludes based on his comprehensive global study on the MACR that there is a wide variety in MACRs, but that ‘the current median age for MACRs worldwide is 12 years’; Cipriani 2008, p. 307. Cf Cipriani 2002 and Van Bueren who observes that ‘[a]t present there is a wide disparity in the minimum age, not only globally but also in the same continent; Van Bueren 2006, p. 27; see ECtHR, Judgment of 16 December 1999, Appl. No. 24888/94, (V. v. UK), para. 72ff.

84 Van Bueren criticizes the CRC Committee’s observations on the MACR regarding England and Wales (the committee found the MACR of 10 as being unlawful) compared to Ireland (a mere consideration to review the recently adjusted age from 7 to 10); Van Bueren 2006, p. 27.

85 GC No. 10, para. 32. It is interesting to note that the Committee also recommends ‘to continue to increase it to a higher age level’ which implies that the Committee prefers a higher MACR without providing for the upper limit. At the same time the CRC Committee ‘urges States Parties not to lower their MACR to the age of 12’ and to provide children under the MACR with the same ‘fair and just’ treatment as children at or above the MACR (para. 33). See also Cipriani 2008.

86 If there is no proof of age or the age of the child cannot be established, the child must not be held criminally responsible and as a result must not be deprived of liberty; GC No. 10, para. 35. Proof of age is dependent on birth registration, which is absent or inadequate in many (developing) countries; cf art. 7 CRC.

87 E.g. Switzerland has an MACR of seven but allows juvenile sanctions from the age of fifteen; Weijers 2006, p. 23. Cf e.g. art. 14 (4) of the UNTAC Law in Cambodia which states that ‘minors less than 13 years cannot be placed in pre-trial detention’; LICADHO 2007, p. 31.

88 Contrary to what the wording of art. 40 (3) (a) CRC seems to indicate.
Cipriani rightly points at ‘informal handling by police officials’ as ‘[t]he most common danger’, particularly for young children under the MACR; Cipriani 2002, p. 26. This often results in arbitrary and indeterminate detention of children together with denial of due process rights, without adequate registration and information to the child’s family, which makes him even more vulnerable to abusive practices.

Under art. 5 (1) ECHR this would not constitute deprivation of liberty (European Commission, Decision of 19 March 1981, Appl. No. 8819/79 (Sargin v. Germany); see for a critical analysis Kilkelly 1999, p. 39-40.)
of the person, International Human Rights Law provides for a number of legal requirements. The use of imprisonment and others forms of deprivation of liberty within the criminal justice system has been common practice for centuries. Unfortunately, too often individuals, including children, have been incarcerated for vague or obscure reasons, without any legal foundation or in an arbitrary way, for long periods of time. As pointed out for example by the CRC Committee in many countries children ‘languish in pre-trial detention for months or even years’ (GC No. 10, para. 80).

The core provision in this regard is article 37 CRC, which embodies the ‘leading principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty, and provisions concerning the treatment of and conditions for children deprived of their liberty’ (GC No. 10, para. 78). The last part, in essence the legal status of the incarcerated child will be addressed in paragraph 3.5ff. This paragraph focuses on the legal requirements regarding the decision to deprive a child of his liberty, namely the prohibition of unlawful or arbitrary deprivation of liberty (para. 3.4.2) and the rule that deprivation of liberty must be used as a measure of last resort and for the shortest appropriate period of time (para. 3.4.3 resp. 3.4.4). Furthermore, a child that is (about to be) deprived of liberty is entitled to a number of procedural safeguards affecting the deprivation of liberty as such. These will be addressed in para. 3.4.5. It is important to note that the legal requirements addressed here in general are of equal relevance to the other forms of deprivation of liberty, but have a different context or may be upheld differently.\footnote{For the scope of art. 37 (b), second sentence, CRC see para. 2.7.3.4.}

3.4.2. Prohibition of Unlawful or Arbitrary Deprivation of Liberty

3.4.2.1 Introduction

Article 37 (b) CRC leaves no doubt about it. In strong and clear terms it states: ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily’. It embodies one of the core principles regarding deprivation of liberty, witnessed by the fact that it can be found in almost every international and regional human rights treaty.\footnote{Cf. art. 9 (1) ICCPR, art. 7 (2) jo. (3) ACHR, art. 6 Banjul Charter and art. 5 (1) ECHR. The latter does not refer explicitly to arbitrariness, however it is the ‘aim and purpose of Article 5 to ensure that no one is arbitrarily deprived of his liberty’; Bleichrodt 2006, p. 463. The ACRWC lacks this principle.} Not surprisingly, this provision was not heavily debated during the drafting process.\footnote{Schabas & Sax 2006, p. 76.}

The second sentence of article 37 (b) CRC states that ‘[t]he arrest, detention or imprisonment of the child shall be in conformity with the law’. This provision, as well as the more general prohibition in article 37 (b)’s first sentence, is based on
article 9 (1) ICCPR, providing that ‘[e]veryone has the right to liberty and security’\(^94\) of person’, that ‘[n]o one shall be subjected to arbitrary arrest or detention’ and that ‘[n]o one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law’.\(^95\) As an alternative to an exhaustive list of all permissible and justified deprivations of liberty, which could not cover all possible forms, the drafters of article 9 ICCPR have chosen to make the answer to the question when one can be deprived of liberty dependent on the requirement of ‘lawfulness’ and the ‘prohibition of arbitrariness’.\(^96\)

For the interpretation of article 37 (b) CRC and the meaning of the prohibition of unlawful or arbitrary deprivation of liberty of children, it is interesting to take a closer look at the implications of article 9 (1) ICCPR.

3.4.2.2 Lawfulness

The requirement of lawfulness entails that domestic statutory law, accessible to all individuals within the jurisdiction of the State Party, or its equivalent, an unwritten norm of common law, must prescribe – clearly – the grounds for deprivation of liberty and the procedures in accordance with which someone can be deprived of his liberty.\(^97\) If an individual is deprived of his liberty on grounds that are not clearly formulated in domestic law or that are against that law, it will amount to violation of the requirement of lawfulness.\(^98\) The same reasoning applies regarding the procedure(s) leading to deprivation of liberty. Schabas & Sax argue that ‘[a]s a consequence, any deprivation of liberty necessitates both legislation and clear competences for the executive in order to comply with the lawfulness requirement’.\(^99\)

It is important to note that provisions in an administrative act or decree will not be sufficient in this regard. According to Nowak: ‘A restriction on liberty of person by an administrative act is permissible only when this takes place in enforcement of a law that provides for such interference with adequate clarity and regulates the procedure to be observed.’\(^100\) Thus, a statutory legal framework providing for the grounds and procedures regarding deprivation of liberty, worked out in more detail

\(^{94}\) Hereinafter reference will only be made to the right to liberty of the person.

\(^{95}\) Detrick 1999, p. 629.

\(^{96}\) Nowak 2005, p. 223. For more information on the drafting history of art. 9 see Ibid., p. 216 and 223-225.

\(^{97}\) Cf the ECtHR that has ruled that the word law under article 5 ECHR need not necessarily be written law; Bleichrodt 2006, p. 463 and ECtHR, Judgment of 26 June 1992, Series A. no. 240 (Drozd and Janousek v. France and Spain), para 107, in which the ECtHR found that the custom in question (‘French-Andorran custom (…) dating back several centuries’) had ‘sufficient stability and legal force to serve as a basis [for the deprivation of liberty]’. See also ECtHR, Judgment of 29 February 1988, Series A. No. 129 (Bouamar v. Belgium), para. 77.

\(^{98}\) Nowak 2005, p. 236.

\(^{99}\) Schabas & Sax 2006, p. 77.

\(^{100}\) Nowak 2005, p. 224.
in administrative acts or decrees, will meet the requirements of the principle of legality.

Furthermore, the HRC, in light of art. 9 (4) ICCPR (i.e. the right to challenge the legality of deprivation of liberty; see further below), held in a number of decisions regarding mandatory detention of refugees in Australia, that the scope of the principle of legality includes both domestic law and international law. The CRC Committee has taken a similar approach. In its recommendations regarding Kazakhstan it recommended to ‘[e]nsure that existing norms and regulations allowing the restriction of freedom of children conform to the laws of Kazakhstan and international standards’.

The Inter-American Court and Commission follow the same approach under art. 7 (2) ACHR and art. XXV American Declaration. According to Davidson the Inter-American Commission ‘[m]ore generally, (...) has stated that any arrest must be made by the agency properly authorized by the national constitution and in accordance with the procedures required by international law’. Under article 5 ECHR ‘deprivation of liberty must be imposed in conformity with the substantive and procedural rules of the applicable national law’. However, the domestic law itself must be in conformity with the [ECHR], including the general principles expressed or implied therein’, according to the ECtHR in Winterwerp v. The Netherlands.

3.4.2.3 Prohibition of Arbitrary Deprivation of Liberty

The prohibition of arbitrary deprivation of liberty is directed to both the legislator as well as the organs of enforcement, like police officials, public prosecutors or judges, and implies that the law (written or unwritten) must not be arbitrary, and its enforcement may not be arbitrary.

The prohibition of arbitrariness has a wider scope and goes further than the requirement of lawfulness. In the HRC case Van Alphen v. the Netherlands (HRC Comm. No. 305/1988) the HRC elaborated on the question when an arrest and

102 Concluding Observations regarding Kazakhstan, CRC/C/15/Add. 213 (10 July 2003), para. 67 (d).
104 Bleichrodt 2006, p. 463.
105 ECtHR, Judgment of 24 October 1979, Series A. No. 33 (Winterwerp v. the Netherlands), para. 45. See also Schabas & Sax 2006, p. 77.
106 Nowak 2005, p. 224. The drafting process shows that the term ‘arbitrary’ is rather controversial.
108 In this case a Dutch solicitor was detained for more than 9 weeks because he refused to provide information which could be used as evidence against his clients for the benefit of criminal investigations. The Dutch authorities were hoping that this detention would force him to waive his
subsequent detention can be considered arbitrary. According to the HRC (para. 5.8): ‘The drafting history of article 9, paragraph 1, confirms that ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all circumstances. Furthermore, remand in custody must be necessary in all the circumstances, for example, to prevent escape, interference with evidence or the recurrence of crime.’ This decision first indicates that although the law may be in accordance with article 9 (1) ICCPR, the enforcement may very well lead to violation. Second, the arrest may have taken place in accordance with article 9 (1) ICCPR, but the following detention may nevertheless lead to a breach. Third, the HRC gave, with reference to the drafting history of the ICCPR, certain qualifications regarding the judgment whether deprivation of liberty can be considered in conformity with article 9 ICCPR. Besides being lawful, it should be ‘reasonable in all circumstances’ and ‘necessary under all circumstances’. The reasonableness is dependent on aspects like appropriateness, justice, predictability; the necessity depends on the circumstances of the case, for example the chance that the detained person will flee if he were not detained or that he would interfere with evidence, or commit another crime.\footnote{109}

According to Nowak the term ‘arbitrary’ must be interpreted broadly: ‘Cases of deprivation of liberty provided for by law must not be manifestly disproportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory and must be able to be deemed appropriate and proportional in view of the circumstances of the case.’\footnote{110} Nowak also argues that ‘[m]ost detentions which the [HRC] has found to be in violation of [a]rt. 9(1) have been obvious cases of arbitrary detention from the very beginning’.\footnote{111} Examples are arbitrary arrest and detention on political grounds, the practice of enforced disappearances, and \textit{detention incommunicado}.\footnote{112} The HRC also found violation of article 9 (1) ICCPR in cases where prisoners were kept in prison after they had served their sentences or after their release had been ordered.\footnote{113} Another example shows that people were illegally abducted by State
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

Joseph, Schultz & Castan draw the conclusion from the jurisprudence of the HRC and its concluding observations that ‘punitive preventative detention is not compatible with article 9 (1) ICCPR’ and that ‘it is not compatible with article 9 for persons to be sentenced and detained on the basis that they are perceived to be likely to reoffend’. Nevertheless, recidivism can be a relevant factor to place an individual in pre-trial detention. In addition, it may be justified to detain a person on the ground that he might be a danger to himself or to society. This would be characterized as treatment in a psychiatric institution or hospital, which has been rightfully acknowledged as a form of deprivation of liberty as protected by article 9 ICCPR.

Finally, the duration and/or continuation of deprivation of liberty may lead to the conclusion that it is (or has become) arbitrary.

### 3.4.2.4 Article 5 (1) ECHR

Nowak argues that ‘one might assume in light of the travaux préparatoires that the categories of detention explicitly mentioned in [a]rt. 5(1) ECHR (…) will not be considered as arbitrary in the sense of [a]rt. 9(1) [I]CCPR’. Unlike the ICCPR, the ECHR contains an exhaustive list of permitted deprivations of liberty in article 5 ECHR. The overall objective of article 5 ECHR is to prevent arbitrary deprivation

---

114 Joseph, Schultz & Castan 2004, p. 310-311. Not in its case law but in its concluding observations, the HRC criticized a practice in which detainees only could be released under the condition that they showed remorse and condemned a practice of detention of vagrants on administrative grounds; *Ibid.*, p. 311 (Iran resp. Ukraine). Nowak 2005


116 *Ibid.*, p. 319-321. See HRC Comm. No. 754/1997 (*A. v. New Zealand*), in which the HRC acknowledged a continued detention in a psychiatric hospital as deprivation of liberty, but subsequently found no violation of article 9 (1) ICCPR, because the psychiatric placement/order ‘was issued according to law, based on an opinion of three psychiatrists [and] a panel of psychiatrists continued to review [the patient’s] situation periodically’; Joseph, Schultz & Castan 2004, p. 320. A clear example of arbitrary detention is detention for debt, prohibited by article 11 ICCPR; Nowak 2005, p. 226. In addition, Nowak argues that ‘preventive detention of persons beyond the limits permitted by art. 5 (1) ECHR’ is ‘another typical example of an arbitrary detention’. He also points at the detention of persons at the US Naval Base of Guantanamo Bay found arbitrary by the UN Working Group on Arbitrary Detention. Schabas & Sax refer to the three categories of arbitrary detention established by the working group: 1. when it is clearly impossible to invoke any legal basis justifying the detention, 2. when it results from the exercise of human rights and fundamental freedoms embodied in the UDHR and if relevant from the ICCPR, and 3. when it has an ‘arbitrary character’ due to the fact that international norms relating to the right to a fair trial have not been observed with a certain level of gravity; Schabas & Sax 2006, p. 79 with reference to UN Doc. E/CE.4/1998/44 (19 December 1997), Annex I, para. 8.

117 Nowak 2005, p. 226-227 with reference to *inter alia* HRC Comm. No. 560/1993 (*A. v. Australia*), i.e. 4 years’ detention of asylum seeking individual, and HRC Comm. No. 900/1999 (*C. v. Australia*), i.e. more than 2 years’ immigration detention without individual justification and substantial judicial review.

Chapter 3

of liberty. Although it does not contain an explicit prohibition of arbitrary deprivation of liberty, it can be regarded ‘as the guiding principle for the interpretation of [a]rticle 5 [ECHR]’.

Article 5 ECHR uses a different wording compared to the other regional human rights conventions and the ICCPR and CRC. It provides that ‘no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law’. It applies to ‘everyone’, which ‘clearly also covers minors’.

The wording ‘following cases’ refers to an exhaustive list of exceptions to this prohibition of deprivation of liberty, which require a narrow interpretation. One of these exceptions is ‘the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority’ (art. 5 (1) (d) ECHR). Other exceptions are the lawful detention after conviction by a competent court (sub a), lawful arrest or detention for non-compliance with a lawful court order (sub b), lawful pre-trial detention in a broad sense, lawful detention inter alia of ‘persons of unsound mind’ (sub e) and finally lawful detention of an alien pending a decision regarding admission, deportation or extradition (sub f). All these exceptions must be ‘lawful’, in addition to only taking place in accordance with a procedure ‘prescribed by law’; in essence ‘deprivation of liberty must be imposed in conformity with the substantive and procedural rules of the applicable national law’. The wording ‘prescribed by law’ does not only refer to domestic law, but also to the ‘quality of law’ which implies that the law is ‘sufficiently accessible and precise’.

Deprivation of liberty based on a court order is in principle lawful. If pre-trial detention is based on an executive order, the detainee must be brought before a court, judge or any other person competent to exercise judicial power, which has the competence to review the deprivation of liberty (and if necessary order the detainee’s release; art. 5 (1) jo. (3) and (4) ECHR). Detention on the basis of an executive order followed by a ‘mere appearance’ before a judicial authority would

---

120 Ibid., p. 463; ECtHR, Judgment of 28 March 2000, Appl. No. 28358/95 (Baranowski v. Poland), paras. 51-52; see also Ibid., p. 464-465.
121 Ibid., p. 463. The national law as such must be compatible with art. 5 ECHR’s objective to protect the individual from arbitrary deprivation of liberty; Ibid., p. 464. See ECtHR, Judgment of 24 October 1979, Winterwerp v. the Netherlands; Series A. No. 33, para. 45.
122 Ibid., p. 463. The national law as such must be compatible with art. 5 ECHR’s objective to protect the individual from arbitrary deprivation of liberty; Ibid., p. 464. See ECtHR, Judgment of 24 October 1979, Winterwerp v. the Netherlands; Series A. No. 33, para. 45.
123 Ibid., p. 463. The national law as such must be compatible with art. 5 ECHR’s objective to protect the individual from arbitrary deprivation of liberty; Ibid., p. 464. See ECtHR, Judgment of 24 October 1979, Winterwerp v. the Netherlands; Series A. No. 33, para. 45.
undermine the overall objective of article 5, the protection against arbitrary detention.124

Finally, the prohibition of arbitrary deprivation of liberty as the guiding principle for the interpretation of article 5 ECHR (see above) implies according to Bleichrodt that ‘it must also be examined whether less severe measures than the deprivation of liberty could have sufficed’. He continues: ‘The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest.’125 This corresponds with the requirement of last resort embodied in article 37 (b) CRC (see below).

3.4.2.5 Juvenile Justice and Article 5 (1) ECHR

Article 5 (1) ECHR contains two specific grounds for deprivation of liberty of individuals (including children) in the context (juvenile) criminal justice (i.e. exceptions to the right to liberty of the person). First, article 5 (1) (c) ECHR allows the lawful arrest or detention of a person in order to bring him before the competent legal authority on reasonable suspicion of having committed an offence.126 A person charged with an offence must always be released pending trial unless the State can show that there are “relevant and sufficient” reasons to justify continued detention’, according to the ECtHR.127

Article 5 (1) (c) ECHR does not provide for an exhaustive list of grounds for arrest and pre-trial detention. Under this provision the arrest or detention of someone is allowed if within reason it is considered necessary, to prevent an offence (or reoffence) or to prevent flight after an offence has been committed. The ECtHR has developed ‘four basic acceptable reasons for refusing bail’.128 Besides the two just mentioned reasons, the ECtHR has acknowledged the danger of collusion (including, e.g. the risk of suppression of evidence, the safety of an individual under investigation and the danger of influencing witnesses) as a

---

124 ECHR, Judgment of 28 March 2000, Appl. No. 28358/95 (Baranowski v. Poland), para. 57. The ECtHR considered ‘detention which extends over a period of several months and which has not been ordered by a court or by a judge or any other person ‘authorised ... to exercise judicial power’ cannot be considered ‘lawful’ in the sense of [art. 5 (1) ECHR’]; see also Bleichrodt 2006, p. 464.
125 Ibid., p. 465; see ECtHR, Judgment of 4 April 2000, Appl. No. 26629/95 (Witold Litwa v. Poland), para. 78.
126 Arresting or detaining an individual on the basis of an alleged offence does meet the requirement of lawfulness (see also the principle of nullem crimen sine lege; art. 7 ECHR), but still can amount to violation of the prohibition of arbitrary detention; see below.
legitimate ground for detention, \(^{129}\) as well as the risk that the accused will cause public disorder. \(^{130}\)

Detention must be seen as an exceptional infringement of the right to liberty of the person and can only be permitted ‘in exhaustively enumerated and strictly defined cases’. \(^{131}\) The exceptional use of pre-trial detention implies that the court must not answer the question whether pre-trial detention is reasonable, but whether release (under bail) should be refused due to one of the reasons mentioned above. \(^{132}\)

Regarding the prolongation of detention, article 5 (3) ECHR is of particular significance, embodying the right to be brought before a judge or other judicial authority (i.e. the competent authority meant in article 5 (1) (c) ECHR)\(^{133}\) and the right to a trial within a reasonable time or to release. \(^{134}\) Although, a person can be arrested and (subsequently) detained on the basis of ‘reasonable suspicion’, this is not sufficient ground to continued detention. When is continued pre-trial detention considered reasonable? \(^{135}\) The answer is dependent on the circumstances of the case: ‘For each individual case and at each moment the interests of the accused person will have to be weighed against the public interest, with due regard to the principle of the presumption of innocence.’ \(^{136}\) Based on the ECtHR’s jurisprudence, the continued detention must be justified by national judicial authorities, who must satisfy the burden of proof, through grounds that are ‘relevant and sufficient’. \(^{137}\) Subsequently, the national authorities have to prove that they demonstrated ‘special diligence’ in the conduct of the proceedings (see art. 5 (3) ECHR). If the authorities cannot provide relevant and sufficient grounds or have not demonstrated special diligence, the duration of the (continued) detention cannot be regarded as reasonable. If a child is concerned, it is ‘more than usually important that the authorities [display] special diligence in ensuring that he [is] brought to trial within a reasonable time’. \(^{138}\)
In addition, national courts are under the obligation to assess the reasons for prolonged detention carefully.\textsuperscript{139} Neither a maximum duration of pre-trial detention, nor an abstract answer to the question what constitutes relevant and sufficient grounds can be deduced from the ECtHR’s case law. Any period of detention must be justified by the authorities in each individual case.\textsuperscript{140} According to the ECtHR jurisprudence, the danger of flight or recidivism as such is not sufficient to justify prolongation of pre-trial detention; these grounds must be assessed in light of other relevant factors. Regarding the danger of flight these elements include, in particular: ‘the character of the person involved, his morals, his assets, his links with the State and his international contacts’.\textsuperscript{141} In addition, continued detention cannot be justified on the ground that the accused may reoffend, which assumption is solely based on the antecedents of the accused.\textsuperscript{142} As mentioned above the ECtHR accepted other grounds than those embodied in article 5 (1) (c) ECHR as grounds for detention and consequently for continuation of detention.

Deprivation of liberty (pre-trial detention) based on art. 5 (1) (c) ECHR ends with the conviction by a court of first instance.\textsuperscript{143} An eventual prolonged deprivation of liberty (after conviction) must be reviewed under article 5 (1) (a) ECHR, which allows deprivation of liberty after conviction by a competent court. This is the second permitted ground for deprivation of liberty under article 5 ECHR relevant to the (juvenile) justice system. The conviction must be imposed by a judicial organ, which must be competent, determined by domestic law, and independent of the executive and of the parties involved in the case.\textsuperscript{144} This implies that deprivation of liberty as a sentence cannot be imposed by the police or the public prosecutor (as under art. 5 (1) (c) ECHR); military commanders or administrative organs are not competent either. Furthermore, the ruling of the judicial court must be lawful,

\textsuperscript{139} Bleichrodt 2006, p. 495; ECtHR, Judgment of 26 June 1991, Series A. No. 207 (Letellier v. France), para. 51.
\textsuperscript{140} ECtHR, Judgment of 24 July 2003, Appl. Nos. 46133/99 and 48183/99 (Smirnova v. Russia), para. 61. The case W. v. Switzerland (ECtHR, Judgment of 26 January 1993, Series A. No. 254-A) is an example of a pre-trial detention of more than four years, which the ECtHR found acceptable. In the Shishkov case the ECtHR found a detention of nearly 8 months unreasonable; ECtHR, Judgment of 9 January 2003, Appl. No. 38822/97 (Shishkov v. Bulgaria), para. 66.
\textsuperscript{141} ECtHR, Judgment of 24 July 2003, Appl. Nos. 46133/99 and 48183/99 (Smirnova v. Russia), para. 60; see also ECtHR, Judgment of 26 January 1993, Series A. No. 254-A (W. v. Switzerland), para. 33.
\textsuperscript{143} Ibid., p. 473.
\textsuperscript{144} Ibid., p. 465-466; see ECtHR, Judgment of 27 June 1968, Series A. No. 8 (Neumeister v. Austria), para. 24, ECtHR, Judgment of 18 June 1971, Series A. No. 12 (De Wilde, Ooms and Versyp (‘vagrancy’) v. Belgium), para. 77, ECtHR, Judgment of 16 July 1971, Series A. No. 13 (Ringeisen v. Austria), para. 95 and ECtHR, Judgment of 8 June 1976, Series A. No. 22 (Engel and others v. the Netherlands), para. 68.
which means that the sentence must be imposed for an offence that, at the time it was committed, constituted a punishable act for which imprisonment could be imposed under domestic law (*nulla poena sine lege*; art. 7 ECHR). Furthermore, the sentence must have ‘a sufficient basis in the conviction of the court’ and ‘the sentence on which the deprivation of liberty is based, must satisfy the provisions of the [ECHR]’; Bleichrodt 2006, p. 466. Finally, the term conviction implies that there must be a connection between the establishment that the crime has been committed, the finding of guilt of the accused and the imposition of the measure that leads to deprivation of liberty. Based on this lawful conviction by a competent court an individual can be deprived of liberty.

Children are not mentioned explicitly in either provision, but article 5 ECHR is equally applicable to them. Arrest, pre-trial detention and imprisonment of children in the juvenile justice system is permitted under article 5 (1) (c) and (a) ECHR. In other words, these two grounds also give content to the requirement of lawfulness and prohibition of arbitrariness of children’s arrest, detention and imprisonment. Arguably, some implications of article 5 (1) (a) and (c) ECHR (i.e. justifications for deprivation of liberty in the context of juvenile justice) are different when children are concerned. For example, the justification of the use and continuation of pre-trial detention may be dependent on other factors compared to adults, such as age, maturity, lesser culpability, and the circumstances and needs of the child. The appropriate sentence may be different for children than for adults as well, for example in terms of proportionality. At least the competent (judicial) authorities should take into account the principles of the administration of juvenile justice.

---

145 Furthermore, the sentence must have ‘a sufficient basis in the conviction of the court’ and ‘the sentence on which the deprivation of liberty is based, must satisfy the provisions of the [ECHR]’; Bleichrodt 2006, p. 466.

146 In the case where a person cannot be held criminally responsible due to his mental capacity he may be detained (prolonged) under art. 5 (1) (e) CRC. A child (under the MACR) may be diverted to, e.g. the child protection system and be detained for educational supervision or for an assessment under art. 5 (1) (d); see below.


148 There are jurisdictions that allow for the imposition of a (non-punitive) treatment order under penal law for individuals who suffer a mental health disorder (i.e. ‘persons of unsound mind’). In this regard, both art. 5 (1) (a) and art. 5 (1) (e) ECHR can apply; see, e.g. ECtHR, Judgment of 11 May 2004, Appl. No. 49902/99 (*Brand v. The Netherlands*) and ECtHR Judgment of 11 May 2004, Appl. no. 48865/99 (*Morsink v. The Netherlands*). It goes beyond the scope of this study to elaborate on art. 5 (1) (e) ECHR; see, e.g. Bleichrodt 2006, p. 477-480.

149 The CRC Committee emphasizes ‘that 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 long-term needs of the society’; GC No. 10, para. 71.
represented *inter alia* by the CRC (see para. 3.3). The ECtHR case law does not provide clear examples of a child-specific approach in this regard.\(^{150}\)

The only specific reference to the child in article 5 can be found in paragraph (1) (d), which allows the detention of a child by lawful order (i.e. not necessarily a court order\(^{151}\)) for the purpose of educational supervision. Most commonly, this is interpreted as placement in borstals, reformatories or clinics as forms of alternative care (*cf* art. 20 CRC). Many European jurisdictions allow deprivation of liberty in the child’s best interests, for example as a measure of child protection. According to Bleichrodt ‘[i]t is then required that it may reasonably be assumed that the development or the health of the minor is seriously endangered – for instance in the case of drug addiction and/or prostitution – or that he is being ill-treated’.\(^{152}\)

Second, under article 5 (1) (d) ECHR children can be lawfully deprived of their liberty in order to bring him before the competent legal authority.

The question should be raised to what extent is article 5 (1) (d) ECHR relevant to deprivation of liberty of children in the context of juvenile justice? As just mentioned, based on article 5 (1) (a) and (c) ECHR a child (like any adult) can be arrested, detained and sentenced to imprisonment. Article 5 (1) (d) ECHR, however, is applicable to deprivation of liberty of children with the purpose of education supervision for example as a measure of penal law or after diversion of the child to the child protection system.\(^{153}\) The primary objective must then be the child’s education;\(^{154}\) a purely repressive disposition is not allowed under article 5 (1) (d) ECHR.

For both approaches (a sentencing to educational treatment or diversion), the ECtHR requires ‘rather strict guarantees that the educational purpose is indeed served by the detention’.\(^{155}\) In the Bouamar case the ECtHR found that ‘the

---

\(^{150}\) See, however, ECtHR, Judgment of 6 May 2008, Appl. No. 20871/04 (*Nart v. Turkey*) in which recent case the ECtHR noted that the Turkish authorities never took into account that the person detained was a minor. In addition, the ECtHR observed that the minor was kept in prison together with adults (para. 33). The presence of these facts contributed to the ECtHR’s judgment that in this specific case the length of the minor’s pre-trial detention, i.e. 48 days, violated art. 5 (3) ECHR (para. 34); *cf* the joint partly dissenting opinion of judges Türmen and Mularoni.

\(^{151}\) Bleichrodt 2006, p. 475. This probably has a connection with the fact that in some (mostly Scandinavian) countries administrative (welfare) authorities have the competence to place a child in a closed institution for, e.g. observation.

\(^{152}\) Ibid., p. 475.

\(^{153}\) The latter option can also apply to children under the MACR, who have committed crimes.

\(^{154}\) Education is much broader that ‘notions of classroom teaching’. According to the ECtHR ‘educational supervision must [in the context of a young person in local authority care] embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned’; ECtHR, Judgment of 16 February 2002, Appl. No. 39474/98 (*D.G. v. Ireland*), para. 80.

detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering the educational aim.\textsuperscript{156}

According to the ECtHR article 5 (1) (d) ‘does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education’. However, ‘[i]n such circumstances (…) the imprisonment must be speedily followed by actual application of such a regime in a setting (open or closed) designed and with sufficient resources for the purpose.’\textsuperscript{157}

The ECtHR opts for a narrow interpretation which implies ‘that where a State has chosen a system of educational supervision as its policy on juvenile delinquency [like e.g. in Belgium – tl], it is obliged to put in place appropriate institutional facilities which meet the demands of security and the educational objectives of the domestic law’.\textsuperscript{158} The same positive obligation seems to be true for the enforcement of education treatment orders as juvenile justice dispositions. However, the ECtHR

\textsuperscript{156} ECtHR, Judgment of 29 February 1988, Series A. No. 129 (Bouamar v. Belgium), para. 52.

\textsuperscript{157} ECtHR, Judgment of 29 February 1988, Series A. No. 129 (Bouamar v. Belgium), para. 50. The ECtHR has not really provided for guidance regarding the interpretation of ‘speedily’ in this regard. In this case a sixteen year old boy was detained in a remand home by a juvenile court, based on legislation meant to promote the diversion of young offenders from the criminal process. This legislation allowed a temporary detention in a remand home (max. 15 days), if it was ‘materially impossible’ to place the child in a reformatory straight away. Even though art. 5 (1) (d) ECHR does not require an immediate placement in an educational setting, in this case there were no closed educational facilities (reformatories) in the boy’s region and due to his difficult behaviour an open setting was not an option. Therefore he was placed temporarily nine successive times, resulting in 119 days in a remand home during one year. The ECtHR ruled that the nine placement orders violated art. 5 (1) (d) ECHR, because their ‘fruitless repetition had the effect of making them less and less “lawful” (…) especially as Crown Counsel never instituted criminal proceedings against the boy’ (para. 53). In the case D.G. v. Ireland a child was placed in a penal institution where the educational and recreational services were voluntary (and the child did not cooperate) and he was subject to a disciplinary regime. This institution could not be categorized as an educational facility. In this case the ECtHR ruled that the child’s placement could not be seen as a temporary placement, due to the complete absence of (appropriate) secure educational facilities; paras. 81-85. Cf ECtHR, Judgment of 11 May 2004, Appl. No. 49902/99 (Brand v. The Netherlands) and ECtHR Judgment of 11 May 2004, Appl. no. 48865/99 (Morsink v. The Netherlands). In these cases (affecting individuals sentenced to a (non-punitive) treatment order under penal law) the ECtHR also ruled that it would be unrealistic to demand immediate placement in the appropriate mental health clinic or treatment centre. However, such placement must be realized within six months or the detention becomes unlawful; see further para. 4.3.

\textsuperscript{158} Kilkelly 1999, p. 43. She moreover argues that ‘if the fulfillment of this obligation should necessitate the building or provision of appropriate reformatories then this action should be undertaken by the State, regardless of the cost’. See also ECtHR, Judgment of 16 February 2002, Appl. No. 39474/98 (D.G. v. Ireland), para. 79.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

has not really provided for specific guidance regarding the implications and objectives of deprivation of liberty for educational supervision.159

As mentioned above, the second ground for placement is to bring the child before the competent authority, which seems to be redundant compared to article 5 (1) (c) ECHR. An important difference is that article 5 (1) (d) ECHR does not require that the child is under ‘reasonable suspicion of having committed an offence’. According to Bleichrodt and Kilkelly it seems aimed at detaining children in order to remove them from harmful surroundings and to protect them against any harm and to prevent them from ‘sliding into criminality’.160

The one case about this provision concerned the detention of a young delinquent for eight months meant to study his behaviour, while a number of alleged offences were investigated.161 The European Commission found that this detention fell within the meaning of article 5 (1) (d) ECHR, due to the fact that its purpose was to bring him before the competent legal authority.162

Thus, it seems to regulate the detention of a child for the purpose of a behavioural study, which does not take place during pre-trial detention where there are yet no criminal charges. Still, this detention must be based on a lawful order and grounded on national law, and must be proportionate in the circumstances of the case.163 In addition, each child placed in a detention centre for this purpose is entitled to all legal safeguards provided by article 5 ECHR.

3.4.2.6 Article 7 (3) ACHR

Regarding article 7 (3) ACHR’s prohibition of arbitrary arrest or imprisonment, flanked by article XXV of the American Declaration, the Inter-American Court ruled in the case Gangaram Panday v. Surinam that although a deprivation of liberty may be lawful under domestic law, if the reasons for it or the procedures followed are ‘unreasonable, unforeseeable or lacking proportionality’ it will be

159 Neither has it placed States under the positive obligation ‘to implement a system which favours the education of children in conflict with the law over their punishment’; a wish expressed by Kilkelly; Bleichrodt 2006, p. 476 and Kilkelly 1999, p. 44-45 both with reference to the travaux préparatoires. According to Kilkelly the drafters wanted to ‘recognise that minors in conflict with the law need to be treated differently from adults, by virtue of their vulnerability’; Kilkelly 1999, p. 44.


161 If this detention were seen as pre-trial detention, it would have been violating art. 5 (1) (c) ECHR. An important difference is that article 5 (1) (d) ECHR does not require that the child is under ‘reasonable suspicion of having committed an offence’. According to Bleichrodt and Kilkelly it seems aimed at detaining children in order to remove them from harmful surroundings and to protect them against any harm and to prevent them from ‘sliding into criminality’. 160

162 Bleichrodt 2006, p. 476 and Kilkelly 1999, p. 44-45 both with reference to the travaux préparatoires. According to Kilkelly the drafters wanted to ‘recognise that minors in conflict with the law need to be treated differently from adults, by virtue of their vulnerability’; Kilkelly 1999, p. 44.

163 See also Bleichrodt 2006, p. 476; Kilkelly 1999, p. 45-46.
arbitrary and thus incompatible with article 7 (3) ACHR.\textsuperscript{164} The Inter-American Commission has not elaborated on the prohibition of arbitrary arrest as enshrined in article XXV of the American Declaration. According to Davidson ‘it seems clear that any unlawful arrest is immediately classified as arbitrary’.\textsuperscript{165}

As with article 5 ECHR, one should raise the question of what the specific implications of the prohibition of arbitrary deprivation of liberty are for children. The Inter-American Court acknowledged in the Case concerning the Children’s Rehabilitation Institute that children, due to their vulnerability, require special measures of protection.\textsuperscript{166} More generally, the Court elaborated on the use of pre-trial detention. Pre-trial detention should be an exception, limited by the presumptions of innocence, necessity and proportionality in democratic society (para. 228). In addition, the duration must be reasonable and should only continue if the circumstances that make the detention necessary exist (para. 229). Where children are concerned, pre-trial detention should arguably be used more reticently.\textsuperscript{167} Furthermore it is interesting that the Court has explicitly referred to article 37 (b) CRC and stated that pre-trial detention of children should take place in conformity with this provision (para. 231).\textsuperscript{168} In addition, the Inter-American Commission ruled in \textit{Minors in Detention v. Honduras} that abandoned children, orphans or vagrants cannot be detained for the sole reason that they are at risk. By doing so Honduras violated these children’s right to liberty of the person protected under article 7 ACHR.\textsuperscript{169}

3.4.2.7 Conclusion

According to article 37 (b) CRC a child may be deprived of his or her liberty neither unlawfully, nor arbitrarily.\textsuperscript{170} These core principles regarding deprivation of liberty can be found in nearly every international and regional human rights treaty. They affect the legal foundation, the procedures and the enforcement and serve as instructions to both the legislator and enforcement authorities. The determination of whether a deprivation of liberty is or has been lawful and non-arbitrary is strongly dependent on the circumstances of the case.

None of the international or regional human rights conventions, nor their judiciary bodies can be considered very explicit. Even though the ECHR, unlike any other

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{164} Inter-American Court, Judgment of 21 January 1994, Series C. No. 16 (\textit{Gangaram-Panday v. Surinam}), para. 47.
\item \textsuperscript{165} Davidson 1998, p. 236.
\item \textsuperscript{166} Inter-American Court, Judgment of 2 September 2004. Series C. No. 112 (\textit{‘Juvenile Reeducation Institute’ v. Paraguay}).
\item \textsuperscript{167} De Jesús Butler 2005, p. 159.
\item \textsuperscript{168} The Court also drew up a list of alternatives that should be considered regarding pre-trial detention of children, which is very much similar to art. 40 (4) CRC (para. 230).
\item \textsuperscript{169} Dohn 2006, p. 769.
\item \textsuperscript{170} In addition, in must be ‘in conformity with the law’; art. 37 (b), second sentence, CRC.
\end{itemize}
\end{footnotesize}
human rights treaty, provides for an exhaustive list of permitted deprivations of liberty (art. 5 ECHR), much discretion is left with the domestic authorities. This is particularly true for the maximum duration of deprivation of liberty. In this regard, the right to be brought before a competent judicial authority and the right to challenge the legality of the deprivation of liberty (in the pre-trial phase) and the requirement of a court order for a deprivation of liberty disposition are essential legal safeguards (see para. 3.4.5).

In addition, the general human rights instruments do not provide much guidance on the implications of the requirement of lawfulness and prohibition of arbitrariness for arrest, detention or imprisonment of children. The only child-specific provision in a general human rights treaty in this regard, art. 5 (1)(d) ECHR, has limited value for deprivation of liberty in the context of juvenile justice, but it is relevant to the placement of a child delinquent in a secure facility with the particular purpose of educational supervision or observation. The Inter-American Court has explicitly made a connection between the use of pre-trial detention for children under article 7 ACHR and between article 37 (b) CRC.

This CRC provision will be addressed more specifically below. In addition, to the requirement of lawfulness and prohibition of arbitrary deprivation of liberty, it explicitly provides that arrest, detention or imprisonment must be used only as measure of last resort and for the shortest appropriate period of time. Although, all human rights provisions addressed above stand for a reticent use of deprivation of liberty in the context of criminal justice and attribute a prominent role to the principle of proportionality, article 37 (b) CRC is unique in the sense that it explicitly recognizes these requirements as fundamental for the imposition of arrest, detention or imprisonment involving children.

3.4.3 Deprivation of Liberty as a Measure of Last Resort

3.4.3.1 Introduction

The Commissioner for Human Rights of the Council of Europe, Thomas Hammarberg, stated in 2006: ‘The only reason for locking up children is that there is no other alternative to handle a serious and immediate risk to others.’

Although, Hammarberg seems to limit the possible use of deprivation of liberty (in the context of juvenile justice) to those situations in which the child is a serious and immediate risk to others, and while there may be other legitimate reasons to arrest, detain or imprison children, the essence of his statement is clear: deprivation of liberty of children must be an ultimum remedium and must only be used if appropriate in light of the interests of both society and the child involved.
Furthermore, art. 37 (b) second sentence states that ‘arrest, detention or imprisonment of a child (…) shall be used only as measure of last resort and for the shortest appropriate period of time’.\footnote{172}

3.4.3.2 Principle of Last Resort

The principle of last resort adds another dimension to the preconditions that deprivation of liberty must be lawful and may not be arbitrary. This dimension focuses on the use of adequate alternatives to deprivation of liberty in light of the assumption that deprivation of liberty is a limitation of the fundamental right to liberty of the person, which calls for reticence, and establishes a need to prevent the arrested, accused or sentenced child from being incarcerated. This requirement of art. 37 (b) CRC fits with the pedagogical ratio behind art. 40 (1) CRC, designed for the administration of juvenile justice, as described earlier.\footnote{173}

The last resort principle consists of two core elements: the development and use of alternatives for deprivation of liberty and legal limitations of the (lawful) use of deprivation of liberty. The latter element overlaps the principle of legality and the prohibition of arbitrariness and is directed towards the legislator and the enforcement authorities. If domestic law clearly prescribes on which grounds and in which cases a child can be deprived of his liberty, the use of deprivation of liberty is limited \textit{per se} and its use as a measure of last resort becomes more likely. In addition, the domestic legislator can build in thresholds fostering the implementation of the last resort principle. In other words, the legislator plays a significant role in the establishment of a climate in which the principle of last resort is respected and implemented.\footnote{174} Legitimate grounds for arrest, pre-trial detention and imprisonment can be found for example in art. 5 (1) ECHR as described above.

A similar point of departure can be found under article 9 (3) ICCPR, which provides, regarding pre-trial detention in particular, that ‘[i]t shall not be the general rule that persons awaiting trial shall be detained in custody’. The HRC argued in its GC No. 8 that ‘pre-trial detention should be an exception and as short

\footnote{172} Furthermore, art. 37 (b) second sentence states that ‘arrest, detention or imprisonment of a child shall be in conformity with the law’; this is the result of consensus reached during the drafting process. The provision is rather redundant taking into account that the first sentence of art. 37 (b) states that ‘no child shall be deprived of his or her liberty unlawfully or arbitrarily’; see para. 2.7.3.4 for more on art. 37 (b) CRC.

\footnote{173} Compare rule 1 JDLs which provides that ‘[j]nprisonment should be used as a last resort’ in light of the general objective of the juvenile justice system, i.e. the upholding of the rights and safety of the child and others and the promotion of the physical and mental well-being of juveniles.

\footnote{174} In addition, the legislator can set explicit time limits, which will have its effect on the use of deprivation of liberty for the ‘shortest appropriate period of time’; see further below.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

175 The reference to the shortest possible period of time is interesting, because the ICCPR is silent about the duration of pre-trial detention. Cf Rule 17 JDLs which provides in more firm wording that ‘detention before trial shall be avoided to the extent possible and limited to exceptional circumstances’.

176 According to the HRC ‘article 9, paragraph 3, allows pre-trial detention as an exception’ and that pre-trial detention may be used if ‘necessary, for example, to ensure the presence of the accused at the trial, avert interference with witnesses and other evidence, or the commission of other offences’.


180 The CRC Committee stresses the need for legislation, by stating that States Parties should ‘take adequate legislative and other measures to reduce the use of pre-trial detention’ GC No. 10, para. 80). According to the CRC Committee: ‘The law should clearly state the conditions that are required to be met in order to place or keep a child in pre-trial detention, in particular to assure the child’s appearance at the court proceedings and if the child is an immediate danger to self or others’. Arguably, this can also include that the competent (judicial) authorities should consider the suspension of detention seriously, which in addition forces the authorities to explicitly justify why the detention is not suspended.

However, the power of legislation should not be overestimated. The key word regarding the principle of last resort is ‘alternatives’. The best way to stimulate the use of arrest, detention or imprisonment as a measure of last resort is to offer adequate alternatives. According to the CRC Committee (GC No. 10, para. 80): ‘An effective package of alternatives must be available (…), in order for the States Parties to realize their obligation under article 37 (b) CRC to use deprivation of liberty only as a measure of last resort.’ Indeed, what is the point of requiring the use of deprivation of liberty as an ultimum remedium if there are no alternatives, if the last resort is the one and only resort? The development of adequate alternatives is of vast importance. One should distinguish between alternatives to arrest and police custody, pre-trial detention, and imprisonment.

A. Arrest and Police Custody

The arrest of children within a juvenile justice context is basically a matter for the police or the law enforcement authorities, although arrest can be based on a court order. Arrest is a form of deprivation of liberty which often results in remand in police custody, which hides children from view and places them in a particularly vulnerable position. Obviously, arrest is a forerunner of remand in police custody and pre-trial detention. Using arrest as a measure of last resort will have an effect as possible’. Pre-trial detention should therefore be limited ‘to essential reasons, such as danger of suppression of evidence, repetition of the offence and absconding’. According to the HRC ‘article 9, paragraph 3, allows pre-trial detention as an exception’ and that pre-trial detention may be used if ‘necessary, for example, to ensure the presence of the accused at the trial, avert interference with witnesses and other evidence, or the commission of other offences’.

175 The reference to the shortest possible period of time is interesting, because the ICCPR is silent about the duration of pre-trial detention. Cf Rule 17 JDLs which provides in more firm wording that ‘detention before trial shall be avoided to the extent possible and limited to exceptional circumstances’.


178 Cf art. 5 (1) ECHR. These remarks make clear that the discussion here overlaps the discussion of the prohibition of arbitrariness; see earlier above.
on the use of detention. Not infrequently children are arrested for legitimate reasons, but still unnecessarily or inappropriately. One can think of arrests of street children or vagrants or arrests for status offences, such as truancy or violations of curfews, or for offences taking place in a school setting which often can be handled in a satisfactory manner by the school itself.\textsuperscript{179}

In order to prevent unnecessary or inappropriate arrest and subsequent police custody and pre-trial detention one should look for alternatives available to law enforcement officials other than arresting the child and taking him into police custody. Law enforcement officials have a large discretion. This implies that above all the police must act and react to children, while keeping the principle of last resort in mind, even if they are entitled to arrest a child and place them in police custody. This will require a substantial change of attitude. Specialized police forces and training and education are of the utmost importance in this regard.\textsuperscript{180} So are ‘the establishment of rules, regulations or protocols which enhance equal treatment of child offenders [and accused – tl] and provide redress, remedies and compensation’ (GC No. 10, para. 6).

In addition, police officers must have appropriate alternatives available. The first most obvious alternative is picking up the child and returning him to his family immediately. However it happens that some children have no family or the family is not known to the authorities\textsuperscript{181} or that the family does not want the child to return to the family home. Moreover, the family may not be a safe place for the child.

If the child’s family is not an option, an alternative may be foster care, a crisis centre, a shelter home or other temporary centre under the supervision of child protection authorities. However, it is of the utmost importance to note that the end does not justify the means. This implies that the alternative home or place should not lead to a placement, which is worse, more harmful, more restrictive (i.e. resulting in deprivation of liberty), or contrary to the child’s best interests and rights or as harmful as police custody.\textsuperscript{182}

B. Pre-trial Detention

According to article 9 (3) ICCPR ‘anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to

\textsuperscript{179} By implication the use of arrest as a measure of last resort covers other (legal) systems as well, besides the juvenile justice system. Cf the implications of art. 2 CRC as addressed by the CRC Committee in its GC No. 10, para. 6. (see para 3.2); cf Inter-American Commission, Case 11.491, Report No. 41/99, 10 March 1999 (Minors in Detention v. Honduras). Cf in this regard, e.g. the project ‘Juvenile Detention Alternatives Initiative (JDAI)’ of The Annie E. Casey Foundation, Baltimore (US); see in particular Orlando 1999.

\textsuperscript{180} Cf Rules 1.6 and 12 Beijing Rules.

\textsuperscript{181} The lack of an adequate system of birth registration may cause difficulties in locating the child’s family.

\textsuperscript{182} Cf e.g. the JDAI project just mentioned and in particular DeMuro 1999.
release’. This provision is important to the principle of last resort, because it builds in an additional check after the police have decided to arrest the child, at the junction of arrest and pre-trial detention. Promptly after his arrest or detention on a criminal charge the child must be brought before a judicial authority, who should examine the legality of his deprivation of liberty, including an assessment of the question whether the arrest or detention is used as a measure of last resort and whether it is legitimate for it to be prolonged (see below).

As mentioned before, the legislator plays an important role regarding the legislative limitations to the use of pre-trial detention. According to the CRC Committee, States Parties should ‘take adequate legislative and other measures [Italic – tl] to reduce the use of pre-trial detention’ (GC No. 10, para. 80). As mentioned before, article 9 (3) ICCPR stipulates that the use of pre-trial detention must be an exception and not ‘the general rule’. Although not as strongly formulated as article 37 (b) CRC,183 it subsequently provides for alternatives to the use of pre-trial detention. By stating that ‘release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment’, article 9 (3) ICCPR implicitly provides for the alternative of conditional release or the suspension of detention under conditions. The HRC took a step further in *Hill and Hill v. Spain* (HRC Comm. No. 526/1993) by ruling that ‘bail should be granted, except in situations where the likelihood exists [that the person charged] would abscond or destroy evidence, influence witnesses or flee from the jurisdiction of the State party’.184 Joseph, Schultz & Castan conclude that ‘article 9(3) ICCPR prescribes that bail be ordinarily available to detainees’.185 They add that ‘[p]resumably, bail should not be set at an excessively high figure which might preclude a detainee from being able to raise it’. This remark is of importance when it comes to the release of children under bail. Van Bueren argues that ‘[i]n states which are party to the [CRC] and where it is not possible for children to meet the required financial guarantees to be released pending trial, the requirement that release of juveniles is only upon payment of bail would appear to breach international standards requiring juveniles to be detained as a last resort’.186 In other words, more and other more realistic conditions must be available.

Rule 13.2 of the Beijing Rules provides more guidance by stating that ‘[w]henever possible, detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement within the family,'

---

or in an educational setting or home'. 187 Alternatives to pre-trial detention within the juvenile justice system basically are either forms of suspension or diversion from the juvenile justice system. The conditions of suspension may be (intensive) probation, home confinement, electronic monitoring or more substantive conditions such as attending school or visiting evening reporting centres. More or less similar to suspension are alternatives during pre-trial detention that are less-restrictive, such as night-detention, training programmes or internships. 188

In the light of this, it is of the utmost importance, however, to acknowledge that diverting children in the pre-trial phase and finding alternatives to pre-trial detention for children within the juvenile justice system should not lead to negligence of the child’s human rights and legal safeguards, such as the presumption of innocence and the right to privacy (art. 40 (2) (b) (i) CRC). These fundamental rights and safeguards must be fully respected and protected at all times and at all costs. 189 In addition, the CRC Committee has rightfully stressed that ‘[t]he use of these alternatives must be carefully structured to reduce the use of pre-trial detention as well, rather than ‘widening the net’ of children sanctioned’ (GC No. 10, para. 80).

Thus, the judgment whether a child should be detained is first a matter of legality. Are there legal grounds to detain the child accused of having infringed penal law? One should also raise the question: is detention really necessary or are there alternatives through which the objectives of pre-trial detention, such as to assure that the child will appear before court, can also be secured? Moreover, one should take into account the best interests of the child (art. 3 (1) CRC). Altogether, a careful assessment is required. Such an assessment should be done in each case regarding each child individually and must primarily take into account the best interests of the child, including the child’s personal circumstances (age, family, etc.), followed by the specific circumstances of the case, including the alleged

187 The aim of the Beijing Rules is to provide rules to reduce the negative implications of the juvenile criminal justice system as much as possible and during pre-trial detention ‘[t]he danger to juveniles of “criminal contamination” (…) must not be underestimated’, see commentary to rule 13. Obviously, regarding the alternative of placement in an educational setting or home there is a risk that the child will be deprived of his liberty as well.

188 Cf art. 40 (4) CRC; see further below. The Inter-American Court considered in the case concerning the Children’s Rehabilitation Institute (Judgment of 2 September 2004. Series C. No. 112 (‘Juvenile Reeducation Institute’ v. Paraguay, para. 230) that the following measures should be considered as alternatives to pre-trial detention: close supervision, permanent escort, foster care, transfer to an educational institute (cf e.g. art. 5 (1) (d) ECHR), care, guidance and supervision orders, counselling, probation, education and vocational training programmes and other alternatives to interment. Cf De Jesús Butler 2005, p. 159. See also Committee of Ministers (Council of Europe), Recommendation Rec (2003), 20, para. 17 calling for the use of ‘placements with relatives, foster families or other forms of supported accommodation’ as alternatives to pre-trial detention. Cf again the JDAI project; DeMuro 1999.

189 See art. 40 (3) (b) CRC; the CRC Committee reiterates this many times in its GC No. 10.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

offence, the presence of victims, public disturbance, etc. 190 This assessment by a competent (judicial) authority has important implications for the principle of last resort. 191

C. Imprisonment

With regard to imprisonment of children it is important to note that according to art. 40 (4) CRC States Parties must ‘ensure that children are dealt with in a manner appropriate to their well being and proportionate both to their circumstances and the offence’ and that to reach this objective ‘[a] variety of dispositions’ must be made available ‘such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care’. 192 This paragraph therefore requires States Parties to design and use alternatives to institutional care (i.e. deprivation of liberty) as a disposition within the juvenile justice system. Obviously, detailed arrangements differ from time to time, from region to region and from culture to culture, but the 1957 Standard Minimum Rules for the Treatment of Prisoners already acknowledged that ‘[a]s a rule (…) young persons should not be sentenced to imprisonment’ (rule 5 (2)). States Parties should try to develop and effectively implement alternatives in constructive ways, which exceed the level of pilots and experimentation. This means that these alternatives should be available nationwide in a well-organized manner, that meets the specific needs of the child, takes into account the objectives of the juvenile justice system (art. 40 (1) CRC) and the public interests, and that respects the child’s human rights and the human rights of others. In addition, the (alternative) disposition must be proportionate. 193

Using imprisonment as a disposition of last resort implies, in light of art. 40 (3) (b) CRC, that one must first search for ‘interventions without resorting to judicial proceedings’. 194 This has an effect on the use of both pre-trial detention, as well as imprisonment. According to the CRC Committee (GC No. 10, para. 26): ‘States Parties should make measures for dealing with children in conflict with the law without resorting to judicial proceedings an integral part of their juvenile justice

190 Although the latter aspects can easily be abused to lock children up unnecessarily.
191 Directly related and of vast importance is the child’s right to challenge the legality of his deprivation of liberty before a court or other competent, independent and impartial authority; art. 37 (d) CRC. See further below.
192 Rule 18 Beijing Rules provides a non-exhaustive list of measures that must be made available in light of the avoidance of institutionalization to the ‘greatest extent possible’. These measure include besides the ones mentioned in art. 40 (4) CRC: community service orders, financial penalties, compensation and restitution, intermediate treatment and other treatment orders, orders to participate in group counselling and similar activities, living communities and other educational settings and other relevant orders. Restorative justice mechanisms can be mentioned in this regard as well.
193 Cf. the Tokyo Rules. As mentioned in Chapter 2, the Council of Europe has drafted European Rules for Juvenile Offenders Subject to Sanctions or Measures, which include detailed rules regarding the imposition and implementation of community sanctions and measures.
system, and ensure that children’s human rights and legal safeguards are thereby fully respected and protected (art. 40 (3) (b) CRC). The juvenile justice system in other words must be an ultimum remedium, which will affect the use of deprivation of liberty in this regard.

The principle of last resort not only requires alternatives to institutional disposition, but also the use of the least restrictive forms of deprivation of liberty, through (gradual) placement in open settings, reintegration programmes and early conditional release.195 Regarding the execution of imprisonment, the principle of last resort implies that States Parties should always seek the least restrictive forms of deprivation of liberty.196 In addition to the principle of last resort, this requirement emphasizes that open institutions should be favoured over closed institutions and ‘any facility should be of a correctional or educational rather than of a prison type’.197 The question can be raised whether it is possible to operate a correctional or educational programme in a more open setting as a viable alternative to the traditional closed model. In the event a closed setting is regarded necessary, the following question must surely be when the child can be transferred to a less restrictive environment. As soon as appropriate, the child must be transferred to a more open setting, preferably a setting in which he is not deprived of his personal liberty.198 In this regard pathways could be designed in which a closed placement is gradually followed by less restrictive (preferably non-restrictive) ones. This would also fit the requirement of deprivation of liberty for the shortest appropriate period of time (see below).

Again, the use of deprivation of liberty as a measure of last resort implies that neither the deprivation of liberty nor the alternatives may be imposed without a proper assessment taking into account the specific circumstances of the case and the specific needs and characteristics of the individual child. Rule 17 (b) of the Beijing Rules provides that ‘[r]estrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum’. Furthermore Rule 17 (c) prescribes that ‘deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving

195 Cf Commentary to rule 19.1 Beijing Rules. And cf rules 30 and 79 JDLs and rule 29.1 Beijing Rules. Gradual reintegration followed by aftercare is also of the utmost importance for the reintegration of the child; see, e.g. the commentary to rule 29.1 Beijing Rules, which calls for semi-institutional arrangements. In addition, the JDLs are drafted in light of its underlying ‘principle of incompleteness’ and objective to foster the integration of facilities into the community; see Chapter 2.
196 See also rule 19 Beijing Rules. According to the attached commentary this rules ‘makes the appeal 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’.
197 Commentary to rule 19 Beijing Rules. Cf rule 30 JDLs.
198 This requires a periodic review or the possibility to request for review; see below.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response. Moreover, "the well-being of the juvenile shall be the guiding factor in the consideration of her or his case".200

Finally, it is important to note that the last resort principle does not imply that all the alternatives must be used and tried first, before imprisonment can be imposed.201 The competent authority must be provided with different options and must subsequently be enabled to judge which of these is likely to have the intended effect and therefore can be regarded as an appropriate and adequate response to the child’s criminal behaviour. Obviously, this judgment must be lawful and not arbitrary.202 The burden of proof regarding the need for deprivation of liberty lies with the authorities. They have to argue why the detention or imprisonment is necessary and shall endure (in the case of prolonged incarceration) and this requirement obviously places the authorities under the duty to review the detention regularly.203

3.4.4 Deprivation of Liberty for the Shortest Appropriate Period of Time

3.4.4.1 Introduction

The requirement that arrest, detention and imprisonment must be imposed only for the shortest appropriate period of time cannot be found in any other international

199 Hodgkin & Newell refer to a member of the CRC Committee who pointed out, during the discussion of Nigeria’s Initial Report, that it is a misconception that 'last resort’ only refers to children guilty of serious crimes; Hodgkin & Newell 2002, p. 550.
200 Rule 17 (d) Beijing Rules. For more information on rule 17 Beijing Rules see the added commentary. It points, inter alia, to the rather controversial debate on the (philosophical) approaches of objectives of the juvenile justice system.
201 This applies to arrest, police custody and pre-trial detention as well.
202 By implication every case needs to be judged and reviewed individually. This requirement leaves no room for, e.g. collective sentences or mandatory sentences (minimum sentences would give the wrong signal as well; it is also relevant to the requirement of the use of deprivation of liberty for the shortest appropriate period of time). See above.
203 Cf Schabas & Sax 2006, p. 84-85. Cf art. 25 CRC, although the question should be raised whether this article is applicable to detention and imprisonment under the juvenile (criminal) justice system; see further below. Subsequently, taking into account the wording and the related limited scope of art. 37 (b) second sentence (which may be too limited; see further below), the value of art. 25 CRC in this regard can be questioned. Cf art. 37 (d) CRC.
204 As pointed out in Chapter 2 the word ‘appropriate’ has been added during the final stages of the drafting of article 37 (b) CRC, replacing the word ‘possible’, which is used in the Beijing Rules (Rules 13.1). Art. 17 JDLs, adopted later than the CRC, ‘returns’ to the use of the shortest possible duration again (rule 17). Both rule 13.1 Beijing Rules and rule 17 JDLs use this wording with regard to pre-trial detention. Furthermore, rule 2 speaks of the ‘minimum necessary period’ for the use of deprivation of liberty in general and rule 19.1 Beijing Rules uses the same wording with regard to institutionalization as a disposition. This different terminology is rather confusing. In
human rights treaty and goes beyond the scope of article 9 (3) ICCPR. As mentioned above the latter deals with the junction between police custody and pre-trial detention, which must not be ‘the general rule’. But more importantly, this article enshrines entitlement regarding a prompt hearing before a judge or other authorized officer and a trial within a reasonable time or release.\textsuperscript{205} Article 37 (b) CRC covers imprisonment as well and going substantially further.\textsuperscript{206} The ICCPR provision merely provides for legal safeguards in order to,\textit{ inter alia}, prevent a prolonged arrest and pre-trial detention due to the absence of a speedy process, while the CRC provision represents a substantial obligation of States Parties for all forms of deprivation of liberty within the juvenile justice system. The right to be brought promptly before a judicial authority is only part of this obligation. Substantially, the use of arrest, detention or imprisonment of the child ‘for the shortest appropriate period of time’ implies that the length of the period of time may not interfere negatively with the ‘best interests of the child’.\textsuperscript{207} In the individual case, the length of deprivation of liberty must be\textit{ appropriate} to the child’s interests and these interests should be pointed out clearly in an assessment, on the basis of which a judicial authority can determine the appropriate length of the detention.\textsuperscript{208}

It would have been easy to determine the meaning of the ‘shortest appropriate period of time’ if international human rights law, and in particular the CRC, provided explicit guidelines on the length (or limitations) of time. It is not surprising that it has not done so, because that would have implied an enormous (and most likely unacceptable) limitation of state sovereignty.\textsuperscript{209} Moreover, the

\begin{flushright}
\textsuperscript{205} Cf art. 5 (3) ECHR and art. 7 (5) ACHR. Nowak elaborates on the personal scope of applicability of art. 9 (3) ICCPR. He argues that this scope is meant to be the same as under the ECHR, although the Committee of Experts of the Council of Europe considered the scope of art. 9 (3) ICCPR – aiming at persons arrested or detained on a criminal charge – more limited than the one of article 5 (3) ECHR, referring to arrest or detention of any person who is suspected of having committed an offence or having planned to do so; Nowak 2005, p. 230.

\textsuperscript{206} Cf Van Bueren 1995, p. 214 and Rules 13.1, 17.1 (b) and 19.1 of the Beijing Rules and Rule 2 JDLs. Obviously, for a proper implementation of art. 37 (b) CRC, the right to challenge the legality of the deprivation of liberty before a court and the right to a prompt decision on any such action, as enshrined in art. 37 (d) CRC, are of the utmost importance; cf art. 9 (4) ICCPR, art. 5 (4) ECHR and art. 7 (6) ACHR.

\textsuperscript{207} Art. 3 (1) CRC; cf Van Bueren 1995, p. 214ff.

\textsuperscript{208} Cf rule 2 JDLs which prescribes that ‘the length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release’.

\textsuperscript{209} Still, one could have opted for the adoption of the utmost limitations. By not doing so, the implications of the shortest appropriate period of time must be determined by other related and more indirect international human rights provisions. In addition, the CRC Committee provided

\end{flushright}
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

adding of the word ‘appropriate’ basically excluded the opportunity of adopting explicit indications or limitations, because this term implies a ‘tailor-made approach’. The shortest appropriate period of time, in other words, must be determined in each case individually, by a competent, independent and impartial authority or judicial body (GC No. 10, para. 81).

This approach can also be found in the HRC case law regarding the relation between the duration of detention and the prohibition of arbitrariness under article 9 (1) ICCPR. Within the ICCPR system the duration of the detention is not necessarily relevant to the judgment of whether the detention leads to a breach of article 9 (1) ICCPR.210 However a detention which as such is lawful and not arbitrary may become arbitrary after a certain period of time (see also para. 3.4.2).

In the case A. v. Australia (HRC Comm. No. 560/1993) the HRC did not condemn detention of immigrants as being arbitrary per se.211 However, the HRC observed that ‘detention should not continue beyond the period for which the State can provide appropriate justification’.212 The HRC clarified this by explaining that although the entry of immigrants may be illegal, requiring investigation, the detention can be arbitrary if there are no other factors present justifying the detention, like the chance that he will abscond or his lack of cooperation.213 It is interesting to note that in this case the HRC ‘essentially condemned the State Party’s blanket policy of detaining all persons in the [individual’s] circumstances’.214 Thus, deprivation of liberty needs to be imposed based on

---


211 See also Nowak 2005, p. 226. The HRC furthermore could not find a rule of ‘international customary law which would render all such detention arbitrary’; Joseph, Schultz & Castan 2004, p. 314.

212 Joseph, Schultz & Castan 2004, p. 315. This has been reaffirmed in HRC Comm. No. 900/1999 (C. v. Australia); Ibid., p. 317. See also Nowak 2005, p. 226-227 with further reference to HRC Comm. No. 1014/2001 (Badan et al. v. Australia; immigration detention for almost two years) and HRC Comm. No. 1096/2002 (Bakhtiyari et al. v. Australia; immigration detention for almost three years). The HRC stated that in this case ‘the State Party has not demonstrated that, in the light of the [immigrant’s] particular circumstances, there were not less invasive means of achieving the same ends, that is to say, compliance with the State party’s immigration policies’. The HRC continued by stating that ‘whatever the reasons for the original detention are, continuance of immigration detention for over two years without individual justification and without any chance of substantial judicial review was (…) arbitrary and constituted a violation of article 9, paragraph 1’; Joseph, Schultz & Castan 2004, p. 317. The HRC also stressed the importance of the right to habeas corpus in this regard by observing ‘that every decision to keep a person in detention should be open to review periodically so that the grounds justifying the detention can be assessed’; Ibid., p. 314-315.

213 Ibid., p. 315.

214 Ibid., p. 315. They also refer to ‘the HRC’s condemnation of the practice of ‘collective punishment for those found guilty of collective crimes’ in Libya; UN Doc. CCPR/C/79/Add. 101, para. 12.

197
individual considerations, on grounds that justifies it in each particular case or situation.

3.4.4.2 Arrest, Police Custody and Pre-trial Detention

Still, one could have chosen the adoption of minimum standards with time limitations, especially regarding police custody or pre-trial detention. Due to the absence of such limitations it is difficult to determine the outer limits. The CRC ‘case law’ provides for little guidance in this regard.\(^{215}\) Schabas & Sax argue that the CRC Committee found a pre-trial detention for a year not acceptable, just like the sentencing of children for twenty years of imprisonment.\(^{216}\) At the same time the CRC Committee criticized the Japanese juvenile justice system as ‘not in the spirit of the CRC principles, in particular the doubling of the limit of pre-trial detention from four to eight weeks’.\(^{217}\) As mentioned earlier, the CRC Committee expressed ‘concern that, in many countries, children languish in pre-trial detention for months or even years, which constitutes a grave violation of article 37 (b) CRC’ (GC No. 10, para. 80).\(^{218}\)

The duration of arrest and pre-trial detention is to a large extent dependent on the duration of the procedural aspects of the juvenile justice system and the progress of the child’s criminal case.\(^{219}\) The CRC Committee expressed for example its

---

215 The HRC case law provides some guidance. In the HRC case, *Jalloh v. The Netherlands* (HRC Comm. No. 794/1998), a minor asylum seeker complained of his detention for three and a half months. The HRC decided that this detention had not breached article 9 (1) ICCPR. First of all the detention was ‘lawful under Dutch law’. Furthermore the detention had been ‘reviewed by the courts on two occasions’ on which the courts found that ‘continued detention was lawful. The HRC continues by reiterating its previous jurisprudence in which the HRC ‘notes that ‘arbitrariness’ must be interpreted more broadly than ‘against the law’ to include elements of unreasonableness’ [Italic – tl’]; Joseph, Schultz & Castan 2004, p. 318. In HRC Comm. No. 631/1995 (*Spakmo v. Norway*) someone has been detained for eight hours in order to force him to stop demolition work, which was considered disturbing. The HRC found a violation of article 9 (1) ICCPR, because it found this detention unreasonable; Nowak 2005, p. 227.

216 Schabas & Sax 2006, p. 88 with reference to the Concluding Observations on Jamaica, CRC/C/15/Add. 210, para. 56(c), resp. on Greece, CRC/C/15/Add. 170, para. 78 (h) and 79(f). Cf Concluding Observations on Burkino Faso in which the CRC Committee noted ‘that the sanctions set forth in the legislation as regards juvenile offenders, especially in cases carrying the death penalty or life imprisonment, reduced respectively to life imprisonment or to 20 years imprisonment, are excessively high’; CRC/C/15Add.19, para. 11; Hodgkin & Newell 2002, p. 551.

217 Concluding Observations on Japan, CRC/C/15/Add. 231, para 53; Schabas & Sax 2006, p. 88.

218 Note that the Committee of Ministers of the Council of Europe provide in its recommendation Rec (2003), 20 that children ‘should not be detained in police custody for longer than forty-eight hours [Italic – tl] in total and for younger offenders every effort should be made to reduce this time further’ (para. 15).

219 See, e.g. rule 17 JDLs which provides that ‘[w]hen preventive detention is nevertheless used, juvenile courts and investigative bodies shall give the highest priority to the most expeditious processing of such cases to ensure the shortest possible duration of detention’.
concerns about ‘delays in judicial proceedings leading to long periods of pre-trial detention’ in its Concluding Observations on Greece.\textsuperscript{220} In addition, children may be – and \textit{de facto} are – detained without any security about their prosecution, trial or without any of these in perspective. Setting time limits in this context is therefore also of great importance.

The ‘appropriate time’ in this phase of the juvenile justice process implies the necessary time to reach the objectives of arrest and pre-trial detention, and its determination is less dependent on the interests of the child than the overall and ultimate objective of the juvenile justice system. Although one must not ignore these aspects, it is conceivable that prolonged arrest and pre-trial detention does not contribute to the child’s reintegration into society.\textsuperscript{221} According to the CRC Committee there is an international consensus that the period between the offence and the final response determines the effect on the ‘desired positive pedagogical impact’ and the effect on the child’s stigmatization, and that it therefore must be ‘as short as possible’ (GC No. 10 para. 51).

However, the CRC does not set any explicit limitation in time other than that the child is entitled to have his case ‘determined \textit{without delay} [Italic – tl] by a competent, independent and impartial authority or judicial body in a fair hearing according to law’.\textsuperscript{222} The CRC Committee ‘recommends the States Parties to set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor and disposition by the court or other competent judicial body’ and it argues that ‘[t]he\textit{se time limits should be much shorter that the ones for adults}'.\textsuperscript{223} Moreover, article 9 (3) ICCPR provides that ‘[a]nyone who is arrested or detained (…) shall be entitled to a trial within reasonable time \textit{or to release} [Italic – tl]’, which clarifies the sanction on prolonged detention due to the absence of a trial within a reasonable

\textsuperscript{220} Schabas & Sax 2006, p. 88 with reference to Greece, CRC/C/15/Add. 170, para. 78.
\textsuperscript{221} Cf e.g. the commentary of rule 20 Beijing Rules which calls for avoidance of unnecessary delay, because ‘[t]he speedy conduct of formal procedures in juvenile cases is a paramount concern’ in light of the assumption that ‘[o]therwise whatever good may be achieved by the procedure and the disposition is at risk’.
\textsuperscript{222} Art. 40 (2) (b) (iii) CRC. Cf art. 37 (d) CRC that speaks of ‘prompt’, which ‘is even stronger – and justifiably so given the seriousness of deprivation of liberty – than the standard ‘without delay’ (art. 40 (2) (b)\textsuperscript{(iii)} CRC), which is stronger than the standard ‘without undue delay’ of art. 14 (3) (c) ICCPR’, according to the CRC Committee (GC No. 10, para. 51). Cf in particular regarding the trial of persons in pre-trial detention: art. 9 (3) ICCPR, art. 5 (3) ECHR and art. 7 (5) ACHR that speak of ‘trial within a reasonable time’; cf regarding the fair trial principle in general (like art. 40 CRC): art. 6 (1) ECHR, art. 8 (1) ACHR and art. 7 (1) (d) ACHPR, that speak of a ‘trial within a reasonable time’. Note that art. 37 CRC does not provide for any guidance for procedural time limitations affecting arrest and pre-trial detention. The only references to speediness can be found in art. 37 (d) CRC.
\textsuperscript{223} GC No. 10, para. 52. The CRC Committee adds that ‘at the same time, decisions without delay should be the result of a process in which the human rights of the child and legal safeguards are fully respected’.
Although, this may not be true under art. 5 (3) ECtHR, according to Bleichrodt it is ‘it is evident that Article 5(3) does not contain a choice between either release or trial within a reasonable time, but the obligation to keep a prisoner no longer in detention on remand than is reasonable and to try him within a reasonable time’; Bleichrodt 2006, p. 491.

This requirement is also relevant to the principle of last resort; see earlier above. Joseph, Schultz & Castan argue that the ‘HRC jurisprudence (…) indicates that the limit of ‘promptness’ for the purposes of the article 9 (3) guarantee of judicial review lies somewhere around three days’; Joseph, Schultz & Castan 2004, p. 324-325. They provide for a more detailed overview of the relevant case law. They refer furthermore to Concluding Observations in which the HRC once stated that ‘(t)he State Party should take action to ensure that detention in police custody never lasts longer than 48 hours and that detainees have access to lawyers from the moment of their detention. The State Party must ensure full de facto compliance with the provisions of article 9, paragraph 3, of the Covenant’; Joseph, Schultz & Castan 2004, p. 325. They therefore argue that the HRC is stricter in its concluding observations than in its GC No. 8. However, the HRC is not as strict as the CRC Committee.

Although, this may not be true under art. 5 (3) ECHR, according to Bleichrodt it is ‘it is evident that Article 5(3) does not contain a choice between either release or trial within a reasonable time, but the obligation to keep a prisoner no longer in detention on remand than is reasonable and to try him within a reasonable time’; Bleichrodt 2006, p. 491.

Cf art. 5 (3) ECHR and art. 7 (5) ACHR. Note that the CRC lacks a similar provision.

This requirement is also relevant to the principle of last resort; see earlier above. Joseph, Schultz & Castan argue that the ‘HRC jurisprudence (…) indicates that the limit of ‘promptness’ for the purposes of the article 9 (3) guarantee of judicial review lies somewhere around three days’; Joseph, Schultz & Castan 2004, p. 324-325. They provide for a more detailed overview of the relevant case law. They refer furthermore to Concluding Observations in which the HRC once stated that ‘(t)he State Party should take action to ensure that detention in police custody never lasts longer than 48 hours and that detainees have access to lawyers from the moment of their detention. The State Party must ensure full de facto compliance with the provisions of article 9, paragraph 3, of the Covenant’; Joseph, Schultz & Castan 2004, p. 325. They therefore argue that the HRC is stricter in its concluding observations than in its GC No. 8. However, the HRC is not as strict as the CRC Committee.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

promptness must be assessed in each case according to its special features, the conclusion can be drawn that the CRC Committee has indeed chosen a firm and, moreover, shorter period of time regarding children.

The CRC Committee also recommends that ‘[i]n case a conditional release of the child, e.g. by applying alternative measures, is not possible the child should be formally charged with the alleged offences and be brought before a court or other competent, independent and impartial authority or judicial body, not later than thirty days after his/her pre-trial detention takes effect’. In addition, the CRC Committee addresses the practice of adjourning court hearings, which leads to the extension of the pre-trial detention, and therefore ‘urges the State parties to introduce the legal provisions necessary to ensure that the court/juvenile judge or other competent body makes a final decision on the charges not later than 6 months after they have been presented’ (GC No. 10, para. 83). Furthermore, one should take into account the fact that pre-trial detention may endure if the child exercises his right to appeal. The Committee does not address this issue, but the same time limits arguably apply.

227 ECHR, Judgment of 22 May 1984, Series A. no. 77 (De Jong, Baljet and Van den Brink v. the Netherlands), para. 52; ECHR, Judgment of 27 June 1968, Series A. No. 7 (Wemhoff v. Germany), para. 10. Bleichrodt furthermore refers to ECHR, Judgment of 28 November 1991, Series A. No. 221 (Koster v. The Netherlands), para. 24 and argues that ‘promptly’ under art. 5 (3) ECHR means that ‘adequate provisions will (…) have to be made in order that the prisoner can be heard as soon as may reasonably be required in view of his interests’; Bleichrodt 2006, p. 487.

228 Additionally, every child arrested or detained is entitled to be informed promptly of any charges (art. 9 (2) ICCPR, art. 5 (2) ECHR, art. 7 (4) ACHR); see para. 3.4.5.

229 At the same time speeding up the process may not lead to negligence of the child’s human rights and legal safeguards either; see para. 52. The Committee of Ministers of the Council of Europe leaves more room in its Recommendation (2003), 20: ‘When, as a last resort, juvenile suspects are remanded in custody, this should not be for longer than six months before the commencement of the trial.’ However, it also provided that ‘[t]his period can only be extended where a judge not involved in the investigation of the case is satisfied that any delays in proceedings are fully justified by exceptional circumstances.’

230 Art. 40 (2) (b) (v) CRC; art. 14 (5) ICCPR. Note that in many jurisdictions the prosecutor has the right to appeal as well. Under the ECHR the ECHR has ruled that in the determination of a trial within a reasonable time one should look at the time between the arrest and the judgment at first instance; Bleichrodt 2006, p. 492 with reference inter alia to ECHR, Judgment of 27 June 1968, Series A. No. 7 (Wemhoff v. Germany), para. 6-8. The period after the first instance may not be taken into account when one assesses the question whether the detention has been reasonable under art. 5 (3) ECHR. In addition the period between the quashing of the first judgment and the delivery of the second judgment may be assessed separately on reasonableness under art. 5 (3) ECHR; Bleichrodt 2006, p. 492-493 with reference to inter alia ECHR, Judgment of 6 June 2000, Appl. No. 33644/96, (Český v. the Czech Republic), para. 71.
3.4.4.3 Imprisonment

The requirement of the shortest appropriate period of time also affects imprisonment as disposition, but is no longer completely dependent on the time limits of the prosecution or the trial.\textsuperscript{231} It is a matter of sentencing in the first place and subsequently one of execution.

The competent independent, impartial body or judicial body\textsuperscript{232} imposing the sentence may only do so after a careful assessment, not only with regard to the alternatives to imprisonment, but also to its duration. The requirement of the shortest appropriate period of time demands that the competent authority takes into account the best interests of the child in light of the child’s well-being and reintegration, as the general objective of the juvenile justice system (art. 40 (1) CRC), but also the circumstances of the case, enshrined in the principle of proportionality (art. 40 (4) CRC).\textsuperscript{233} The latter principle is nowadays considered one of the core principles in the (juvenile) justice system and is of particular importance when it comes to imprisonment of children. The principle is contrary to some (historical) approaches, such as the one known as the social welfare approach, according to which reactions to delinquent behaviour can lead to long (and prolonged) deprivations of liberty in borstals, reformatories, etc., \textit{inter alia} aiming at the removal of the child from his social environment and re-education.\textsuperscript{234} The more contemporary approach is that the principle of proportionality forms part of most (juvenile) justice systems.\textsuperscript{235}

The principle of proportionality is also meant to prevent the tipping of the scale towards repression. Mere repression will be in conflict with the objective of the

\textsuperscript{231} In some jurisdictions, however, the court can order imprisonment for less the period spent in pre-trial detention. In addition, violation of requirement of trial within reasonable time or without undue delay can lead to the reduction of the length (or severity) of the sanction as well. Cf art. 9 (3) ICCPR requiring release as the ultimate sanction for violation of the right to a trial within reasonable time. As mentioned before, art. 5 (3) ECHR seems to represent another approach; see Bleichrodt 2006, p. 491. Moreover, an accused child can be released awaiting trial (without excluding the sentence of imprisonment after conviction). A European child then falls under the protection of art. 6 (1) ECHR, Bleichrodt 2006, p. 491 with reference to, e.g. ECtHR, Judgment of 13 July 1995, Series A. no. 321 (\textit{Van der Tang v. Spain}), para. 58. Art. 6 (1) ECHR provides for a trial without undue delay which implies different criteria the trial within a reasonable time under art. 5 (3) ECHR; \textit{Ibid.}, p. 492. Under art. 6 (1) ECHR the reasonableness must be judged in view of the circumstances of the case. Violation of this aspect of art. 6 (1) can be compensated by, e.g. a reduction of the sentence; Van Hoof & Viering 2006, p. 606-611.

\textsuperscript{232} Art. 40 (2) (b) (iii) CRC; cf Rule 2 JDLs which provides that ‘[t]he length of the sanction should be determined by the judicial authority without precluding the possibility of his or her early release’.


\textsuperscript{234} Cf e.g. Weijers & Liefaard 2007 and para. 4.1.

\textsuperscript{235} However, one should note that is subject to a dynamic debate; see, e.g. art. 40 (1) CRC jo. rule 17 for the guiding principles of the juvenile justice system, adjudication and disposition.
juvenile justice system, embodied in article 40 (1) CRC, and with the requirement of imprisonment for the shortest appropriate period of time. In light of this, the imposition of life imprisonment of children, although not forbidden by the CRC (art. 37 (a) CRC), can be considered incompatible with article 40 (1) jo. 37 (b) CRC. One could raise the question when or under which circumstances life imprisonment could possibly be a disposition of the shortest appropriate period of time. Although it seems not difficult to answer this question, the CRC framework gives little guidance on the maximum time limits of the disposition of imprisonment. The CRC Committee has provided some indication.

Furthermore, many jurisdictions allow (mandatory) transfer or waiver of children to the adult court or the treatment under the adult penal law as adult offenders. The CRC Committee has criticized these laws and practices heavily and recommended in GC No. 10 for States Parties, to ‘change their laws with a view to achieve a non-discriminatory full implementation of their juvenile justice rules to all persons under the age of 18 years’. This criticism is directed in particular and explicitly to any limitation of the applicability of the juvenile justice rules to children under the age of sixteen or lower, or that allow that 16 or 17 year olds to be treated as adult criminals (GC No. 10, para. 38). Moreover, these laws and practices will violate the requirement of the shortest appropriate period of time, on the basis of the assumption that an adult sentence in essence is not appropriate for children.

The same conclusion applies to sentences with a significant discretion for the executive power, President, Monarchs or other Heads of State. According to Hodgkin & Newell the CRC Committee expressed its concerns regarding Nigeria ‘that the provisions of national legislation by which a child may be detained ‘at Her Majesty’s Pleasure’ may permit the indiscriminate sentencing of children for indeterminate periods’. Rule 2 JDLs provides, in this regard, that ‘[t]he length of the sanction should be determined by the judicial authority’.

---

237 The CRC Committee has found sentencing of children for twenty years not acceptable; Schabas & Sax 2006, p. 88 with reference to the Concluding Observations on Greece, CRC/C/15/Add. 170, para. 78 (h) and 79(f). Cf Concluding Observations on Burkino Faso in which the CRC Committee noted ‘that the sanctions set forth in the legislation as regards juvenile offenders, especially in cases carrying the death penalty or life imprisonment, reduced respectively to life imprisonment or to 20 years imprisonment, are excessively high’ CRC/C/15/Add.19, para. 11; Hodgkin & Newell 2002, p. 551.
238 See, e.g. Weijers 2006.
239 In addition, the appropriateness of juvenile sanctions is, to a large extent, dependent upon their execution; see further below.
The assessment of the duration of the disposition is complex, because it is delicate and potentially paradoxical. The assessment is delicate because it must be based on the merits of the individual case, including the child’s best interests and the public interest. In addition, it is potentially paradoxical due to the chosen wording ‘shortest’ and ‘appropriate’. ‘Shortest’ implies that one should always seek the shortest imprisonment, which is based on rule 19 Beijing Rules and rule 2 JDLs calling for respectively the use of institutionalization, deprivation of liberty for the ‘minimum necessary period’ and ‘appropriate’ emphasizes that imprisonment must be based on a ‘tailor-made’ decision, but does not necessarily imply the shortest form. On the contrary, ‘appropriate’ may very well imply a longer imprisonment, which may be in conflict with the principle of proportionality (see below).

This raises the question: what is the relation between shortest and appropriate? Appropriate is not necessarily the shortest period of time. Are these two separate elements or are they attached and bound to each other, so that one should always look for the ‘shortest appropriate’ period of time? The CRC seems to represent the latter interpretation. The use of imprisonment for the shortest (possible) period of time at all costs may very well be inappropriate for the best interests of the child in question. It might for example be on strained terms with the interests of the child in need of the structure and protection a closed environment can provide for, or with the interests of the child in need of psychiatric treatment. Therefore, deprivation of liberty as part of juvenile justice should first of all be the shortest appropriate disposition in light of the best interests of the child and the child’s specific needs in conjunction with the realization of the objectives of juvenile justice (art. 40 (1) CRC). In addition, one should impose deprivation of liberty, within the boundaries of appropriateness, for the shortest period of time.

In other words, the requirement of the shortest appropriate period of time requires States Parties to use deprivation of liberty as an appropriate response to delinquent behaviour for the shortest possible period of time. It should essentially contribute to the objectives of juvenile justice, in particular to the promotion of the child’s reintegration into society (art. 40 (1) CRC). It is assumed that this objective of reintegration in general is not served by deprivation of liberty or that it is better served by limiting the duration of imprisonment. In light of this, the use of the term ‘appropriate’ may have weakened the provision in the sense that it leaves too much room for abusive practices.

242 Compare rule 13 Beijing Rules which require the ‘shortest possible period of time’ and rule 17 JDLs ‘the shortest possible duration’ for the use of pre-trial detention; these wordings seems to be more firmly.

243 ‘Shortest’ as the adjective of ‘appropriate’.

244 The best interests of the child principle should also be paramount when considering deprivation of liberty and it is not excluded that the conclusion may be that deprivation of liberty is considered to be in the child’s best interests and therefore is appropriate.

245 Cf also Commentary to rule 19 Beijing Rules and rule 5 (2) Standard Minimum Rules.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

In addition, the relation between proportionality and the shortest appropriate period of time should be highlighted (again), since the determination of the appropriate period of time could lead to a disposition that is disproportional. By implication the longer imprisonment endures, even if ‘legitimized’ by the child’s particular need for treatment, the more it becomes disproportionate. A certain disproportionateness may be defended by the child’s best interests and needs for treatment, also in light of article 40 (1) CRC. However, one should not lose sight of the fact that the deprivation of liberty forms part of the juvenile justice system and may therefore never result in an indeterminate sanction or a sanction that is not aiming at the child’s reintegration, enabling him to play a constructive role. Thus, each disposition under article 40, including imprisonment or any other order that leads to deprivation of liberty, should take into account the principle of proportionality, which rules out a general (merely repressive) approach.

The requirement of the shortest appropriate period of time must also be seen as a positive obligation for States Parties to establish a system that promotes necessary liberty deprivation only for the shortest appropriate period of time. This implies a duty to seek effective programmes that rely on a relatively short period of deprivation of liberty. In addition, these programmes must start as soon as possible and be appropriate with reintegration programmes and a gradual return to society. If the deprivation of liberty as a disposition also has the objective of the child’s treatment, which it can be in certain legal systems, periodic review under article 25 CRC arguably is required. This can be of significance for the determination of whether a child could start with a reintegration programme. Early and conditional release should be mentioned in this regard as well, as rule 2 JDLs provides that judicial authority must determine the length of the sanction ‘without precluding the possibility of his or her early release’. One could for example think of a system in

---

246 As mentioned earlier, in some jurisdictions a child can be sentenced to a treatment order under juvenile criminal law, which on the one hand takes into account the seriousness of the crime and on the other the needs of the child; cf Chapter 4.

247 For example mandatory sentences (like, e.g. in the US; see also the rule ‘three strikes and you are out’) or minimum sentences (like, e.g. in Germany) imply per definition a violation of this principle, i.e. the appropriateness then depends on the legislators’ assumption of the appropriate period of time concerning specific offences, which precludes any individual assessment taking into account the personal circumstances of the child offender and the circumstances of the case.

248 This does also fit one of the key principles of the JDLs which proclaims that the institutions should try to (re)establish (or maintain) as much as possible the contact between the community and the particular child.

249 GC. No. 10, para. 77; see also para. 3.4.5.

250 Cf para. 3.4.4.2 for conditions regarding the suspension of pre-trial detention.

251 According to rule 28.1 Beijing Rules ‘conditional release shall be used (…) to the greatest possible extent, and shall be granted at the earliest possible time’. According to the commentary to this rule one can think of conditions like ‘attendance in community programmes, residence in halfway houses, etc.’. In addition, children must receive ‘full support by the community’ and assistance and supervision by an appropriate authority, such as the probation services; rule 28.2. Aftercare is of
which the judicial authority determines the length of the sanction in each case individually, within the boundaries provided by the legislator (minimum or mandatory sentences excluded) and where the director of the institution where the child is placed has the authority to request early (conditional) release when appropriate.\textsuperscript{252}

If the law permits prolongation by the court of the sanction that leads to deprivation of liberty,\textsuperscript{253} it should be used as a measure of last resort only and the subsequent decision should only lead to the imposition of liberty deprivation if it is a last resort and for the shortest appropriate period of time. The burden of proof regarding the need to request a prolongation lies with the authorities (see above). In light of this, the possibility of sanctioning the child to imprisonment or a treatment order leading to placement in a setting that deprives him of his liberty for an indefinite term, without a regular review before the authority competent to order his release, seems to be in conflict with article 37 (b) CRC.\textsuperscript{254}

Finally, the ‘appropriateness’ of the deprivation of liberty is also dependent on the available institutions. It does not call for the creation and establishment of more, but better institutions. However, it does call for the use of appropriate institutions if one chooses to permit lawful and non-arbitrary deprivation of liberty of children. A sentence of imprisonment can hardly be defended under article 37 (b) CRC if it results in placement of the child in inadequate institutions.

The (in)adequacy of institutions should be determined in light of the objectives of the child’s placement (i.e. the objectives of the juvenile justice system and the child’s specific needs) and the requirement that children must be treated with humanity, with respect for their human dignity and in a manner that takes into account the needs of persons of their age (art. 37 (c) CRC). Disregard or negligence of the child’s legal status in this regard will result in the placement being in conflict with the requirement of the shortest appropriate period of time.

In addition, practices in which children are waiting for the appropriate placement in another inappropriate setting can amount to a violation of article 37 (b) CRC as well.\textsuperscript{255}

\textsuperscript{252} The utmost importance for the success of the child’s reintegration; see also rule 29.1.
\textsuperscript{253} It is unclear whether a child has the right to challenge the length of the sanction under his right to challenge the legality of the deprivation of liberty (art. 37 (d) CRC) when this is based on a court order; see below).
\textsuperscript{254} See for example Dutch law regarding the treatment order for children; see Chapter 4.
\textsuperscript{255} And art. 25 CRC does not provide for such as right to review either; see further below.
\textsuperscript{255} Bleichrodt 2006, p. 475-476. Cf ECtHR, Judgment of 11 May 2004, Appl. No. 49902/99 (\textit{Brand v. The Netherlands}) and ECtHR Judgment of 11 May 2004, Appl. no. 48865/99 (\textit{Morsink v. The Netherlands}). See para. 3.4.2.5 and para. 4.3.
3.4.4.4 Conclusion

In conclusion, the requirement to use deprivation of liberty for the shortest appropriate period of time is rather complicated, but full of potential; while it does not seem to be very controversial it can be subject to many different interpretations. It is clear that the second sentence of article 37 (b) CRC requires a ‘tailor-made’ reaction regarding accused and sentenced children. The competent authority must assess what the shortest appropriate disposition is, taking into account the offence, the objectives of the juvenile justice system (including proportionality and non-discrimination) and the best interests of the child, within the borders of the other demands of lawfulness and the prohibition of arbitrariness and together with the use of arrest, detention or imprisonment as a measure of last resort. In addition, the presence of periodic review and/or the right to challenge the legality of the deprivation of liberty is vital (art. 37 (d) CRC).

The CRC provision enshrines an obligation for the domestic legislator to adopt and elaborate this requirement in domestic legislation. In particular, the legislator should set time limits for all stages of the trial. The CRC Committee provides some firm recommendations regarding the duration of the juvenile criminal process and trial, which affects the duration of the arrest and pre-trial detention. The CRC Committee remains silent on the maximum duration of both arrest and detention, as well as imprisonment. Although, arguably, it is an illusion that States Parties accept any limitation of their sovereignty regarding the determination of sentences and the utmost duration of deprivation of liberty within the context of juvenile justice. However, it is defensible to call for terms that are (much) shorter than those regarding adults at every stage.

3.4.5 Legal Safeguards and Remedies for Children Deprived of Liberty

3.4.5.1 Introduction

A child deprived of liberty is entitled to a number of legal guarantees relevant to safeguarding the lawfulness and non-arbitrariness (i.e. legality) of the deprivation of liberty. According to article 37 (d) CRC: ‘Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.’ In other words, this CRC provision contains three rights, namely the right of access to legal and other appropriate assistance, the right to challenge the deprivation of liberty, also known as the right to habeas corpus, and the right to a prompt decision.

These entitlements can be considered part of the legal status of each child deprived of liberty discussed below. However, they are particularly relevant to safeguarding
the requirements regarding deprivation of liberty as addressed in this paragraph. For example, the right to challenge the deprivation of liberty on its legality is a legal remedy directly related to compliance with the requirements of lawfulness and non-arbitrariness and is of great importance for the enforcement of the requirements of last resort and the shortest appropriate period of time. In addition, the right to have prompt access to legal (and other appropriate) assistance can be valued in the light of these requirements as well and is of particular significance for the realization of the right to challenge the legality of deprivation of liberty.

These are just a few examples which confirm the relevance of article 37 (d) CRC’s entitlements for the enforcement of the requirements for deprivation of liberty. They are also of the utmost importance for the legal status of the children deprived of liberty both in the pre-trial and the post-disposition phase. In this regard, it is important to note that article 37 (d) CRC applies to any form of deprivation of liberty, regardless of the (legal) system the deprivation takes place, although the implications may be different.256

Although article 37 CRC is considered the core-article for deprivation of liberty of children, other provisions of International Human Rights Law provide additional safeguards. Article 9 (3) ICCPR provides a prompt bringing before a judge or other judicial officer and article 9 (2) ICCPR stipulates that ‘anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him’ (cf art. 40 (2) (b) (ii) CRC). Furthermore, article 9 (5) ICCPR embodies the right to compensation if one’s rights under article 9 have been violated. In light of article 41 CRC it is important to take a closer look at these provisions.257

This paragraph addresses the legal safeguards just mentioned, relevant to the enforcement of the requirements stipulated by International Human Rights Law. These are, successively, the right to legal and other assistance (para. 3.4.5.2), the right to be informed about reasons for arrest and charges (para. 3.4.5.3), the right to challenge legality, including the rights to a prompt bringing before a judge or other competent judicial authority and to a prompt decision (para. 3.4.5.4), and the right to compensation (para. 3.4.5.5).

3.4.5.2 Right to Legal and Other Appropriate Assistance

Every child deprived of his liberty is entitled to ‘prompt access to legal and other appropriate assistance’. This right has been granted to the child deprived of his

---

256 Art. 37 (d) CRC explicitly refers to every child deprived of his or her liberty; cf art. 37 (b), second sentence, CRC. In addition, art. 37 (d) CRC is based on art. 9 (4) ICCPR, which according to the HRC applies to all persons deprived of liberty; Detrick 1999, p. 637 and HRC GC No. 8, para. 1.

257 See also, e.g. art. 5 (2)-(5) ECHR and art. 7 (4)-(6) ACHR. See for more on the ECtHR jurisprudence in this regard: Bleichrodt 2006, p. 484ff.
liberty, because his particular dependent status demands assistance – a safeguard that stands on its own (i.e. separately from the other legal safeguards embodied in article 37 (d) CRC). As soon as a child is arrested and placed in police custody, in pre-trial detention or imprisoned, he must be granted ‘prompt access’ to assistance. The exact time limit of ‘prompt access’ is not stated, but the CRC Committee has asked States Parties to set a time limit and has criticized States Parties for not having done so. However, it should in any event mean that the child receives assistance immediately after he finds himself in the position that he may want to consider challenging the legality of his deprivation of liberty. In this regard, it is important to note that it is the child who has the right to access, which rules out others than the child deciding on the desired form of assistance. Given the absolute wording it also may be assumed that the authorities have the positive obligation to provide the required assistance (free of charge).

The right to legal and other appropriate assistance is applicable to each child deprived of liberty, regardless of the phase of the juvenile justice system in which he is. In this regard, it may overlap article 40 (2) (b) (ii) CRC, which provides the child’s entitlement to legal or other assistance during the justice process. Still, it is important to recognize their differences in nature. The right to legal or other appropriate assistance under article 40 CRC is meant to assist the child in his defence and assist him during ‘all (…) stages of the process, beginning with the interviewing (interrogation) of the child by the police’ (GC No. 10, para. 52). The right to legal and other appropriate assistance under article 37 CRC has the objective of providing for assistance related to the particular situation the child is in, that is deprivation of liberty (pre-trial or post-disposition). This calls for legal support (e.g. to challenge the legality of deprivation of liberty or to remedy arbitrary treatment), but also for any other form of support (e.g. emotional, medical, psychological or educational support or support of contact between the child and his parents; see below).

In this regard, it is important to stress that the child is entitled to both legal assistance as well as other appropriate assistance. Contrary to article 40 (2) (b) (ii)

258 Schabas & Sax 2006, p. 94-95 with reference to the CRC Committee’s Guidelines for Periodic Reports, (CRC/C/58) and to the Concluding Observations on Bolivia (CRC/C/15/Add. 1). According to the information derived from the States Parties’ report before the CRC Committee, access to a lawyer must be guaranteed for children in pre-trial detention and furthermore, legal assistance should be free to children; Ibid., p. 94-95 with reference to Concluding Observations on Romania, CRC/C/15/Add. 199 and Switzerland, CRC/C/15/Add. 182.

259 There will be no overlap concerning children deprived of their liberty outside the juvenile justice context.

260 The right to have a lawyer present during police interrogations has not explicitly been recognized in International Human Rights Law; see, e.g. Coster van Voorhout & Franken 2008, p. 366-368 regarding art. 6 ECHR. Still, regarding children in particular the position of the CRC Committee (i.e. a broad interpretation of art. 40 (2) (b) (ii) CRC) is defendable and supported by art. 37 (d) CRC; see for more details para. 4.4.2.
CRC, article 37 (d) CRC uses cumulative wording (‘and’), which implies that if a child is deprived of his liberty he must be entitled to a higher degree of assistance than if he (merely) needs to prepare and present his defence.

Through article 37 (d) CRC’s entitlement to ‘other appropriate assistance’, it is acknowledged that the child finds himself in a situation that may require special (other than legal) assistance, such as psychological, medical or educational assistance or specific assistance from a care and protection board or probation services. The word ‘appropriate’ indicates that there should be a relation between the child’s special condition and the desired assistance.

Parental assistance can be a form of ‘other appropriate assistance’ as well. It supplements the right of each child deprived of liberty to maintain contact with his family through correspondence and visits, provided that this contact is not against the best interests of the child (art. 37 (c) CRC; see para. 3.9). Consequently, ‘appropriate assistance’ under article 37 (d) CRC arguably implies that the best interests of the child (art. 3 (1) CRC) may provide a ground for limitation or denial of parental assistance.

Parental assistance regarding children within the juvenile justice system is furthermore recognized by article 40 CRC. Under article 40 (2) (b) (iii) CRC, the child is entitled to the presence of his parents (or legal guardians) during the trial, as a form of ‘general psychological and emotional assistance’ (GC No. 10, para. 53) besides the legal or other appropriate assistance provided for by the same paragraph of article 40 CRC. Furthermore, the child’s parents can play a role regarding information of the charges against the child (art. 40 (2) (b) (ii) CRC).

In conclusion, the right to legal and other appropriate assistance under article 37 (d) CRC concerns all aspects of deprivation of liberty, including legality and the child’s legal status during his deprivation of liberty. Besides the relevance of the right to legal and other appropriate assistance for the right to challenge the legality of deprivation of liberty, it also affects the legal status of the child deprived of liberty, including his entitlements to medical, psychological and educational assistance, and special protection rights. It therefore is of vast importance in light of the child’s right to be treated with humanity and respect for the dignity of the human person, and in a manner that takes into account his age (art. 37 (c) CRC; see para. 3.5).

It is interesting to note that art. 9 (4) ICCPR does not contain an entitlement to legal representation. But the HRC has explicitly linked legal representation to the entitlements of article 9 (4) ICCPR. Joseph, Schultz & Castan rightfully argue
that ‘(i)n practice, it is virtually impossible for people to challenge their detention without legal representation’. The HRC stated in its concluding observations on Ireland that ‘pre-charge detainees are also permitted access to legal aid if they are unable to afford their own legal counsel.’ Although this has not been made explicitly clear, the very same should apply to all people deprived of their liberty. States should neither interfere with the ability to obtain legal advice nor influence the quality of that advice negatively. In other words the legal aid must be available and moreover be of a certain zealous quality and independence in order to effect the right to challenge the legality of the deprivation of liberty.

3.4.5.3 Information on the Reasons for Arrest and Prompt Information on Charges

A second important legal safeguard is information on the reasons for arrest and prompt information on any charges against the child in question. According to article 9 (2) ICCPR: ‘Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.’ This obligation to inform the arrested person is based on the principle of legal certainty. It serves the legal interests of the arrested person and is furthermore relevant to effecting the right to challenge the legality of the arrest and subsequent detention.

First, it is important to distinguish between the two moments at which an arrested person must be informed, initially and subsequently. The duty to provide initial information means that at the moment a person is arrested, he must be informed...
immediately about the reasons for his arrest. It is necessary to inform the arrested person of the substance of the reasons for the arrest. This obligation may not be limited to the announcement that someone has been arrested for, for example, ‘criminal reasons’. Neither is the obligation to provide information fulfilled if the arresting officer is of the opinion that the arrested person is aware of the reasons for the arrest. ‘One must be reasonably aware of the precise reasons for one’s arrest’, according to Joseph, Schultz & Castan and ‘[i]t is not sufficient to be informed that one is being arrested ‘under prompt security measures without any indication of the substance’ of the reasons for the arrest’. 270 Nowak argues that at the time of arrest, the – initial – information ‘may usually be limited to a general (i.e. not legally founded) description of the reasons for arrest’. 271

If a person is arrested and not released immediately after the arrest, but remanded to police custody, he must be informed of any charges against him. This must happen ‘promptly’. It is important to note that this obligation to inform also derives from the fact that the child is accused of having infringed the penal law. According to article 40 (2) (b) (ii) CRC every such child has the right ‘to be informed promptly and directly of the charges against him or her’. 272 According to the CRC Committee (GC No. 10, para. 47): ‘Prompt and direct means as soon as possible, and that is when the prosecutor or the judge initially takes procedural steps against the child. But also when the authorities decide to deal with the case without resorting to judicial proceedings, the child must be informed of the charge(s) that may justify this approach.’ 273 In the event of the latter situation, this should lead to immediate release of the child. While article 14 (3) (a) ICCPR stipulates that information must be provided ‘in detail in a language which [the person] understands of the nature and cause of the charges’, article 40 CRC lacks such an explicit reference to the child’s capacity to understand the information. Nevertheless, the CRC Committee has addressed this aspect in General Comment No. 10 (paras. 47 and 48). The child should receive information in a language he understands, which ‘may require a presentation of information in a foreign language but also a “translation” of the formal legal jargon often used in criminal/juvenile charges into a language that the child can understand’. In its further elaboration the CRC Committee stresses that ‘an oral explanation [of the official document] may often be necessary’, which should not be left to the parents.

270 Joseph, Schultz & Castan 2004, p. 321 with further reference to HRC Comm. No. 43/1979 (Drescher Caldas v. Uruguay). See also Nowak 2005, p. 229. By implication this raises the question: what should be the procedure if an arrested person does not understand the language the arrest officials use? This will be addressed further below.


272 See also art. 14 (3) (a) ICCPR; nevertheless art. 9 (2) ICCPR links the right to be informed explicitly (and may be redundantly) to the arrest as a form of deprivation of liberty. The regional human rights treaties contain similar provisions.

273 Cf art. 40 (3) (b) CRC.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

or to the child’s legal or other assistance. ‘It is the responsibility of the authorities (e.g. police, prosecutor or judge) to make sure that the child understands each charge brought against him/her’, according to the CRC Committee.\footnote{Note that art. 40 (2) (b) (ii) CRC provides that the child must be informed of the charges ‘if appropriate through his or her parents or legal guardians’. According to the CRC Committee this should not be used as ‘an alternative to communicating this information to the child’. That the ‘both the child and the parents or legal guardians receive the information in such a way that they can understand the charge(s) and the possible consequences’ is ‘most appropriate’; GC No. 10, para. 48.}

The HRC has not been very explicit on article 9 (2) ICCPR’s requirement to inform each arrested person \textit{promptly} on any charges against them. According to Joseph, Schultz & Castan the ‘shortest delay which has been found actually to breach article 9 (2) remains the seven day delay in the [\textit{Grant v. Jamaica} – tl] case’.\footnote{Joseph, Schultz & Castan 2004, p. 323; HRC Comm. No. 597/1994.} Nowak argues that the subsequent information must be provided ‘during the first interrogation at the latest’. Second, this information ‘must contain the specific accusations in a legal sense, enabling the person concerned to submit a well-founded application for remand.’\footnote{Nowak 2005, p. 230. Under art. 5 (2) ECHR some delay (potentially 48 hours) regarding information on the reasons for arrest is allowed; Bleichrodt 2006, p. 486.}

As mentioned before the CRC does not refer to prompt information on the reasons for arrest. Given the fact that the CRC Committee recommends the bringing of an arrested child before an authority competent to examine the legality of the deprivation of liberty within 24 hours (GC No. 10, para. 83), this arguably should also be the maximum term for information on the reasons for arrest (or charges) against children.

The jurisprudence of the HRC provides for some further clarification regarding the interpretation of ‘prompt’ under article 9 (2) ICCPR. The HRC stated that article 9 (2) ICCPR should be distinguished from article 14 (3) (a) ICCPR’s obligation that everyone, ‘in determination of any criminal charge against him (…) [shall] (…) be informed promptly and in detail in a language which he understands of the nature and the cause of the charge against him’. This provision is meant for each individual who has been ‘formally charged with a criminal offence (…) [and] does not apply to those remanded in custody pending the result of police investigations; [this] situation is covered by article 9, paragraph 2, of the [ICCPR]’.\footnote{Joseph, Schultz & Castan 2004, p. 322; HRC Comm. No. 253/1987 (\textit{Kelly v. Jamaica}).} Article 14 (3) (a) ICCPR – as quoted earlier – elaborates explicitly on the way of informing the arrested and detained person. Besides ‘promptly’ this should happen ‘in detail’, ‘in a language which he understands’ and the information should entail ‘the nature and cause of the charge against him’. One may wonder why these additional
demands, especially the one with regard to the language, are not embodied in article 9 ICCPR. Article 9 (2) ICCPR does not contain any requirements as to form.278

In *Griffin v. Spain* (HRC Comm. No. 493/1992) the HRC observed ‘that, although no interpreter was present during the arrest, it is wholly unreasonable to argue that the [arrested person] was unaware of the reasons for his arrest [the petitioners were arrested after the police had searched his camper and had found drugs – tl]. In any event, he was promptly informed [through an interpreter in front of an examining magistrate – tl], in his own language, of the charges against him’.279 This ruling points out that the HRC attaches value to emphasize, although implicitly, that the obligation to inform the arrested or detained person should occur in a manner comparable to article 14 (1) (a) ICCPR, which means at least in a language he understands. If the person involved does not understand the language of the arresting officials, an interpreter ‘sufficiently competent’ must be used.280 This jurisprudence also implies if a person is arrested while committing a crime – caught in the act – where the need for information is less than when a person is arrested while not ‘caught in the act’.281

Joseph, Schultz & Castan warn that ‘[p]olice should be required to inform a detainee of the reason for his/her arrest, and the reason for continued detention after arrest if those reasons should differ’.282 This warning is based on the case *Leehong v. Jamaica* (HRC Comm. No. 613/1995) in which the HRC found no violation of *inter alia* article 9 (2) ICCPR when the police had arrested a person on the basis of charges later dropped. However, the suspect had been kept in detention for other charges (concerning another crime that appeared to be related to the detainee) than those of which he had been informed. The HRC did not hold that this practice breached article 9 (2) ICCPR. This provided reason for Joseph, Schultz & Castan to warn that this ‘may pave the way for police abuse of power’.283

3.4.5.4 Right to Challenge the Legality of Deprivation of Liberty

**A. Introduction**

The right to challenge the legality of the deprivation of liberty (hereinafter: right to challenge the legality), is an important legal guarantee for safeguarding lawful and

---

278 See also Nowak 2005, p. 228. *Cf* e.g. art. 5 (2) ECHR.
279 Joseph, Schultz & Castan 2004, p. 322-323. Unfortunately the case does not show the time between the arrest and the bringing before the magistrate. The HRC assumed this had happened promptly.
281 The HRC has concluded in *Stephens v. Jamaica* (HRC Comm. No. 373/1989) there has not been a violation of article 9 (2) ICCPR because the person involved ‘was fully aware of the reasons for his detention as he had surrendered himself to the police and a detective had cautioned (him) whilst he was in custody’; *Ibid.*, p. 322.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

non-arbitrary deprivation of liberty, which, particularly for children, includes the use of deprivation of liberty as a measure of last resort and for the shortest appropriate period of time. The right embodied in article 37 (d) CRC is founded on article 9 (4) ICCPR\(^{284}\) which provides that ‘anyone who is deprived of his liberty through arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful’. Therefore, it is worthwhile to integrate the interpretation of article 9 (4) ICCPR with the interpretation of this CRC entitlement.\(^{285}\)

As mentioned earlier the right to challenge the legality affects all forms of deprivation of liberty.\(^{286}\) Nowak argues that "[t]he true significance of the right to remand (…) comes to light in the case of custody or other security measures or in preventive cases of deprivation of liberty beyond that required for criminal justice, such as detention of vagrants, drug addicts, the mentally ill and aliens".\(^{287}\) Within the juvenile justice system, deprivation of liberty is often surrounded by legal safeguards such as periodic reviews and a court order, arguably initiated on the basis of international human rights provisions, such as article 40 CRC or article 14 ICCPR. However, in the ‘grey areas’ around the justice system, this right to challenge the legality of deprivation of liberty is particularly relevant. According to the CRC Committee: ‘The right to challenge the legality of deprivation of liberty not only includes the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision (e.g. the police, the prosecutor and other competent authority)’ (GC No. 10, para. 84).

The following aspects will be addressed successively: the aspect of legality, the right to challenge ‘before a court’, the prompt bringing before a judge or other competent (judicial) authority and the implications of the wording ‘a prompt decision’. Finally, the relation between the right to challenge legality, to appeal and periodic review (art. 25 CRC) will be addressed briefly.

---

\(^{284}\) Detrick 1999, p. 636. Other founding provisions are arts. 9 (3) and 10 (2) (b) ICCPR.

\(^{285}\) The right to legal and other appropriate assistance and the right to be informed of the reasons for arrest and on charges (see above) are of vast importance for the realization of the right to challenge legality.

\(^{286}\) Cf HRC GC No. 8 and Nowak 2005, p. 235. The right to challenge legality cannot be derogated in states of emergency (art. 4 ICCPR), unlike other parts of art. 9 ICCPR; see HRC General Comment No. 29, States of Emergency (article 4), 31 August 2001, CCPR/C/21/Rev.1/Add.11 (HRC GC No. 29), para. 16 and Nowak 2005, p. 226.

\(^{287}\) Nowak 2005, p. 235.
B. Legality

Article 37 (d) CRC gives every child the right to challenge the legality of the deprivation of liberty. The legality includes both the lawfulness and the prohibition of arbitrary deprivation of liberty, which implies a challenge or review regarding the full extent of article 37 (b) CRC. This includes a full review under both domestic law and international law, which for example also includes a review regarding art. 37 (a) and (c) CRC. For example, a mandatory detention system per se seems to violate the right to challenge the legality. Furthermore, it is important to note that the child is entitled to challenge the legality regardless of whether his deprivation of liberty is de facto unlawful.

C. Before a Court

Article 9 (4) ICCPR provides that the right to challenge legality includes the right to do so ‘before a court’, and the HRC has argued that this is important because a

---

288 Cf art. 9 (4) ICCPR which speaks of the review of the deprivation of liberty on its ‘lawfulness’. This should be interpreted as lawfulness under art. 9 (1) ICCPR and therefore includes a review with regard to the question whether deprivation of liberty is or has been arbitrary. According to Bhagwati in his concurring opinion on the HRC’s decision in A. v. Australia (Comm. No. 560/1993) ‘it is elementary that detention which is arbitrary is unlawful or in other words, unjustified by law’; as cited in Joseph, Schultz & Castan 2004, p. 342. Cf art. 9 (5) ICCPR’s right to compensation which applies to victims of ‘unlawful arrest or detention’. Furthermore, Joseph, Schultz & Castan argue that the absence of any avenue of meaningful judicial review is a factor that should normally (even always) result in the designation of an instance of detention as arbitrary and therefore contrary to article 9 (1); Ibid., p. 344. In HRC Comm. No. 900/199 (C. v. Australia) the HRC reiterates its decision in A. v. Australia and considers ‘that an inability judicially to challenge a detention that was, or had become, contrary to article 9, paragraph 1, constitutes a violation of article 9, paragraph 4’; as cited in Ibid., p. 343. It is this broad interpretation of article 9 (4) that has led to some discussion, including by concurring opinions of Rodley and Kretzmer who have argued that ‘it is unnecessary for the HRC to come to conclusions regarding the violation (or non-violation) of a procedural right, [a]rticle 9(4), in circumstances where a breach of a related substantive right, article 9 (1), has arisen’; Ibid., p. 343.

289 If ‘lawful’ would refer only to lawful under domestic law, it would be rather easy for a State Party to fulfil this requirement by merely providing for a legal basis for detention, e.g. in municipal law, regardless of the real effectiveness of this basis. Subsequently, as noticed by the HRC in for example the A. v Australia case, a periodic review would be a hollow gesture. Furthermore it would also be quite easy for the State Party to undermine the objectives of the ICCPR; Ibid., p. 344 with reference to arts. 9(5), 13 and 17 ICCPR. Joseph, Schultz & Castan argue that ‘perhaps a teleological, expansive interpretation of ‘lawfulness’ may be justified in order to prevent States immunizing themselves from certain ICCPR obligations by enacting perverse laws’ but that ‘on the other hand, it is likely that the HRC can classify such perverse laws as breaches of other ICCPR rights (…) on the interplay between article 9 (1) and (4), without the need to twist the text of the ICCPR’; Ibid., p. 344.

290 The limitation of this review to a ‘review of reasonableness’ would breach article 9 (4) ICCPR (and art. 37 (d) CRC); cf Nowak 2005, p. 236. Cf rule 14 JDLs and art. 25 CRC.

291 Nowak 2005, p. 236.

292 Ibid., p. 235.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

court can ensure ‘a higher degree of objectivity and independence’. Article 37 (d) CRC also refers to a court, but also to another ‘competent, independent and impartial authority’. The reason for this arguably is related to differences in legal system between States Parties, but in essence it provides for the essential characteristics of the body competent to review the legality of deprivation of liberty of children. The CRC Committee seems to consider it particularly relevant that the authority has judicial powers given its reference to ‘or other competent, independent and impartial authority or judicial body’ (GC No. 10, para. 84).

This position is supported by article 9 (3) ICCPR, which stipulates that ‘[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power’, although the CRC lacks such a provision (see below).

Thus, although the CRC leaves room to authorize an authority other than a court to review a challenge of the legality of deprivation of liberty, article 37 (d) CRC explicitly refers to the required characteristics of the authority: it must be competent, which implies that it must have full legal power to assess and review the legality of the deprivation of liberty, including the right to order the child’s release. Furthermore, the body must be impartial and independent. This excludes a review of arrest by the police administration or of remand in custody ordered by the public prosecutor by the public prosecutors office (see below under D.).

293 Joseph, Schultz & Castan 2004, p. 336; see HRC Comm. No. 291/1988 (Torres v. Finland), in which case the person in police detention could appeal to the Minister of the Interior. The HRC ruled that it did not ‘satisfy the requirements of article 9, paragraph 4’. See also Nowak 2005, p. 236.

294 The term ‘court’ covers both the more ordinary (criminal or civil) courts, and for instance constitutional, administrative or military courts; Nowak 2005, p. 235-236. Cf. 14 (1) ICCPR. According to the HRC ‘competent, independent and impartial authority’ under article 14 (1) ICCPR, on the right to a fair trial refers to ‘all courts and tribunals (…) whether ordinary or specialized’. The HRC has particularly noted ‘the existence, in many countries, of military or special courts which try civilians’ which ‘could present serious problems as far as the equitable, impartial and independent administration of justice is concerned’; HRC GC No. 13, para. 4. Cf art. 8 ACHR and art. 40 (2) (b) (iii) CRC which also mentions ‘judicial body’ and art. 6 ECHR which refers to ‘an independent and impartial tribunal’. Art. 7 ACHPR only refers to the competency and impartiality of the court or tribunal and art. 17 ACRWC merely to an ‘impartial tribunal’.

295 Schabas & Sax 2006, p. 94 and see above. The HRC determined in Vuolanne v. Finland ‘that military detentions must comply with the procedural safeguards stipulated in article 9 (4)’ (HRC Comm. No. 265/1987). See Nowak 2005, p. 236. For a detailed description of this case see Joseph, Schultz & Castan 2004, p. 337-339. The right to review before a court concerning a detention during military service may therefore take place before a military court as well. Review by a higher military officer did not meet the requirements of art. 9 (4) ICCPR. Joseph, Schultz & Castan argue that this decision shows that a distinction between ‘administration of justice for civilians and members of the military’ is in this regard not adequate; Ibid. 2004, p. 339-340.
However, a parole board competent to take decisions on the (early) release of a child may meet these requirements.296

D. Prompt Bringing before a Judge or Other Judicial Official
An important legal safeguard in this regard is that once a person is arrested or detained on a criminal charge he must be brought before a judge or other judicial official promptly (art. 9 (3) ICCPR). The CRC does not contain this safeguard which is of vital importance for safeguarding the legality of the person’s arrest and subsequent detention. Nevertheless, the CRC Committee recommends that ‘[e]very child arrested and deprived of his/her liberty should be brought before a competent authority to examine the legality of the (continuation of) this deprivation of liberty within 24 hours’ (GC No. 10, para. 83).

In the case Kulomin v. Hungary (HRC Comm. No. 521/1992) the HRC considered ‘that it is inherent to the proper exercise of judicial power, that it be exercised by an authority which is independent, objective and impartial in relation to the relevant issues’ (para. 11.3). In this case the HRC was not satisfied that the public prosecutor had ordered and renewed the pre-trial detention. According to the HRC the public prosecutor could not be regarded “as having the institutional objectivity and impartiality necessary to be considered as an “officer authorised to exercise judicial power” within the meaning of article 9 (3)”.297 The Kulomin v. Hungary case stresses that such a judicial officer, not being a judge, needs to be independent, objective and impartial.298

E. Prompt Decision
If the child exercises his right to challenge the legality of his deprivation of liberty, he is additionally entitled ‘to a prompt decision’, according to article 37 (d) CRC. Article 9 (4) ICCPR does not refer to a prompt decision, but to a decision ‘without delay’. According to the CRC Committee (GC No. 10, para. 51): ‘The standard ‘prompt’ is even stronger (…) than the standard ‘without delay’(…)’. Neither the text of the CRC nor its drafting history explicitly define what prompt means in

---

296 Although it is questionable whether the right to challenge legality applies regarding deprivation of liberty as a disposition ordered by a court; see, e.g. the jurisprudence of ECtHR regarding art. 5 (4) ECHR as highlighted below).

297 Joseph, Schultz & Castan argue that the HRC omits clarification of why the public prosecutor ‘lacked sufficient ‘institutional objectivity and impartiality’’, in other words what is meant exactly by an ‘officer authorised by the law to exercise judicial power’; Joseph, Schultz & Castan 2004, p. 325. Cf the dissenting opinion of Mr. Ando opposing the ‘categorical statement’ of the HRC that a public prosecutor lacks the institutional objectivity and impartiality necessary to be considered as an ‘officer authorised to exercise judicial power’ under art. 9 (3) ICCPR; Ibid., p. 326.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

terms of time. The same applies for ‘without delay’ under article 9 (4) ICCPR and the HRC has not exhaustively addressed this issue either. 299 The HRC ruled in the Torres v. Finland case (HRC Comm. No. 291/1988) that ‘the question of whether a decision was reached without delay must be assessed in a case-by-case basis’. 300 According to Nowak the requirement that the decision must be made without delay usually means ‘within several weeks’, but that it depends on the ‘the type of deprivation of liberty and on the circumstances of a given case’. 301 Schabas & Sax conclude that ‘[a]s an indication, the [HRC] practice, under the [ICCPR], refers in that context to periods of several weeks, but less than three months’. 302

Thus, based on the case law under the ICCPR (and ECHR) the term for the decision on the child’s action under the right to challenge legality cannot be determined in general. It requires an assessment on a case-by-case basis. Therefore, it is helpful that the CRC Committee has given a rather firm indication by stating that ‘[t]he right to a prompt decision means that a decision must be rendered as soon as possible [Italic – tl], e.g. within or not later than two weeks after the challenge is made’ (GC No. 10, para. 84).

International Human Rights Law does not provide the right to have prompt access to the court. The HRC has acknowledged that article 9 (4) also foresees no delay between the start of the detention and the first (and following) review proceedings. In the case Torres v. Finland (HRC Comm. No. 291/1988) the HRC determined that ‘[a]s no challenge could have been made until the second week of detention, the (…) detention (…) violated the requirement of article 9, paragraph 4, of the Covenant that a detained person be able to claim a review’. 303 This ruling shows that the HRC acknowledges that the right to challenge legality foresees in no delay

---

301 Nowak 2005, p. 236 with reference to the case law under art. 5 (4) ECHR, which speaks of ‘speedily’ rather than ‘promptly’ and which implies a less urgent decision than a prompt decision (see also art. 5(3) ECHR); Bleichrodt 2006, p. 507 with reference to ECHR, Judgment of 29 August 1990, Series A. No. 181-A (E. v. Norway), para. 64. Note that according to the ECHR the term starts at the day of the application for release and ends on the day the court has given judgment. According to Bleichrodt ‘comparable factors may be taken into consideration as those which play a role with respect to the requirement of trial within a reasonable time under Article 5(3) and under Article 6(1), such as for instance, the conduct of the applicant and the way the authorities have handled the case’; Bleichrodt 2006, p. 507 with reference to ECHR, Judgment of 23 February 1984, Series A. No. 75 (Luberti v. Italy), paras 30-37 and ECHR, Judgment of 21 February 1990, Series A. No. 170-A (Van der Leer v. The Netherlands), para. 36. He adds that ‘[n]either an excessive workload, nor a vacation period can justify a period of inactivity on the part of the judicial authorities’ with reference resp. to ECHR, Judgment of 25 October 1989, Series A. No. 164 (Bezucherti v. Italy), para. 25 and ECHR, Judgment of 29 August 1990, Series A. No. 181-A (E. v. Norway), para. 66. See for more on this case law Bleichrodt 2006, p. 507 and Mowbray 2004, p. 82ff.
302 Schabas & Sax 2006, p. 94.

---

219
between the start of the deprivation of liberty and the first (and following) review procedure. According to Nowak “without delay’ also means that the lawfulness of administrative detention must be directly reviewed by a court, i.e. not only after a review by a higher administrative authority”; Nowak 2005, p. 237. See further also HRC Comm. No. 253/1987 (Kelly v. Jamaica) in which a detention of five weeks without access to a judge constituted a breach of art. 9 (3) and (4) ICCPR.

According to Hodgkin & Newell the CRC Committee expressed its concern about the practice according to which ‘a child may remain in custody for the excessively long period of 45 days before the legality of his or her detention is decided upon’; Concluding Observations Bolivia CRC/C/15/Add.1, para. 11 and Hodgkin & Newell 2002, p. 551. Cf further Belgium, CRC/C/15/Add.38, para. 11; Madagascar, CRC/C/15/Add.26, para. 16; Jamaica, CRC/C/15/Add.32, para. 17 and Slovenia CRC/C/15/Add.65, paras. 19 and 27.

The right to legal assistance is of eminent importance in this regard as well.

Regarding pre-trial detention the CRC Committee has recommended to review pre-trial detention ‘regularly, preferably every two weeks’. The CRC Committee remains silent about review of continued imprisonment.
309 See Bleichrodt 2006, p. 499-501 regarding the implications of art. 5 (4) ECHR. Regarding indeterminate sentences (incl. mandatory life sentences; ECHR, Judgment of 28 May 2002, Appl. No. 46295/99 (Stafford v. UK), para. 87ff), the ECHR has ruled that the initial (and final) decision depriving an individual of his liberty cannot be subject to review under art. 5 (4) ECHR, but ‘new issues’ affecting the lawfulness of the deprivation of liberty may arise during ‘ensuing period of detention’, which can be subject to interim review; see, e.g. ECHR, Judgment of 2 March 1987, Series A. No. 114 (Weeks v. UK), para. 59. The exact implications are dependent on the circumstances of the case.

In addition, one could wonder what is the relationship between article 25 CRC, providing for a right to periodic review, and article 37 (d) CRC? The former CRC provision stipulates that ‘States [P]arties recognise 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 period review of the treatment provided to the child and all other circumstances to his or her placement’. This aims primarily at a review of the conditions of children under alternative care, protection or treatment, which includes arguably an institutional placement as well. At the same time, article 37 (d) CRC covers all forms of deprivation of liberty, including forms of alternative care. It is however questionable whether article 25 CRC covers deprivation of liberty within the juvenile justice system as well. The answer may be positive, according to the wording of article 25 CRC, when the child receives treatment during his imprisonment: a treatment order as disposition. Given the position of this provision in the CRC, the answer may very well be negative. The CRC Committee refers to article 25 CRC in addressing the issue of life imprisonment in its GC No. 10 (para. 77) and states: ‘For all sentences imposed upon children the possibility of release should be realistic and regularly considered. In this regard, the Committee refers to article 25 of CRC providing the right to periodic review for all children placed for the purpose of care, protection or treatment.’ By doing so, the CRC Committee indicates that article 25 CRC should be embraced regarding (long and potentially life) imprisonments under the (juvenile) justice system, implying a periodic review on the possibility of release.

310 Cf Detrick 1999, p. 436-444.

311 Note furthermore that art. 25 CRC does not provide for a specific authority competent to review.
Furthermore, the right to challenge the legality cannot be equated with the right to appeal; the latter is embodied in a separate provision, namely article 40 (2) (b) (v) CRC. According to Schabas & Sax the right is ‘concerned specifically with the legality of the deprivation of liberty itself, independently of the right to appeal in criminal matters’. However, based on the fact that the CRC Committee has argued in its General Comment on Juvenile Justice that ‘[t]he right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court (…)’ (GC No. 10, para. 84), it seems defensible that lodging an appeal is one way (i.e. a form) to exercise the right to challenge the legality of deprivation of liberty.

3.4.5.5 Right to Compensation

Finally, some international human rights treaties, the ICCPR and the ECHR, provide for the right to compensation as a remedy for unlawful deprivation of liberty. The CRC does not provide for an explicit right to compensation, but taking into account article 41 CRC, this right has implications for children deprived of liberty in countries that have ratified the ICCPR (or the ECHR).

The final and fifth paragraph of article 9 ICCPR entails the ‘enforceable right to compensation’ to ‘[a]nyone who has been the victim of unlawful arrest or detention’. This claim has an equivalent in the ECHR, namely article 5 (5). However the former differs from the latter to some extent. Article 9 (4) ICCPR entitles every victim of unlawful arrest or detention to compensation, while article 5 (5) ECHR embodies a right to compensation in the event of a violation of article 5 ECHR. Additionally under article 9 (5) ICCPR it is irrelevant whether a violation of article 9 has been ascertained. For instance if a violation of article 9 has been determined before a domestic court, but this court has not granted compensation, this provides grounds – violation of art. 9(5) ICCPR – to file a
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

Nowak 2005, p. 238. 318

According to Nowak ‘[i]n the reverse case, an arrest may be consistent with domestic laws but nevertheless unlawful under international law, regardless of whether this is arbitrary or in violation of the procedural guarantees in paras. 2 to 4.’ 319 Furthermore, when detention is justifiable under domestic and international law, but the right to challenge the legality has been violated, this entitles the detained person to the right to compensation. 320

A person who has spent some time in pre-trial detention and is acquitted later does not necessarily have a right to compensation. This depends on the lawfulness of the pre-trial detention. As long as this pre-trial detention is grounded ‘on a reasonable suspicion of having committed a crime’, article 9 (5) does not grant compensation. 321

The implementation of the right to compensation depends on the domestic implementation, since article 9 (5) refers to an enforceable right. Usually this implies that the entitled person will have a civil law claim and the amount of compensation ‘turns on the national statutory provisions, although the claim under art. 9(5) doubtlessly also covers non-pecuniary damage’. 322 Although the CRC does not explicitly provide for the right to compensation in this regard, the CRC Committee has stressed that ‘States Parties have to take all necessary measures to ensure that all children in conflict with the law are treated equally’ (art. 2 CRC) and that in this regard it is important to establish ‘rules, regulations or protocols which enhance equal treatment of child offenders and to provide redress, remedies and compensation’ (GC No. 10, para. 6; cf art. 39 CRC).

3.4.6 Conclusion

This paragraph addressed the legal requirements regarding the deprivation of liberty of children: the prohibition of unlawful or arbitrary deprivation of liberty and its use as a measure of last resort and for the shortest appropriate period of time. The principle of last resort and proportionality have been recognized in the jurisprudence of the different judicial human rights bodies as part of the prohibition of arbitrary deprivation of liberty. Article 37 (b) CRC has explicitly made the

318 Nowak 2005, p. 238.
320 Joseph, Schultz & Castan argue that ‘[a] finding of a violation of article 9 (5) should not therefore be dependent upon a violation of another Covenant right, specifically another right in article 9.’ In other words a violation of domestic law may lead to ‘an enforceable right to compensation.’ See Joseph, Schultz & Castan 2004, p. 347.
322 Ibid., p. 239. He furthermore argues that ‘from the word “unlawful” [follows] that culpable conduct is not a prerequisite for the compensation claim’; cf art. 5 (5) ECHR.
requirements of last resort and the shortest appropriate period of time part of international treaty law – so has article 40 CRC regarding the principle of proportionality. In addition, the requirement of the shortest appropriate period of time is much more dynamic and an exclusive child-specific asset. It calls for a tailor-made approach regarding the duration of deprivation of liberty, in which the interests of the juvenile justice system must be balanced with the best interests of the child. This is not free from challenges and conflict of interests, for example with the principle of proportionality, which should also be upheld due to the fact that deprivation of liberty in this regard remains part of the juvenile justice system (presuming a relation between the committed offence and the response to it). Moreover, the requirement of the shortest appropriate period of time is potentially paradoxical itself, since shortest and appropriate do not necessarily serve the same interests.

The implementation of the requirements of last resort and shortest appropriate period of time places both the domestic legislator as well as the enforcing authorities under different (positive) obligations, including legislation providing for clear grounds, cases, competences and time limits for the use of arrest, detention and imprisonment323, creation of alternatives for incarceration (including less restrictive ways of depriving children of their liberty, such as (semi-)open institutions or home confinement), training law enforcement and other officials in using alternatives, and the creation of appropriate facilities adequate to address the children’s specific needs and to contribute to make the deprivation a (short) and appropriate measure.

In order to protect the rights of each child under the threat of being deprived of liberty (i.e. a proper implementation of the just mentioned requirements), International Human Rights Law provides for a number of essential legal safeguards. The CRC explicitly provides for the right to legal and other appropriate assistance (which is directly linked to and meant for the deprivation of liberty) and the right to challenge the legality of deprivation of liberty before a court or other competent independent and impartial authority (preferably a judicial authority) and to a prompt decision in this regard (preferably within two weeks). In addition and under application of article 41 CRC, each child deprived of liberty could be entitled to safeguards under other human rights treaties, including the right to be brought promptly before a court, to be informed promptly about the reason for arrest (information on charges is covered by art. 40 CRC as well) and to compensation after unlawful deprivation of liberty. The implications of these provisions are not very clear and are strongly dependent on the circumstances of the case; however some general guidelines could be deduced from the jurisprudence of the HRC and ECtHR. A significant child rights approach is, however, hard to find, which is not really surprising given the fact that these safeguards cannot be found in the CRC.

323 It could also explicitly refer to the requirements of last resort and shortest appropriate period of time and force courts (and others) to state explicitly how they applied these principles.
Nevertheless, the CRC Committee has provided a number of recommendations in this regard, one of which is that each child arrested or detained should be brought before a competent authority within 24 hours.

Having described and analyzed the legal requirements of deprivation of liberty of children, it is time to address the (legal) position of children deprived of liberty.

3.5 General Principles and Key Issues Regarding the Treatment of Children Deprived of Liberty

3.5.1 Introduction

The previous paragraph pointed out that International Human Rights Law requires that deprivation of liberty of children (arrest, detention or imprisonment in the context of juvenile justice) must be as a measure of last resort and for the shortest appropriate period of time (art. 37 (b) CRC): a clear requirement for the utmost restraint concerning the use of deprivation of liberty of children, which implies the use of alternatives to juvenile justice and to arrest, detention or imprisonment as part of it and the use of the least restrictive forms of deprivation of liberty (in open rather than in closed institutions).

However, International Human Rights Law does not prohibit deprivation of liberty and it is far from realistic to presume that one day there will be no children under arrest, in pre-trial detention or sentenced to imprisonment. Therefore, International Human Rights Law calls for a certain quality of treatment of children deprived of liberty, implying that a child deprived of his liberty must have a legal status in accordance with the standards set by international human rights instruments.

This and the following paragraphs (para. 3.6ff) will address the various aspects of the legal status of children deprived of their liberty and highlight the implications of the relevant provisions of International Human Rights Law and Standards for the implementation of the decision to deprive children of their liberty.

3.5.2 Equal Rights for Children Deprived of Their Liberty

As mentioned in paragraph 3.3 and Chapter 2, the overarching principle of International Human Rights Law is that by entering the facility in which the arrest, detention or imprisonment is executed, the child does not lose his human rights (art. 2 CRC). Every child deprived of his liberty must first of all be recognized as a rights holder entitled to all (civil, political, social, economic and cultural) rights under the CRC (and other relevant provisions of International Human Rights Law...
Chapter 3

The enjoyment of these rights may only be limited if required by the child’s special condition (i.e. deprivation of liberty) and only with full implementation of the principle of the best interests of the child and the other general CRC principles (see above para. 3.3.2). Limitations to the enjoyment of CRC rights may only be imposed if required by and proportionate in light of the (objectives of the) deprivation of liberty, and only after assessing the best interests of the child (art. 3 CRC), which includes a duty to consult the child (art. 12 CRC). Furthermore, it is important to stress that for an effective application of these elements it is essential that the child has the right to remedy violations of his legal status, in particular to redress unlawful or arbitrary treatment.

As rules 12 and 13 of the JDLs state ‘[t]he deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles’. Subsequently, ‘the benefit of meaningful activities and programmes which would serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them in developing their potential as member of society’, should be guaranteed. ‘[N]ot for any reason related to their status, juveniles shall be denied ‘the civil, economic, political, social and cultural rights to which they are entitled under national or international law’, according to rule 13. This is a strongly formulated rule. It uses ‘hard international law wording’ – ‘shall’ and is closely related to article 2 CRC, which prohibits discrimination on the basis of the status of the child, and to article 37 (c) CRC which enshrines the child’s entitlement to all rights under the CRC, through the requirement of the right to humane treatment.

One other aspect should be mentioned here. A child deprived of liberty may not be a resident of the specific State Party under which jurisdiction the deprivation of liberty takes place. Children may very well be immigrant, alien or refugee children. According to article 2 CRC these children are entitled to all rights under the CRC as well. In particular, article 22 CRC places States Parties under the obligation to ensure that these children ‘receive appropriate protection and humanitarian

325 An example explicitly provided by the CRC Committee is the right to privacy. According to the CRC Committee: ‘The right of the child to have his/her privacy fully respected in all stages of the proceedings reflects the right to protection of privacy enshrined in article 16 CRC. “All stages of the proceedings” includes from the initial contact with law enforcement (e.g. a request for information and identification) up until the final decision by a competent authority or release from supervision, custody or deprivation of liberty’; GC No. 10, para. 64.

326 *Cf* HRC GC No. 21, para. 3 in which the HRC speaks of ‘restrictions that are *unavoidable* [Italic – it] in a closed environment’.

327 *Cf* the HRC’s comments regarding the effective application of art. 10 (1) ICCPR. HRC GC No. 21, para. 7.

328 Originally the draft used the word ‘should’, but this was amended deliberately by the UN Crime Prevention and Criminal Justice Branch into ‘shall’; Defence for Children International 1990, p. 17.
assistance’ in the enjoyment of their (appropriate) rights under international human rights and humanitarian law. One particular aspect regarding the child’s legal status is that the child must be able to understand his status. This is of particular significance for immigrant children who may require translated documents or the assistance of an interpreter (cf. art. 40 (2) (b) (vi) CRC). Moreover, article 22 (2) CRC provides that ‘[i]n cases where no parents or other members of the family can be found, the child shall be accorded the same protection as any other child permanently or temporarily deprived of his or her family environment for any reason, as set forth in the present Convention’.

### 3.5.3 Right to Be Treated in Accordance with Article 37 (c) CRC

In addition to the general principles of the CRC, article 37 (c) CRC represents the core provision concerning the treatment of children deprived of their liberty. It provides that States Parties must ‘ensure’ (i.e. a positive obligation) that ‘[e]very child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age’.

As pointed out in Chapter 2, article 37 (c) CRC is founded on article 10 (1) ICCPR. This article uses similar wording and stipulates that ‘[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’. According to Nowak ‘[a]rt. 10 establishes a relationship between the rights to liberty of person (Art. 9) and personal integrity (Art. 7)’.

Article 9 ICCPR, as addressed earlier, embodies everyone’s right to liberty of the person and allows limitations only if these are not unlawful or arbitrary, but does not contain any requirements regarding the treatment of individuals deprived of their liberty. Article 7 ICCPR prohibits torture or cruel, inhuman or degrading treatment or punishment. Article 10’s added value is that it stipulates minimum guarantees of humane treatment for those deprived of liberty. It explicitly provides the foundation for the legal status of the individual deprived of liberty.

The same is true for article 37 (c) which is situated between article 37 (b)’s requirement of legality (i.e. lawfulness and non-arbitrariness) of deprivation of

---

331 Nowak 2005, p. 242 with further reference to HRC Comm. No. 78/1980 (Angel Estrella v. Uruguay) in which the HRC found that limitation of a prisoner’s correspondence may very well amount to violation of article 10 (1) besides a breach of article 17’s prohibition of arbitrary or unlawful interference with one’s correspondence. Cf. art. 5 ACHR and art. 5 Banjul Charter. The ECHR lacks such a provision. Moreover, it is interesting to note that article 10 ICCPR is not a non-derogable provision like article 7 ICCPR, while the art. 5 ACHR contains both the prohibition of torture and the right to humane treatment and is non-derogable; see also Rodley 1999, p. 278.
liberty and article 37 (a) CRC’s prohibition of torture and other cruel, inhuman or degrading treatment or punishment. In comparison to its predecessor, however, article 37 (c) CRC adds that every child, deprived of liberty must be treated ‘in a manner that takes into account the needs of persons of his or her age’. This special feature represents the CRC’s child rights approach, including the concept of the evolving capacities of the child and the principle of the best interests of the child (art. 3 CRC).

Schabas & Sax argue that ‘[t]he qualification added by [a]rticle 37 (c) in respect to the needs of children, highlights a specific child developmental-orientation within the general principle’. They add that ‘[t]he reference to the child’s age conveys the message that children should not be regarded as one homogenous group, but instead that the conditions and the treatment of the young persons have to be constantly monitored and flexibly adapted due to their personal development’.333

This remark is important and points at the child-specific approach that must be present when it comes to deprivation of liberty of children, while taking into account the differences between children according to age and maturity. There are more general differences between children which should be addressed, such as differences between boys and girls. This deserves particular attention as well and may not lead to discrimination, for example towards girls (see also para. 3.7).

In particular, children under arrest, in policy custody, in pre-trial detention or serving imprisonment (i.e. deprivation of liberty in the context of juvenile justice) must be granted the same quality of treatment under article 37 (c) CRC as any other child. In addition, they are entitled to treatment in conformity with article 40 CRC, which inter alia implies that treatment must foster their eventual reintegration into society. To this end it may be necessary to address specific individual needs of children, such (mental) health problems, including disabilities, behavioural disorders or social issues, like the absence of parents or family, the lack of a permanent residence or their refugee status (see further para. 3.12).334

Thus, article 37 (c) CRC places States Parties under the positive obligation to recognize the child deprived of liberty as a human being in development, calling for a full recognition of this child as a rights holder under International Human Rights Law, who must be treated as a human being, with respect for his human dignity on the one hand and as an individual with particular needs (i.e. developmental needs (provisions), special measures of protection and right to participation). In addition, article 37 (c) CRC explicitly provides for two specific rights: the right of the child

333 Schabas & Sax 2006, p. 89. Cf e.g. art. 37(d) and 25 CRC.
334 This also points at the interrelation of the different (legal) systems in which children participate; see para. 3.2.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

3.5.4 Specific Issues under or Related to Article 37 (c) CRC

The next paragraphs will address specific issues directly related to or relevant to the treatment of children deprived of their liberty. These issues can also be considered elements of the overall right of the child deprived of his liberty to be treated with humanity, respect for his human dignity and in a child-specific manner.

The first and very significant element is the prohibition of torture and other cruel, inhuman or degrading treatment or punishment, a fundamental provision of International Human Rights Law, embodied in article 37 (a) CRC (see Chapter 2). This absolute and non-derogable provision applies to all children, but it is particularly significant for children deprived of liberty. Primarily, this is because children deprived of liberty are particularly vulnerable to abusive practices like torture or inhuman treatment and second, because children are more vulnerable than adults.

The UN Violence Study pointed specifically to the vulnerability of children deprived of their liberty. It reported violence, abuse and neglect by institutional to be separated from adults and the right of the child to maintain contact with his family through correspondence and visits (see below).

---

335 As stressed in Chapter 2, the latter element has been recognized as one of the key principles of the JDLs.

336 The prohibition of torture and other forms of ill-treatment or punishment can also be found in art. 5 UDHR and other treaties: art. 5 (2) ACHR, art. 5 Banjul Charter, arts. 16 (1) and 17 (2)(a) ACRWC and art. 3 ECHR. Both the ACRWC and ECHR do not explicitly prohibit cruel treatment or punishment.

337 Cf. e.g. HRC GC No. 21, para. 3 in which the HRC refers to inter alia persons in detention as ‘persons who are particularly vulnerable because of their status as persons deprived of their liberty’. According to Nowak ‘experience has shown that precisely the situation of “special power relationships” within closed facilities often occasions massive violations of the most diverse human rights’; Nowak 2005, p. 242. Schabas & Sax argue that “[t]he restriction of persons to closed locations naturally creates situations of power imbalances and dependencies, and abuse and exploitation is likely to occur in such settings’ and that “[t]he purpose of this fundamental provision is therefore to uphold the respect for all rights of the person deprived of personal liberty to the greatest extent possible in such circumstances”; Schabas & Sax 2006, p. 88-89.

338 See, e.g. Rodley who argues that ‘[i]n fact, children by virtue of their special vulnerability may well be the victims of similar suffering by practices that would not be expected to be as grave if inflicted on adults, such as inadequate conditions of detention’; Rodley 1998, p. xv. Cf Van Bueren: ‘Children are rarely perceived as victims of torture, although, ironically, they may be easier targets, not only because of their vulnerability, but also because of the effect on the local community. Children are regarded as a symbol of a community’s future, and if they are targeted and seized in order to subjugate their families and neighbours it creates a general unease. Everyone realizes that no one is safe in a state capable of torturing children.’; Van Bueren 1998, p. 58. Cf CPT 9th General Report in which the CPT considers juveniles (persons under eighteen) ‘inherently more vulnerable than adults’ and that ‘particular vigilance is required to ensure that their physical and mental well-being is adequately protected’ (para. 20).
staff, which included ‘beatings with hands, sticks and hoses, and hitting children’s heads against the wall, restraining children in cloth sacks, tethering them to furniture, locking them in freezing rooms for days at a time and leaving them to lie in their own excrement’.

In addition, it observed that ‘[i]n at least 77 countries corporal and other violent punishments are accepted as legal disciplinary measures in penal institutions’ and that ‘[c]hildren may be beaten, caned, painfully restrained, and subjected to humiliating treatment such as being stripped naked and caned in front of other detainees’. In addition, it turned out that ‘[g]irls in detention facilities are at particular risk of physical and sexual abuse, mainly when supervised by male staff’.

States Parties have the obligation to protect the child against torture or other forms of ill-treatment while he falls under their duty of care (i.e. during deprivation of liberty). As pointed out in Chapter 2 this prohibition is particularly related to the right to be treated with humanity and respect for human dignity (art. 37 (c) CRC) or as Schabas & Sax argue: ‘[T]he prohibition of torture or other cruel, inhuman or degrading treatment or punishment may be regarded as one specific qualification of the general rule of treatment with respect and dignity.’

The second specific issue is the separation of different categories of individuals deprived of liberty, that is that certain groups of individuals deprived of liberty should not be housed together. As mentioned in Chapter 1 and as noted in the UN Violence Study, deprivation of liberty of children together with adults ‘is routine in many countries’, which exposes children to potential (sexual) abuse and exploitation by adults. It turns out that children deprived of their liberty are at ‘heightened risk of self-harm or suicidal behaviour (…) when detained in adult facilities’. Article 37 (c) CRC explicitly provides that ‘every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so’. The separation of children from adults, which is prompted by the need for protection of the child against negative influences of adults and by the need for the creation of a child-friendly (or: appropriate) environment, has also been recognized in article 10 (2) (b) and (3) ICCPR. In addition, there are a few other separation issues that deserve particular attention, one of which is the separation of unconvicted and convicted individuals deprived of liberty based on the presumption of innocence (art. 10 (2) (a) ICCPR; cf rule 17 JDLs). These and other separation issues will be addressed in paragraph 3.7.

339 UN Violence Study 2006, p. 16.
340 Ibid., p. 17.
341 Schabas & Sax 2006, p. 90.
Finally, there are three groups of aspects relevant to the legal status of the child deprived of his liberty. The first group contains the administrative aspects of deprivation of liberty placement and includes aspects such as selection and placement, admission, transfer, information for child and family, and records and personal files (para. 3.8). The second group consists of aspects that provide the (substantive) quality of treatment of children deprived of their liberty, including the enjoyment of rights. It affects the implementation of the right to an adequate standard of living, to health care, to education and to remain in contact with the child’s family, one of the specific rights under art. 37 (c) CRC, as well as contact with the wider community. The implications of these rights for the treatment of children deprived of liberty will be addressed in paragraph 3.9. The third group of aspects relevant to the legal status involves the relation between measures to maintain order and safety in the institution on the one hand and the right of the child to be protected against unlawful or arbitrary limitation of his human rights and freedoms on the other. This affects in particular the use of force and restraint, and the imposition of disciplinary measures (e.g. solitary confinement). The implications of International Human Rights Law and Standards in this regard will be addressed in paragraph 3.10 and are also related to the prohibition of torture and other forms of ill-treatment or punishment as highlighted in paragraph 3.6. As mentioned above, for the realization of the legal status of the child deprived of liberty, it is important that the child has effective remedies to protect him against unlawful and arbitrary treatment in the institution. This includes the right to file complaints before a competent, impartial and independent authority, but also the establishment of independent inspection and supervisory bodies to monitor (daily) practices in institutions and the overall treatment of children placed there in light of (inter)national (human rights) law (para. 3.11).

The relevant provisions of International Human Rights Law and Standards that provide for the guiding principles and rules are concentrated around article 37 (c) CRC, placing States Parties under the obligation to provide for such minimum conditions of deprivation of liberty that safeguard a climate in which the child is being treated humanely, with respect for his dignity and in a manner appropriate for his needs as a child. In this regard the CRC Committee has urged States Parties to implement the JDLs in conjunction with the SMR343 and to incorporate them into national laws and regulations (GC No. 10, para. 88); a clear instruction towards the domestic legislator as part of the broader States Parties’ obligation to implement international law and standards (see para. 3.13).

343 Cf Rule 9 Beijing Rules. The HRC has referred to the SMR as the relevant set of standards for the implementation of art. 10 ICCPR, see Chapter 2.
3.6 Prohibition of Torture or Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment

3.6.1 Introduction

Article 37 (a) CRC embodies the prohibition of torture and other forms of cruel, inhuman or degrading treatment or punishment – an absolute provision of International Human Rights Law, which admits no derogation. This prohibition of unlawful infringements upon a person’s physical or mental integrity can be found in all international human rights treaties. In addition, it has become the subject of specific UN, Inter-American and European Conventions and is considered part of International Customary Law; it is even recognized as *ius cogens*. As a consequence, there strictly was no need to adopt a similar provision for children in the CRC. With today’s knowledge, the almost universal ratification of the CRC confirms a clear and (almost) universal rejection of torture and other forms of ill-treatment.

Although this prohibition is of equal relevance to both adults and children, as will be addressed below, there may be different implications. In this regard, the adoption of article 37 (a) CRC could point to an international call for a child-specific approach. This finds, however, little support given the rather small debate that took place during the drafting and given the fact that it failed to address the question whether specific definitions of the different forms of prohibited treatment and punishment would be required.

The CRC does not provide definitions of torture and the other forms of ill-treatment. The CRC Committee has not been very explicit regarding the implications of the prohibition of article 37 (a) CRC. Schabas & Sax provide examples of situations in which the CRC Committee held States Parties responsible for torture and they argue that “[t]he CRC Committee has identified several specific manifestations of cruel, inhuman or degrading treatment or punishment (...) [which] include violations concerning conditions of detention, including psychological intimidation, holding children in solitary confinement and police brutality.” According to Hodgkin & Newell: ‘The Committee has (...) expressed...”

---

344 Nowak 2005, p. 157-158; Rodley 1999, p. 74. Cf art. 7 jo. 4 (2) ICCPR, art. 3 jo. 15 (2) ECHR, art. 5 (2) jo. art. 27 (2) ACHR and art. 5 Banjul Charter; see also art. 17 (2)(a) ACRWC, the scope of which is limited to children deprived of their liberty.

345 If not stated otherwise ill-treatment represents ‘other cruel, inhuman or degrading treatment or punishment’.

346 Sottas raises this question and answers it positively; Sottas 1998, p. 143ff.


348 *Ibid.*, p. 16. They find it confusing that the CRC Committee uses the term ill-treatment as well. Schabas & Sax remark that “[i]t is not evident whether ‘ill-treatment’ is simply shorthand for ‘cruel, inhuman or degrading treatment or punishment’, or rather whether it is a euphemism adopted by the [CRC] Committee in order to make the bitter pill of criticism for violation of..."
concern at allegations of torture and inhuman or degrading treatment of children in detention and on the streets, by police, security forces, teachers and within the family. The Committee has proposed formal investigations of any allegations of torture and suggested that perpetrators should be brought to trial (by civilian courts) and if found guilty, punished.  

It is clear that the prohibition of torture and other forms of ill-treatment protect the child’s right to physical and mental/spiritual integrity and it is not limited to children deprived of liberty. However, it is of particular significance for the latter group. As, for example, Morgan & Evans note: ‘the [CPT] has, on occasion, found credible evidence of juveniles being tortured or otherwise ill-treated and, as with adults, it considered that the risk of this happening is greatest in police custody’.  

The scope of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment regarding adults (deprived of their liberty) has been discussed thoroughly by many. This is not true for children. This paragraph provides general observations and remarks regarding the definitions and implications of the prohibition of torture and other forms of ill-treatment and pays, in addition, attention to the position of children in this regard (paras. 3.6.2 and 3.6.3).  

Within the context of deprivation of liberty and the prohibition of article 37 (a) CRC, there are some specific issues that deserve special attention: the conditions of deprivation of liberty, including solitary confinement and detention incommunicado, corporal punishment and, finally, medical experimentation (para. 3.6.4). These issues are also relevant to the general quality of treatment to which children deprived of their liberty are entitled (art. 37 (c) CRC; see para. 3.7ff), but will be addressed here due to the fact that they potentially violate the prohibition of torture and other ill-treatment.
3.6.2 Torture

Torture has been defined neither in the CRC, nor in the ICCPR or the other general human rights treaties. However, article 1 CAT does provide a definition: ‘[A]ny act by which severe pain or 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 for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.’

The CAT definition is not the only one available, but it can be used as a point of reference for article 37 (a) CRC, since it is a widely accepted definition.

Torture embodies several cumulative components. The first component is that torture is an act that causes ‘severe pain or suffering’ which can be physical or mental. This component is rather subjective and raises the question whether an act, which may not cause severe pain with some people, can amount to an act of torture regarding others. Joseph, Schultz & Castan argue that ‘acts that would not cause extreme pain or suffering to an ordinary person are normally outside the definition’. The qualification of an act that causes severe pain or suffering must be made on a case-by-case basis and all the relevant circumstances must be taken into account and be given weight, including ‘the victim’s subjective pain

---

353 Already in 1969, the European Commission on Human Rights defined torture in ‘The Greek Case’, the ‘first and most extensively reasoned formal finding, by a body called upon to apply a human rights treaty, that torture has taken place’; Rodley 1999, p. 77. The European Commission stated in this case (against Greece, instituted by Sweden, Denmark, Norway and The Netherlands), that ‘the word ‘torture’ is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and is generally an aggravated form of inhuman treatment’. In other words, torture comprises inhuman degrading treatment which covers ‘at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable’; European Commission, Report of 5 November 1969, The Greek Case, Yearbook XII (1969), p. 186; Vermeulen 2006, p. 406. Cf art. 1.1 of the 1975 Declaration against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; art. 2 of the Inter-American Convention to Prevent and Punish Torture contains a slightly broader definition; Rodley 1999, p. 51. See also Schabas & Sax 2006, p. 12. See for an analysis on the element of ‘justifiability’ as part of the concept of ‘art. 3 ECHR treatment’; see Rodley 1999, p. 78-84.


Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

The European Commission, in ‘The Greek case’, and the 1975 Declaration against Torture (art. 1.1) defined torture as an aggravated form of inhuman treatment, while stressing that torture is the most severe, most heinous and thus most extreme form of treatment or punishment. Although, the word ‘aggravated’ was set aside deliberately during the drafting of the CAT, there is no doubt that torture is ‘at the top end of a scale of rising disapproval’. Consequently, ‘severe pain or suffering’ as used in the CAT definition primarily implies that the threshold for torture is higher than for the other forms of ill-treatment (see also below). The ECtHR ruled in the case Ireland v. the UK that the assessment in this regard ‘depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim’.

This analysis implies that the threshold for the constitution of torture, as far as this first element is concerned, arguably is lower regarding children than regarding adults, due to the (essential) difference in pain tolerance between children and adults.

Secondly, an act of torture has to be inflicted ‘intentionally’. Joseph, Schultz & Castan argue that ‘[a]s the definition refers twice more to ‘pain and suffering’, it seems that the relevant intention is to cause, or at least be recklessly indifferent to the possibility of causing, that pain or suffering’. Subsequently the question can be raised whether the use of the term ‘act’ includes omissions. Joseph, Schultz & Castan argue that ‘[a]s the definition refers twice more to ‘pain and suffering’, it seems that the relevant intention is to cause, or at least be recklessly indifferent to the possibility of causing, that pain or suffering’. Subsequently the question can be raised whether the use of the term ‘act’ includes omissions.

356 Nowak 2005, p. 162. For examples (mostly South American and some African examples) derived from the HRC jurisprudence, see Nowak 2005, p. 162-163. For a broad discussion of the case law under inter alia the ECHR and ICCPR on ‘degree of pain or suffering/aggravation’ see Rodley 1999, p. 85-100. Rodley concludes that ‘[t]o sum up on the issue of how severe or aggravated inhuman treatment has to be for it to amount to torture is virtually impossible’; Rodley 1999, p. 98. Cf art. 16 CAT, which refers to the other forms of ill-treatment as ‘other forms of cruel, inhuman or degrading treatment or punishment which do not constitute torture’. Note that art. 2 of the Inter-American Convention to Prevent and Punish Torture does not refer to ‘severe’ pain or suffering, because this definition deliberately includes ‘the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish’, such as the induction of anxiety (through, e.g. sensory deprivation techniques) or ‘more sophisticated techniques of mind control (e.g. chemical techniques); Ibid., p. 100.

357 Ibid., p. 99. Cf the tenet of dolus in criminal law.


359 Sottas 1998, p. 144. In addition, it may have different implications for girls and boys; see, e.g. Chinkin 1998.

360 Joseph, Schultz & Castan 2004, p. 196-197. Recklessness may nevertheless lead to an act of torture. This approach is in conformity with criminal law in which recklessness or conditional intent lead to the assumption that the actor committed an act intentionally; Cf the tenet of dolus malice in criminal law.
Castan argue that ‘affirmative and negative conduct should suffice to constitute torture, if the other requisite elements of the definition are present’.  

The third component of the definition is that the act of torture must be inflicted for a purpose. If no purpose is pursued the ill-treatment will not amount to torture. Or as Nowak states: ‘If one person intentionally mistreats another person severely without thereby pursuing some purpose (e.g. purely sadistically), then this is not torture but rather cruel treatment.’ Article 1 CAT provides for a few examples of purposes that could be pursued, namely: for obtaining information or a confession, use of torture as a punishment or as a measure to intimidate. Joseph, Schultz & Castan express the hope that ‘[a]ny malevolent purpose would hopefully satisfy this aspect of the definition’.  

Although the CAT definition brings punishment within the scope of torture, as long as the other components are present as well, the rider clause of the definition excludes ‘pain or suffering arising only from, inherent in or incidental to lawful sanctions’. This implies that lawful imprisonment or lawful corporal punishment cannot amount to torture, although they may (and will) still amount to one of the other forms of prohibited ill-punishment.  

Joseph, Schultz & Castan argue that ‘[l]awful’ should be interpreted so as to permit sanctions that are otherwise permitted under CAT and other relevant international law’. As an example, they consider that ‘imprisonment for reasonably serious crimes’ falls within this clause, ‘[h]owever, the rider should not exempt imprisonment from being classified as “torture” if the conditions of such imprisonment are extremely harsh’. In this regard it is interesting to note that the
implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

definition of torture embodied in the 1975 Declaration against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment excludes ‘lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners’ from amounting to torture.\(^{366}\) However, as will be highlighted below, prison conditions resulting from a lawful sanction, can still violate the prohibition of ill-treatment.\(^{367}\)

The final component of torture as defined in article 1 CAT is that ‘the pain and suffering should be inflicted at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’\(^{368}\) The inclusion of this part of the definition is meant to ‘prevent States from being held liable for acts beyond their control’.\(^{369}\) Nevertheless, the use of the term ‘acquiescence’ has lowered the threshold in this regard. If States fail to respond adequately to (private) torture or if they do not do their reasonable best to prevent these forms of torture, they can be held liable for these acts of torture.\(^{370}\)

This has implications for police or prison officials if they witness torture in the police

---

\(^{366}\) See also Rodley 1999, p. 278.

\(^{367}\) According to Schabas and Sax: ‘To the extent this definition applies to article 37(a) of the [CRC], it operates to limit the scope of the first sentence with respect to punishment imposed pursuant to lawful sanctions. (…) This interpretation is further enhanced when the second sentence of article 37 (a) [prohibition of life without early release – til] is used to limit the ambit of the first sentence.’; Schabas & Sax, p. 22. Note that art. 1 CAT does not mention cruel, inhuman or degrading treatment or punishment. Schabas & Sax however, argue that ‘the reference to “punishment” suggests that it is under this rubric, rather than under that of torture, that “punishment” associated with “lawful sanctions” ought to be considered’. Therefore, ‘[t]he CRC Committee might (…) examine any forms of excessive or disproportionate punishments (with the stunning exception of the most severe of them all, life imprisonment), in its examination of article 37 (a)’; Ibid., p. 22.

\(^{368}\) According to art. 3 Inter-American Convention to Prevent and Punish Torture two categories of individuals can be held guilty of the crime of torture: (a) ‘[a] public servant or employee who acting in that capacity orders, instigates or induces the use of torture, or who directly commits it or who, being able to prevent it, fails to do so’ and (b) ‘[a] person who at the instigation of a public servant or employee mentioned in subparagraph (a) orders, instigates or induces the use of torture, directly commits it or is an accomplice thereto’.


\(^{370}\) Ibid., p. 198ff. An example of State acquiescence can be found in a case before the CAT Committee, CAT Comm. No. 161/2000 (Dzemajl et al. v. Yugoslavia). From this case the conclusion can be drawn that ‘police inaction in the face of blatant torture (or cruel, inhuman or degrading treatment) constitutes acquiescence in the part of the State in the perpetration of that treatment, contrary to article 1 (…) of CAT’. The decision in this case furthermore ‘indicates that a State’s failure to take reasonable steps to prevent torture (or cruel, inhuman or degrading treatment) constitutes acquiescence, giving rise to accountability under CAT’; Ibid., p. 202.

\(^{371}\) This raises questions like: what exactly is a public official? Can, e.g. a prison worker of a privately run prison be considered a public official? This prison worker is performing a governmental task, namely a task directly related to deprivation of liberty of individuals in the justice system. Therefore, he could be considered under the scope of ‘public official’, despite the fact that he is listed on the payroll of a private company that runs that prison. The government can be held
directly responsible for acts of these private actors (in an official capacity). In addition, the government can be held responsible for heinous acts committed by non-governmental or unofficial groups, such as paramilitary units; *Ibid.*, p. 206; Rodley 1999, p. 100. The CRC Committee has stressed that ‘decentralization of power, through devolution and delegation of government, does not in any way reduce the direct responsibility of the State Party’s government to fulfil its obligations to all children within its jurisdiction, regardless of the State structure’; GC No. 5, para. 40.

Nowak explains that the HRC has rejected the narrow approach as represented by the wording of CAT’s definition of torture and ‘has recognized horizontal effects from the very beginning’. 372 The HRC provided in its 20th General Comment that “[i]t is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity.” 373

Van Bueren argues that the HRC appears to be influenced by the jurisprudence within the Inter-American Human Rights System, particularly by the cases of *Velasquez Rodriguez* and *Godinez Cruz v. Honduras*. 374 In the first case ‘the Inter-American Court determined that an illegal act which breaches human rights and which is not directly imputable to the state, because it is an act of a private person or because the person responsible has not been identified, can lead to international responsibility of the state not because of the act itself but because of the failure to ‘prevent the violation or to respond to it as required by the Convention.’ In addition the Inter-American Court ruled that ‘where human rights violations by private parties are not seriously investigated the parties are in a sense aided by the government making the state responsible in the international plane.’ 375

Furthermore, the Inter-American Commission on Human Rights has chosen a rather broad approach by arguing that states are under the obligation to prevent and

---

372 Nowak 2005, p. 161. Nowak elaborates more on State obligations to protect individual’s rights under art. 7 ICCPR against infringements from other private persons; *Ibid.*, p. 182ff. He argues concerning privatization of prisons in particular that ‘there can be no doubt that the State has an obligation to protect detainees against any act of torture by a private person, whether an official of a private security company or a fellow prisoner in a public or private prison’; *Ibid.*, p. 183. This equally applies to torture, cruel, inhumane or degrading treatment committed by, e.g. teachers or parents (See also Nowak 2005, p. 184 with reference to art. 19 CRC).

373 HRC General Comment No. 20, Replaces general comment 7 concerning prohibition of torture and cruel treatment or punishment (Art. 7), 10 March 1992 (HRC GC No. 20), para. 2. See earlier HRC GC No. 7, para. 2: ‘[I]t is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority.’


Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

supress violence ‘whether committed by public officials or by private individuals, whether their motives are political or otherwise’.376

Finally, both the European Commission on Human Rights and the ECtHR have found that States may indirectly be responsible for the behaviour of private actors violating article 3 ECHR.377

Thus, international jurisprudence and points of view clearly represent a broad approach that holds States responsible for the prevention of and protection against torture (and other forms of ill-treatment, which will be discussed below) by both public and private actors in both the public and private spheres.378

3.6.3 Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment

3.6.3.1 Definitions

Neither the CRC or CAT, nor other human rights instruments define the other prohibited forms of ill-treatment or punishment. As pointed out in the former paragraph (para. 3.8.2.2), the main difference between torture and the other forms of cruel, inhuman or degrading treatment or punishment is the level of severity of inflicted pain or suffering. These forms of prohibited treatment or punishment form a chain of aggravation; torture is the most severe form of treatment or punishment, while degrading is the least severe. Or as Nowak argues: ‘Insofar as the various terms are used in a particular order, a certain classification as to the kind and purpose of treatment can be seen, especially as regards the intensity of suffering imposed: this runs from “mere” degrading treatment or punishment to that which is inhuman and cruel, up to torture as the most reprehensible form.’379


377 See Van Bueren 1998, p. 63 with reference to ECtHR, Judgment of 26 March 1985, Series A. No. 91 (X and Y v. the Netherlands), ECtHR, Judgment of 6 February 1976, Series A. No. 20 (Swedish Engine Drivers Union Case v. Sweden), para. 42 and European Commission, Report Appl. No. 4125/69, X. v. Ireland, Yearbook XIV (1971), para. 188 and 198. Note that the Statute of the International Criminal Court defines torture as ‘the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions’ (art. 7 (2) (e)). The ICC Statute does not speak of the reason or purpose for the act of torture, nor does it mention that the act should be inflicted by a ‘public official’. According to Joseph, Schultz & Castan the ICC attributes personal responsibility, rather than States responsibility; Joseph, Schultz & Castan 2004, p. 208.

378 Van Bueren 1998, p. 64. This may also imply that parents could be perpetrators of torture, since their authority over the child is recognized by the State; Sottas 1998, p. 146-147. Furthermore, it has implications for the privatization of police tasks, detention centres and prisons. See for more on privatization of prisons, e.g. Nathan 1996ff and James et al. 1997.

This chain of aggravation was made clear for the first time by the European Commission in *The Greek Case* – a case, which has been influential for the later adopted specific anti-torture declaration and conventions, and influenced the position of the international and regional judicial human rights bodies under the general human rights treaties. The European Commission stated that ‘[t]he notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable’ and that ‘[t]he word ‘torture’ is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confession, or the infliction of punishment, and is generally an aggravated form of inhuman treatment’ and finally that ‘[t]reatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience’. The European Commission also stressed that ‘[i]t is plain that there may be treatment to which all these descriptions apply, for all torture must be inhuman and degrading treatment, and inhuman treatment also degrading’. The ECtHR adopted this approach and since then, under article 3 ECHR, the ‘difference in the intensity of the suffering inflicted’ principally answers the question whether an act amounts to torture or to inhuman or degrading treatment or punishment. For the determination of torture the other components addressed

---

380 According to Rodley ‘The Greek case’ represents the ‘first and most extensively reasoned formal finding, by a body called upon to apply a human rights treaty, that torture has taken place’; Rodley 1999, p. 77.


383 ECtHR, Judgment of 18 January 1978, Series A. no. 25 (*Ireland v. UK*), para. 167. As mentioned before, art. 3 ECHR does not prohibit *cruel* treatment. This omission represents according to Rodley ‘a change of little significance’; Rodley 1999, p. 75. According to Vermeulen ‘it should be kept in mind that the [ECtHR] does not always draw a sharp distinction and often uses qualifications such as ‘inhuman and degrading treatment’’. See for more information on the case law under art. 3 ECHR, in particular regarding the different forms of prohibited treatment or punishment and their general aspects Vermeulen 2006, p. 406ff.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

above must be present as well. However, for the separate determination of the other forms of ill-treatment or punishment one should assess the level of severity of the inflicted pain or suffering on a case-by-case basis. Ill-treatment must reach a minimum level of severity in order to amount to a violation. According to the ECtHR in *Ireland v. UK* (para. 162): ‘The assessment of this minimum is, in nature of things, relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc.’.  

Thus, under article 3 ECHR there are no general standards regarding which treatment or punishment violates the prohibition of this provision. Instead, these forms of treatment and punishment are rather dynamic and their presence should be determined on a case-by-case basis, while taking into account ‘the prevalent views of the time’. It is likely that this jurisprudence has to a large extent determined the position of *inter alia* the HRC.

The HRC has found it not ‘necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied’. According to Joseph, Schultz & Castan the HRC has, in line with this comment, failed to specify in its case law which part of article 7 ICCPR has been violated. Taking into account HRC General Comment No. 20 in conjunction with article 16 CAT, which obliges States Parties to prevent ‘other acts of cruel, inhuman or degrading treatment or punishment which do not amount to torture (…)’, the conclusion is justified that the ‘requirements of severity, intention, and purpose’ should be applied more leniently in determining the other forms of ill-treatment than with regard to torture.

---

384 See also ECtHR, Judgment of 26 October 2000, Appl. No. 30210/96 (*Kudla v. Poland*).
385 Vermeulen 2006, p. 412. In addition, Vermeulen argues that ‘[i]t has to be stressed (…) that the national authorities are often allowed a wide margin of appreciation’; *Ibid.,* p. 413. Cf Van Bueren 1998, p. 65. She also said that ‘[i]f the treatment is considered to be inhuman than it is also degrading’, but that ‘[t]he converse is not necessarily true; a finding of degrading treatment does not necessarily mean a finding of inhuman treatment as in *Tyrer v. UK*, where a punishment of three strokes of a birch for a 15-year-old school boy who assaulted a school student was considered to be degrading but not inhuman’; Van Bueren 1998, p. 66 with reference to ECtHR, Judgment of 25 April 1978, Series A. No. 26 (*Tyrer v. UK*), para. 31ff. This judgment is also relevant to the special issue of corporal punishment, which will be addressed below.
386 HRC GC No. 20, para. 4; see also earlier HRC GC No. 7, para. 2.
387 Nowak argues that the HRC has shown more willingness to differentiate in the more recent years; Nowak 2005, p. 160. In addition, he found that ‘[i]t is only exceptionally that the [HRC] establishes cruel treatment alone or inhuman treatment alone’; *Ibid.,* p. 165. For HRC case law in this regard see, e.g. *Ibid.,* p. 164-165.
In order to determine a violation of article 7 ICCPR the HRC concluded in the case *Vuolanne v. Finland* that ‘the assessment of what constitutes inhuman or degrading treatment falling within the meaning of article 7 depends on all the circumstances of the case, such as the duration and manner of treatment, its physical or mental effects as well as the sex, age and state of health of the victim’, a reasoning similar to the one used by the ECtHR in the above mentioned case *Ireland v. UK*.389

In conclusion, like torture, the other forms of ill-treatment are certainly not abstract terms. The determination whether an individual has been treated or punished in violation of the prohibition of cruel, inhuman or degrading treatment or punishment should be determined on a case-by-case basis. Besides the circumstances of the case (manner of treatment, duration etc.), important aspects are: the sex, age and health of the individual involved.

As with the elements of torture, there arguably are different thresholds for cruel, inhuman or degrading treatment or punishment of children. Given the chain of aggravation one could argue that treatment that is degrading for adults may be cruel or inhuman for children (or event amount to torture if the other components are present as well; see above).390

In addition, treatment that may not be degrading for adults may very well be degrading for children, for example blaming or accusing a child in front of his peers or forcing a child to wear clothes meant to identify him as a bad person.391

It seems generally accepted that children, and children deprived of their liberty in particular, are more vulnerable to abusive practices like torture, cruel, inhuman and

---

389 HRC Comm. No. 265/1987 (*Vuolanne v. Finland*), para. 9.2; Joseph, Schultz & Castan 2004, p. 211. In this case Vuolanne claimed that his military detention in a small cell for ten days for disciplinary reasons breached article 7 ICCPR. He claimed that he was locked up in a cell of 2x3 metres with a tiny window, a camp bed, small table, a chair and a dim electric light only. Furthermore he was allowed to leave his cell only for purposes of eating, visiting the bathroom and taking fresh air for 30 minutes per day. The HRC ruled that his rights under article 7 had not been violated.

390 Van Bueren follows a different reasoning and lets loose the chain of aggravation. She argues that ‘[a]rguably the level of treatment or punishment amounting to torture or inhuman treatment and punishment is the same for both children and adults but [that] this is not necessarily the case with cruel and degrading treatment and punishment’ and that ‘[a] particular form of treatment or punishment may not be prohibited when inflicted upon adults but may amount to cruel or degrading when perpetrated against children’; Van Bueren 1995, p. 223; see also Van Bueren 1998, p. 65. *Cf* Van Bueren 1998, p. 58 in which she argues that ‘[i]n reality (…) it is torture and inhuman treatment and punishment which are regarded as being ultimate forms of barbarity attracting society’s disapprobation’. Van Bueren also emphasizes the absence of a definition of cruel treatment or punishment in international jurisprudence, while according to her ‘the concept of cruelty (…) may have the greatest potential for children deprived of their liberty, as cruelty is arguably a less severe form of treatment than torture and inhuman treatment and its nature is different from that of degrading treatment’, Van Bueren 1995, p. 224.

391 See rule 36 JDLs that stipulates that detention facilities should provide for personal clothing ‘which should in no manner be degrading or humiliating’.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

degradating treatment and that these forms of ill-treatment have more impact on children (see also para. 3.5.4).\footnote{See the different contributions in Van Bueren 1998, like for example the contribution from Sottas \textit{inter alia} addresses the need for a specific definition for torture of children (Sottas 1998, p. 143ff) or Chinkin who asks for attention to the torture of the girl-child; Chinkin 1998, p. 81-106. Van Bueren rightfully raises the question whether one should additionally distinguish between older and younger children. International human rights law does not attribute differentiation between the developmental stages of children; Van Bueren 1998, p. 65 and 59-60; art. 5 CRC. Cf e.g. ECtHR, Judgment of 7 July 1989, Series A. No. 161 (\textit{Soering v. UK}), para. 100.} Given this particular vulnerability as a human being in development, the threshold for cruel, inhuman and degrading treatment (and punishment) should arguably be lower than for adults.

3.6.3.2 Treatment and Punishment

In the above mentioned Vuolanne case the HRC also stated ‘that for punishment to be degrading \textit{[Italic – tl]}, the humiliation or debasement involved must exceed a particular level and must, in any event, entail other elements beyond the mere fact of deprivation of liberty’ (para. 9.2).\footnote{Joseph, Schultz & Castan find the HRC’s statement that ‘degrading treatment’ must entail more than ‘the mere deprivation of liberty’ is a bit stiff and suggest that deprivation of liberty as such could breach art. 7 ICCPR if it concerns an extremely claustrophobic person; Joseph, Schultz & Castan 2004, p. 211.} This remark is interesting in light of the difference between ill-treatment and ill-punishment, which requires some additional attention.

All relevant international human rights provisions prohibit both ill-treatment and ill-punishment. Punishment is inflicted for disciplinary purposes, while treatment has a much wider scope.\footnote{Joseph, Schultz & Castan 2004, p. 195.} Obviously, disciplining individuals can have different forms and certainly not all constitute a breach of International Human Rights Law.\footnote{Note that lawful punishment is excluded from torture (see above).} Nowak rightfully stresses that ‘every type of punishment constitutes an interference with human rights and must, therefore, meet the proportionality test and other limitation criteria’.\footnote{Nowak 2005, p. 167.} This is dependent on the nature of the punishment. As the Vuolanne case points out, deprivation of liberty, the most common punishment, as such does not (necessarily) amount to ill-punishment. However, the form of deprivation of liberty, duration or conditions may constitute cruel, inhuman or degrading punishment (see, e.g. \textit{The Greek case} and below). The same is true for disciplinary measures or sanctions during the deprivation of liberty. The HRC for example remarked in General Comment No. 20 (para. 6) that prolonged solitary confinement may constitute a breach of article 7 ICCPR (see below). For a violation of this article it is not enough that a punishment is ‘extraordinary’. Nowak argues that ‘[s]ince all punishment contains an element of humiliation and perhaps also inhumanity, an additional element or reprehensibleness [sic] must also be
Chapter 3

3.6.4 Specific Issues for Children Deprived of Their Liberty

In light of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment there are a number of specific issues that deserve special attention regarding children deprived of liberty. These are: conditions of deprivation of liberty (including solitary confinement and detention incommunicado), corporal punishment and medical and scientific experimentation.  

3.6.4.1 Harsh Conditions of Deprivation of Liberty

A. Harsh Conditions in General

As Nowak argues, ‘most violations of Art. 7 occur in detention, whether police custody, pre-trial detention, imprisonment after conviction, re-education in correctional institutions or detention in psychiatric hospitals’. This is the reason why the ICCPR contains a special provision for persons deprived of their liberty, article 10 ICCPR (Cf art. 37 (c)). Joseph, Schultz & Castan argue that in the HRC’s jurisprudence most violations of article 7 ICCPR tend to be found with regard to the treatment of a detainee. It appears that the HRC has conceded that ‘force may be used to enforce discipline in a prison, but that such force must be proportionate [Italic – tl] in the circumstances’. In general when it comes to conditions of deprivation of liberty, article 7 ICCPR is strongly linked to article 10 ICCPR, the legal basis for conditions of deprivation of liberty providing for treatment with humanity; the same is true for article 37 (a) and (c) CRC (see para. 2.7).

However, it is important to stress that the conditions as such may lead to a violation of the prohibition of cruel, inhuman or degrading treatment or punishment and may present in order to qualify as a violation of [article] 7. Other punishments that should be mentioned in this regard are capital punishment (regarding children prohibited by arts. 37 (a) CRC and 6 (5) ICCPR) and corporal punishment, such as flogging, beating with a stick or stoning.

397 Nowak 2005, p. 166.
398 Alternatives to deprivation of liberty resulting in forced labour or torture or inhuman and degrading treatment must be explicitly prohibited; GC No. 10, para. 73. The Committee adds that ‘those responsible for such illegal practices should be brought to justice’.
399 Nowak 2005, p. 172. In the HRC case law, regarding persons in detention most violations of article 7 constituted violations of art. 10 ICCPR. Although, according to Nowak, the HRC has not been fully consistent.
401 See HRC Comm. No. 818/1998 (Sandy Sextus v. Trinidad and Tobago), para. 7.4.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

even breach the prohibition of torture.\textsuperscript{402} According to Nowak this applies for example ‘when a person is bound and blindfolded, detained in a truck garage, subjected to cold, forced to sleep on the ground and given little to eat’ and in the case of ‘detention in an overcrowded cell illuminated constantly by artificial light and where during the rainy season water floods the room up to 10 cm high’.\textsuperscript{403}

The HRC case \textit{Edwards v. Jamaica} (HRC Comm. No. 529/1993) shows that the length of time in which a person is kept in detention under bad conditions can lead to violation of article 7 ICCPR, whilst the conditions as such would lead ‘merely’ to a breach of article 10 (1) ICCPR.\textsuperscript{404} In two other cases the HRC found a breach of article 7 ICCPR based on the alleged inhumane conditions under which individuals had been deprived of liberty. In these cases the conditions themselves led to a breach of article 7 ICCPR, regardless of the length of time the persons were detained under these conditions.\textsuperscript{405} Joseph, Schultz & Castan argue that the HRC has stated in its early jurisprudence that ‘detention detrimental to [one]’s health’ constituted a breach of article 7’.\textsuperscript{406} However it seems that the HRC has left this position, according to later jurisprudence.\textsuperscript{407}

In \textit{Conteris v. Uruguay} (HRC Comm. No. 139/1983) the HRC found that certain arbitrary prison practices with the objective of humiliating prisoners and making them feel insecure constituted degrading treatment prohibited under article 7.\textsuperscript{408}

‘\textit{The Greek Case}’ before the former European Commission on Human Rights (see above) is another example of prison conditions constituting a violation of

\textsuperscript{402} Based on the HRC’s case law a distinction must be made between the deprivation of liberty as such that can lead to a breach of article 7 ICCPR (e.g. \textit{Vuolanne v. Finland}), and the consequences of detention that may lead to a breach of the actual detention (conditions of detention); Joseph, Schultz & Castan 2004, p. 249.

\textsuperscript{403} Nowak 2005, p. 165.

\textsuperscript{404} Joseph, Schultz & Castan 2004, p. 250. In this case a person was held alone in a cell of 6 feet by 14 feet for a period of ten years. He was let out for only three and a half hours a day, received no books and there were no provisions for recreational facilities.


\textsuperscript{406} Ibid., p. 251; See HRC Comm. No. 5/1977 (\textit{Massera v. Uruguay}).

\textsuperscript{407} For more information about cases (categorized by country) in which the conditions of detention constituted violations of article 7 see Nowak 2005, p. 172-175.

\textsuperscript{408} See Nowak 2005, p. 166. The prisoners in the “Libertad” Prison in Montevideo were repeatedly placed in solitary confinement, subjected to cold and persistently relocated to different cells. Nowak provides more examples in which, e.g. women were hung naked from handcuffs or were forced to maintain certain positions for long periods of time (HRC Comm. No. 147/1983 (\textit{Arzuaga Gilboa v. Uruguay}) and HRC Comm. No. 37/1978 (\textit{Soriano de Bouton v Uruguay})), or examples from Jamaica in which prison warders emptied a urine bucket over the head of a prisoner, threw his food and water on the floor and his mattress out of his cell, beat prisoners, or repeatedly soaked the bedding of the prisoners. These all constituted degrading treatment prohibited under art. 7 ICCPR. Cf HRC Comm. No. 520/1988 (\textit{Francis v. Jamaica}), HRC Comm. No. 321/1988 (\textit{Thomas v. Jamaica}) and HRC Comm. No. 615/1995 (\textit{Young v. Jamaica}); Ibid., p. 166.
article 3 ECHR’s prohibition of inhuman or degrading treatment. The ECtHR has also ruled in a number of cases in this regard.

More recently, the Inter-American Court found violations of human rights law, inter alia of article 5 (2) ACHR’s prohibition of torture or cruel, inhuman or degrading treatment or punishment, in the case of ‘Juvenile Reeducation Institute’ v. Paraguay. In this case children were detained in inadequate conditions, such as overpopulation, with poor health care service and insufficient competent staff.

With regard to the conditions under which a person is detained, the HRC observed in the Mukong v. Cameroon case (HRC Comm. No. 458/1991) that ‘certain minimum standards regarding the conditions of detention must be observed regardless of a State Party’s level of development. These include, in accordance with Rules 10, 12, 17, 19 and 20 of the U.N. Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength. It should be noted that these are the minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

these obligations difficult.413 Although this judgment seems to be quite reasonable, it may still be difficult for many developing countries to live up to these standards. It may even result in the fact that persons deprived of their liberty receive a more adequate standard of living than many people outside the detention centres. Nevertheless this decision of the HRC is an important one, because it explicitly refers to the Standard Minimum Rules for the Treatment of Prisoners, as rules that fill the requirement of prohibition of inhuman, cruel or degrading treatment of article 7 ICCPR. Second, it formulates the State Party’s minimum level of responsibility when it comes to the conditions of detention, regardless of the developmental status of the State Party.414

The above mentioned conclusions derived from the ICCPR framework apply to children deprived of liberty. Van Bueren argues that ‘the actual conditions of detention may (…) amount to a prohibited form of treatment or punishment, including the quantity and quality of food, space and sanitary conditions’.415 Regarding conditions of deprivation of liberty of children, the Special Rapporteur on Torture found in his report of 2000 that ‘[s]evere overcrowding, unsanitary conditions and inadequate and/or insufficient food and clothing are often exacerbated by a shortage or absence of adequately trained professionals. The resulting lack of attention to the medical, emotional, educational, rehabilitative and recreational needs of detained children can result in conditions that amount to cruel or inhuman treatment’.416

The CRC Committee has often considered ‘harsh conditions of detention’ as ‘amounting to cruel, inhuman or degrading treatment’.417 In addition, the CRC Committee has found reason to criticize State Parties for the high number of children in prisons, under poor conditions, often not separated from adults, because this ‘might render children ‘vulnerable to abuse and ill-treatment’.418 Other
examples show that children are intimidated psychologically or are subjected to ‘police brutality’.\footnote{Schabas & Sax 2006, p. 18. Other examples of solitary confinement or the practice of detention incommunicado can be found in the concluding observations regarding the UK, CRC/C/15/Add. 188 and Turkey, CRC/C/15/Add. 152.}

Regarding Singapore, the CRC Committee shared its concern that juvenile offenders were disciplined by the use of solitary confinement.\footnote{Ibid., p. 18-19; Concluding Observations Singapore, CRC/C/15/Add. 220.} Solitary confinement requires specific attention together with the phenomenon of \textit{detention incommunicado}.

\section*{B. Solitary Confinement and \textit{Detention Incommunicado}}

There are two specific forms of detention that require special attention: solitary confinement and \textit{detention incommunicado}.\footnote{Enforced disappearances should be briefly noted in this regard as well, although it goes beyond the scope of this study to address this issue separately. It is strongly related to detention incommunicado. Nowak states that enforced disappearances ‘in any case amount to cruel and inhuman treatment, but often it also involves torture and a violation of the right to life’; Nowak 2005, p. 179-180.} The first form in essence means that a person is detained in isolation, isolated from other inmates but also deprived of any contact with the outside world. This can be used as a temporary form of disciplining individuals deprived of liberty, but it is used as a permanent measure as well.\footnote{See, e.g. HRC Comm. No. 845/1998 (Kennedy v. Trinidad and Tobago), in which the HRC found that Kennedy, while being on death row for almost eight years ‘was subjected to solitary confinement in a small cell with no sanitation except for a slop pail, no natural light, being allowed out of his cell only once a week, and with wholly inadequate food’; para. 7.8. The HRC ruled that art. 10 ICCPR has been violated, but found no violation of art. 7.} The HRC stated in its General Comment 20 that ‘prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by article 7’.\footnote{HRC GC No. 20, para. 6. In its previous General Comment on art. 7 ICCPR (No. 7) the HRC did not use the word ‘prolonged’; HRC GC No. 7, para 2.} \textit{Detention incommunicado} is ‘an aggravated form of detention where one is not necessarily in solitary confinement, but one is denied access to family, friends and others (e.g. lawyers)’.\footnote{Joseph, Schultz & Castan 2004, p. 253. Nowak argues that detention incommunicado in practice means that ‘nobody, apart from the authorities, knows where the detainee is kept. Family members often witness the enforced disappearance of their loved ones, but then they receive no information about their fate and whereabouts. Usually the authorities even deny the arrest and detention (…). The practice of enforced disappearance and incommunicado detention, without any access to family members, lawyers or doctors, makes victims particularly vulnerable to torture, and the authorities, by denying even the arrest, avoid any accountability’; Nowak 2005, p. 176.} To deprive someone of contact with the outside world may violate article 7 ICCPR.\footnote{A clarification to principle 6 of the Body of Principles, prohibiting torture or cruel, inhuman or degrading treatment or punishment of an individual under any form of detention or imprisonment, reveals that ‘[t]he term “cruel, inhuman or degrading treatment or punishment” should in such a way interpreted so as to extend the widest possible protection against abuses, whether physical or mental including the holding of a detained or imprisoned person in conditions which deprive him,}
The leading HRC case on solitary confinement is *Polay Campos v. Peru* (HRC Comm. No. 577/1994) in which the HRC found that the ‘total isolation of Mr. Polay Campos for a period of a year and the restrictions placed on correspondence between him and his family constitute inhuman treatment within the meaning of article 7 and are inconsistent with the standards of human treatment required under article 10, paragraph 1, of the Covenant’. The shortest term of *detention incommunicado* that has constituted a breach of article 7 ICCPR in the HRC jurisprudence was eight months.

Nowak sums up that ‘the [HRC] has established that prolonged solitary confinement (one year) without any communication to the outside world, even in cases of highly dangerous terrorists, amount to inhuman treatment. The practice of “incommunicado detention”, (...) constitutes in principle a violation (...) under [art. 10 (1)] (...) Longer periods of “incommunicado” detention amount to (...) violation of [art. 7]. Prolonged “incommunicado” detention (three years) even constitutes torture’.

Thus, the HRC has stressed that prolonged solitary confinement and *detention incommunicado* may very well amount to a violation of article 7 ICCPR. One could raise the question whether solitary confinement (or *detention incommunicado*) would more easily lead to prohibited treatment or punishment regarding children than adults. The answer to this question cannot be derived from International Human Rights Law, but it is certainly defensible that the child should be awarded a higher level of special protection due to his particular vulnerability and in light of his age and maturity (see also art. 24 ICCPR). Both particular forms of deprivation of liberty are specifically dangerous for children, since ‘prolonged...
or indefinite detention [or] isolation’ places children at a ‘heightened risk of self-harm or suicidal behaviour’.430

Based on the HRC position Hodgkin & Newell conclude that ‘placing a child in isolation or solitary confinement raises a further issue under article 37 (a) of the Convention, in addition to the issues relating to the restriction of liberty involved’.431 According to Van Bueren the HRC ‘acknowledges that solitary confinement may, according to the circumstances, be contrary to article 7 of the [ICCPR], which prohibits such treatment and punishment if it is not used for the purposes of preventing escape, protecting health or maintaining discipline’.432 She furthermore argues that ‘[i]t is arguable (…) that solitary confinement, regardless of conditions and duration [thus, per se and not limited to a prolonged period of time – timidly] amount to cruel punishment when applied to children’. This can lead to the conclusion that ‘[i]f solitary confinement amounts to cruel punishment when applied to children, then all of the States Parties to the majority of principal human rights treaties are prohibited from imposing solitary confinement’.433 This approach seems to be supported by rule 67 JDLs and the CRC Committee (see GC No. 10, para. 89).

Moreover, detention incommunicado will breach article 9 (4) CRC which provides that the child and his parents or other family members are entitled to essential information on the whereabouts of members of the family (see also art. 37 (c) and art. 9 (3) CRC). It is in light of this that Van Bueren states that ‘where a child has not been notified of the whereabouts of a family member, in contravention of article 9(4) of the [CRC], the resulting anxiety could amount to a prohibited level of suffering’.434

In conclusion, conditions of deprivation of liberty and more specifically solitary confinement and detention incommunicado may amount to torture or other forms of ill-treatment or ill-punishment, particularly with children where the standard is higher. States are under a specific obligation to prevent the (conditions of) deprivation of liberty amounting to such heinous treatment. This has implications for both domestic legislation and its enforcement.

3.6.4.2 Corporal Punishment

The HRC has stated in its GC No. 20, that ‘the prohibition [of torture and cruel, inhuman or degrading punishment] must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure’. In addition, the HRC found it ‘appropriate to emphasize (…)
that article 7 protects, in particular, children, pupils and patients in teaching and medical institutions’ (HRC GC No. 20, para. 5). The HRC has emphasized the relevance of article 7 ICCPR for the protection of children in institutions against corporal punishment, but it has limited it to *excessive* chastisement only. The HRC hardened its position later in its case law and concluding observations. It seems that corporal punishment (as a sentence) constitutes a breach of article 7 ICCPR *per se*. The HRC ruled explicitly for the first time against corporal punishment as a sentence in the case *Osbourne v. Jamaica* (HRC Comm. No. 759/1997). The HRC stated as follows: ‘Irrespective of the nature of the crime that is to be punished, however brutal it may be, it is the firm opinion of the Committee that corporal punishment constitutes cruel, inhuman and degrading treatment or punishment contrary to article 7 of the Covenant.’ The HRC ruled that by imposing a sentence of whipping the Jamaican State violated the rights of the sentenced person under article 7 ICCPR.435

The CAT Committee has taken a rather cautious position and has stated that corporal punishment ‘could constitute in itself a violation of the Convention’.436 In addition the Commission on Human Rights reminded governments in 2001 ‘that corporal punishment, including of children, can amount to cruel, inhuman or degrading punishment or even to torture’.437

The CPT has concluded that ‘in the interests of the prevention of ill-treatment, all forms of physical chastisement must be both formally prohibited and avoided in practice. Inmates who misbehave should be dealt with only in accordance with prescribed disciplinary procedures.’438

The CRC Committee has certainly gone beyond the prohibition of ‘excessive chastisement’ and has stated that any form of corporal punishment of children is prohibited under the CRC. According to Hodgkin & Newell ‘[t]he [CRC] Committee has in particular criticized legal provisions in States Parties that attempt to draw a line between acceptable and unacceptable forms of corporal punishment’.439

---


438 CPT 9th General Report, para. 24. The CPT’s position has not always been that clear; see Morgan & Evans 2001, p. 127.

439 Hodgkin & Newell 2002, p. 546; cf art. 19 jo. 37 CRC. Cf Rule 17 (2) and (3) of the Beijing Rules and Schabas & Sax 2006, p. 13. Other relevant provisions in this regard are article 28 CRC, the legal basis for the child’s right to education and rule 67 JDLs that strictly prohibits all disciplinary measure that constitutes cruel, inhuman or degrading treatment, and subsequently
In 2000 the CRC Committee recommended that ‘States Parties review all relevant legislation to ensure that all forms of violence against children, however light, are prohibited, including the use of torture, or cruel, inhuman or degrading treatment (such as flogging, corporal punishment or other violent measures) for punishment or disciplining within the child justice system, or in any other context’. 440

In 2006, the CRC Committee issued a General Comment on corporal punishment and other cruel or degrading forms of punishment. 441 The CRC Committee aimed to highlight ‘the obligation of all States Parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that States must take’ (GC No. 8, para. 2). According to the CRC Committee ‘[a]ddressing the widespread acceptance or tolerance of corporal punishment of children and eliminating it, in the family, schools and other

440 Hodgkin & Newell 2002, p. 546-547 with reference to the Committee report on the twenty-fifth session, September/October 2000, CRC/C/100, p. 131 (following the General Discussion on State violence against Children). Cf e.g. the concluding observations regarding the Islamic Republic of Iran in which the Committee was ‘seriously concerned’ that ‘in light of article 37 (a) of the Convention, (…) persons who committed crimes while under 18 can be subjected to corporal punishment under Note 2 of article 49 of the Islamic Penal Law, or can be subjected to a variety of types of cruel, inhuman or degrading treatment and punishment such as amputation, flogging and stoning, which are systematically imposed by judicial authorities. Concurring with the Human Rights Committee (CCPR/C/79/Add.25), the Committee finds that application of such measures is incompatible with the Convention’. The Committee subsequently recommended ‘that the State Party take[s] all necessary steps to end the imposition of corporal punishment under Note 2 of article 49 of the Islamic Penal Law and the imposition of amputation, flogging, stoning and other forms of cruel, inhuman or degrading treatment and punishment to persons who may have committed crimes while under 18’; CRC/C/15/Add. 123, par. 37 and 38. Cf Schabas & Sax 2006, p. 22-24. According to Schabas & Sax the CRC Committee’s attention to the issue of punishment so far ‘is essentially confined to corporal punishment’; Schabas & Sax 2006, p. 21-22.

441 General Comment No. 8 (2006), ‘The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment (arts. 19; 28, para. 2; and 37, inter alia)’, CRC/C/GC/8, 2 March 2007 (GC no. 8), para 1.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

Corporal punishment is defined by the CRC Committee as ‘any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light’ and is considered to be ‘invariably degrading’. ‘Most involves hitting (“smacking”, “slapping”, “spanking”) children, with the hand or with an implement - whip, stick, belt, wooden spoon, etc. But it can also involve, for example, kicking, shaking or throwing children, scratching, pinching, biting, pulling hair or boxing ears,’ according to the CRC Committee. It furthermore states that ‘[i]n addition, there are other non-physical forms of punishment which are also cruel and degrading and thus incompatible with the Convention’ (GC No. 8, para. 11).

By qualifying corporal punishment as a form of cruel, inhuman and degrading punishment the CRC Committee distinguishes it from torture.

Corporal punishment and other cruel or degrading forms of punishment of children (hereafter: corporal punishment) do not take place only within the family environment, but also in ‘all forms of alternative care, schools and other educational institutions, justice systems – both as a sentence of the courts and as a punishment within penal and other institutions – in situations of child labour, and in the community’ (GC No. 8, para. 12). The prohibition is of particular significance for children deprived of their liberty, since it implies that corporal punishment as a disciplinary measure in detention centres, prisons or other institutions should be regarded as prohibited (see also para. 3.10).

The CRC Committee advocates an absolute prohibition of all forms of corporal punishment or other cruel or degrading treatment, based on article 37 CRC. The prohibition of corporal punishment is based on article 37 (a) CRC and ‘complemented and extended by article 19, which requires States to “take all

442 I.e. punching or striking with the fist.
443 One can think of ‘punishment which belittles, humiliates, denigrates, scapegoats, threatens, scares or ridicules the child’.
444 By doing so, the CRC Committee has chosen not to categorize corporal punishment as a form of inhuman punishment (cf Van Bueren 1995, p. 224 as discussed above). In addition, the CRC Committee has deliberately (and rightfully) not referred to torture; cf the position of the Commission on Human Rights as mentioned above.
445 Still, it is important to stress that it is every State’s obligation to prohibit all forms of corporal punishment and other forms of cruel and degrading forms of punishment: ‘The dignity of each and every individual is the fundamental guiding principle of international human rights law’ (GC No. 8, para. 16). The CRC Committee refers to many other, in particular regional, human rights standards; GC No. 8, para. 22ff.
appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child’’ (GC No. 8, para. 18). According to the CRC Committee the statement ‘all forms of physical and mental violence’ leaves no room for any level of legalized violence against children; ‘[c]orporal punishment and other cruel or degrading forms of punishment are forms of violence and States must take all appropriate legislative, administrative, social and educational measures to eliminate them’ (GC No. 8, para. 18).

Subsequently, it holds States Parties responsible to implement all appropriate legislative, administrative, social and educational measures to protect the child (see GC No. 8, para. 30ff). These for example include the adoption of a prohibition of corporal punishment in domestic law. In addition, States Parties are under the obligation to prevent impunity of perpetrators, by investigating allegations and punish perpetrators. Furthermore, victims should be redressed and their physical and psychological recovery and social reintegration should be ensured (see art. 39

---

446 See also art. 4 CRC. In para. 19 the CRC Committee addresses art. 28 (2) CRC stating that States Parties must ‘ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the [CRC]’. In para. 20 and 21 the CRC Committee mentions that both related provisions (art. 19 and 28 (2)) do not explicitly refer to corporal punishment. Nor can any reference to this subject be found in the travaux preparatoires for the CRC. However, the CRC Committee argues that ‘the [CRC], like all human rights instruments, must be regarded as a living instrument, whose interpretation develops over time.’ Subsequently, the CRC Committee has taken into account that ‘the prevalence of corporal punishment of children in their homes, schools and other institutions has become more visible’ and ‘[o]nce visible, it is clear that the practice [of corporal punishment – tl] directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity’.

447 Art. 37 jo. arts. 19 and 28 (2) CRC. Note that the CRC Committee does not reject ‘the positive concept of discipline’. Regarding parents, obviously, States must respect responsibilities, rights and duties of the parents to provide ‘appropriate direction and guidance’ (art. 5 CRC). However, the CRC Committee states that the ‘interpretation of “appropriate” direction and guidance must be consistent with the whole [CRC] and leaves no room for justification of violent or other cruel or degrading forms of discipline’. Regarding teachers and others working with children, e.g. in institutions or in conflict with the law (e.g. police officers or prison guards), the CRC acknowledges that professionals may be confronted with (violent or dangerous) behaviour that justifies the use of force or restraint. However, a distinction should be made between ‘the use of force motivated by the need to protect the child or others and the use of force to punish’ and ‘[t]he principle of the minimum necessary use of force for the shortest necessary period of time must always apply’. The CRC Committee adds (in para. 15) that ‘[d]etailed guidance and training is also required, both to minimize the necessity to use restraint and to ensure that any methods used are safe and proportionate to the situation and do not involve the deliberate infliction of pain as a form of control’; GC No. 8, paras. 13-15 and 28.

448 The instructions can be relevant to the other forms of ill-treatment (incl. torture) as well; see also para. 3.13.
The need for remedies and redress of victims of human rights violations is particularly relevant to children deprived of liberty, due to their particular vulnerability and dependence.450

The position of the CRC Committee is supported by the findings and recommendations of the UN Study on Violence against Children concluding inter alia that ‘[n]o violence against children is justifiable’ and urging States ‘to prohibit all forms of violence against children, in all settings, including all corporal punishment, harmful traditional practices, such as early and forced marriages, female genital mutilation and so-called honour crimes, sexual violence, and torture and other cruel, inhuman or degrading treatment or punishment, as required by international treaties, including the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child’ .451

3.6.4.3 Medical Experimentation

Article 7 ICCPR contains the explicit prohibition of medical and scientific experimentation without free consent. The ICCPR provision states that ‘no one shall be subjected without his free consent to medical or scientific experimentation.’ The adoption of this clause has arisen from the atrocious experiences from World War II in which many unauthorized medical experiments took place in the concentration camps of the Nazi regime.452 Obviously individuals deprived of their liberty are particularly vulnerable to abusive practices, one of which has proven to be medical experimentation. Medical experimentation must be distinguished explicitly from medical treatment, such as for example compulsory medication. This does not fall within the scope of this clause.453 Medical or scientific experimentation is permissible if the experiment does not constitute torture, cruel, inhuman or degrading treatment, or if the person provides his or her free consent.454 Nowak argues that if an experiment (or the effects) amounts to a
breach of article 7, first sentence, but the person concerned has expressed his consent, this does not constitute a violation of article 7.\footnote{Nowak 2005, p. 191 with reference to Dinstein 1981, p. 194 who defends the approach that this would breach art. 7 ICCPR. According to Nowak consent to inhuman experimentation may be revoked at any time.}

The HRC observed in its GC No. 20 that 'special protection in regard to [medical or scientific] experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment.'\footnote{Joseph, Schultz & Castan 2004, p. 253. Joseph, Schultz & Castan argue that ‘any consent given by [prisoners or other detainees] is inherently suspect’.} It seems clear that children are meant in this regard and should be awarded special protection, particularly when they are deprived of their liberty (see also art. 24 ICCPR). The HRC has stated in its concluding observations regarding the Netherlands that ‘[t]he State party should […] remove minors and other persons unable to give genuine consent from any medical experiments which do not directly benefit these individuals (non-therapeutic medical research).’\footnote{Joseph, Schultz & Castan 2004, p. 254; UN doc. CCPR/CO/72/NETH (2001).} This means that the specific status of a minor in this regard is based on the assumption that he is not able to give genuine consent. This point of departure does not take into account the child as a human being in development, which may become old and mature enough to consent. Nevertheless, it is important that children receive special protection – children deprived of their liberty even more. Article 37 (a) CRC does not contain any reference to medical or scientific experimentation at all. As mentioned in Chapter 2, a provision similar to article 7 ICCPR has not been adopted due to lack of consensus. The lack of an explicit reference, however, could imply that medical experimentation regarding children is prohibited, regardless of whether the child could have (or has) consented (in accordance with his age or maturity; art. 12 CRC). Although, the approach of article 37 (a) CRC in this regard is not clear, this interpretation is defensible, also in light of article 36 CRC.\footnote{This provision is meant to protect the child against all forms of exploitation; see also Hodgkin & Newell 2002, p. 544. It would also protect the (younger) child against bad intentions of his parents, who could (in accordance with their authority over the child) provide for the required consent for medical or scientific experimentation under article 7 ICCPR. Cf Nowak 2005, p. 190 regarding the consent of a statutory guardian.}

3.6.5 Conclusion

This paragraph has paid attention to the different provisions of International Human Rights Law prohibiting torture and other forms of cruel, inhuman or degrading treatment or punishment. Regarding children, more specifically children deprived of their liberty, article 37 (a) CRC (in conjunction with arts. 19 and 36 CRC) is of particular importance. For both adults and children, each form of ill-treatment implies a gross violation of their fundamental rights to physical and mental integrity. The significance of the prohibition of torture and other forms of cruel,
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

inhuman or degrading treatment or punishment is in this regard not different for children than it is for adults. However, the impact of ill-treatment may very well be. Due to the specific status of the child, as a human being in development, the demands regarding the constitution of ill-treatment and subsequently the thresholds for violations of the relevant provisions of International Human Rights Law are different (i.e. there is a lower threshold for constitution and a higher level of protection).

Torture as prohibited by article 37 (a) CRC comprises torture as defined in article 1 CAT, although the threshold for one of its key elements, ‘severe pain or suffering’, is arguably lower for children. In addition, its scope is not limited to violations in public settings but also extends to private institutions in which children are deprived of their liberty. In this regard, each official working in such institution should refrain from treatment or punishment as prohibited under article 37 (a) CRC; the institution should also protect each child against ill-treatment by other inmates. The lower threshold regarding (severe) pain or suffering also has implications for the constitution of other prohibited forms of ill-treatment. First, certain treatment or punishment should sooner be regarded as ‘degrading’ (i.e. considered the least infringing form of ill-treatment) compared to adults and given the chain of aggravation certain treatment should sooner be regarded as cruel or inhuman for children rather than ‘merely’ degrading.

Nevertheless, an assessment of the implications of this absolute (and non-derogable) prohibition, which can be found in each human rights treaty and forms part of International Customary Law, is not easily conducted. It is particularly dependent upon the circumstances of the case and clear definitions (only torture has been defined) and demarcations are absent. Particularly given the need for a child-specific approach (i.e. with lower thresholds) it is advisable that the CRC Committee provide for further guidance regarding the implications of article 37 (a) CRC, with explicit attention to children deprived of their liberty.

There are a few specific forms of treatment of children deprived of their liberty that may amount to violation of the prohibition of torture or ill-treatment: harsh conditions of deprivation of liberty, including solitary confinement (see also rule 67 JDLs) and detention incommunicado, and corporal punishment. Such treatment or punishment can also lead to violation of article 37 (c) CRC (and art. 10 (1) ICCPR), entitling each child deprived of liberty to be treated with humanity and respect for his inherent dignity, and the right to maintain contact with his family as part of it (see also art. 9 (3) CRC). Detention incommunicado also violates article 9 (4) CRC, which provides for the mutual right of information regarding the whereabouts of both a child and his parents.

This stresses the strong interdependence of the different human rights provisions relevant to children deprived of their liberty. Consequently, the implications of these provisions, particularly regarding the legal status of children deprived of their liberty, are also relevant to the protection of children against the
prohibited forms of heinous treatment or punishment (and vice versa). Examples of these implications affect (positive) obligations for States regarding *inter alia* conditions of detention and imprisonment, disciplinary measures (i.e. the prohibition of solitary confinement and corporal punishment), effective remedies and redress for victims of violations of human rights.

### 3.7 Separation Issues

#### 3.7.1 Introduction

The requirement that children, deprived of liberty, must be treated with humanity, with respect for their inherent dignity and in a manner that takes into account the child’s needs is embodied in article 37 (c) CRC. As part of this treatment, article 37 (c) CRC requires that children deprived of their liberty are separated from adults unless it is considered in the child’s best interests not to do so. This form of separation will be addressed in paragraph 3.7.2. However, the rules for children deprived of their liberty take into account other forms of separation. For instance, rule 28 JDLs provides that ‘[t]he detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations’. In addition, rule 28 JDLs stresses that ‘[t]he principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being’. In other words: rule 28 JDLs recommends separation of different categories of children deprived of their liberty based on needs, age and maturity. This will be elaborated in paragraph 3.7.3, together with the issue of separation of boys and girls.

In addition, one should distinguish between children in pre-trial detention and convicted imprisoned children. Article 10 (2)(a) ICCRP explicitly stipulates that States Parties must segregate pre-trial detainees from convicted prisons, save in exceptional circumstances, and grant them special treatment in accordance with their status as unconvicted individuals (i.e. presumption of innocence). In addition, the Standard Minimum Rules provides for a specific set of rules regarding the treatment of pre-trial detainees (the JDLs does that to a lesser extent). The CRC does not contain a similar requirement, but acknowledges the presumption of innocence (art. 40 (2) (b) (i) CRC), which has implications for the treatment of children in pre-trial detention. This separation issue will be addressed in paragraph 3.7.4.
Although article 37 (c) CRC applies to all forms of deprivation of liberty of children and rule 28 JDLs represents a needs-based approach regarding appropriate placement of children, which seems to make the (legal) context of the deprivation of liberty secondary, there may be reasons to proclaim separation of children deprived of liberty under the juvenile justice system from children detained under other legal systems. In the Netherlands, for example, the practice of non-separation (or mixing) of children under the juvenile justice system and child protection system has been subject to significant debate (see para. 4.6) and the CRC Committee criticized the Dutch government for this practice and subsequently urged them to ‘[a]void detention of juvenile offenders with children institutionalized for behavioural problems’.459 This issue of (non-)separation will be addressed briefly in light of International Human Rights Law and Standards (para. 3.7.5).

3.7.2 Separation of Children from Adults

3.7.2.1 Article 37 (c) CRC: Separation, Unless in the Child’s Best Interests

Article 37 (c) CRC requires that a child deprived of his liberty ‘shall’ be separated from adults. This rule is by the wording ‘in particular’ of the second sentence linked to the fundamental requirement that the child deprived of his liberty must be treated with humanity and respect for his inherent dignity and in a manner that takes into account the needs of persons of his age. The separation from adults is apparently seen as one of the consequences of this treatment.

Article 10 ICCPR contains two provisions with a similar meaning.460 Article 10 (2) (b) stipulates that ‘[a]ccused juvenile persons shall be separated from adults’ and paragraph (3) that ‘[j]uvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status’.461 These ICCPR provisions have been formulated in absolute terms, while article 37 (c) CRC leaves room for departure from the principle of separation of children and adults, if the best interests requires doing so.

The requirement of separation between adults and children deprived of liberty has also been acknowledged by the Inter-American Commission on Human Rights under article 19 ACHR, in the case Minors in Detention v. Honduras.462 The

459 CRC Committee, Concluding Observations: The Kingdom of the Netherlands (Netherlands & Aruba), CRC/C/15/Add. 227, 26 February 2004, para. 59 (d).
460 Cf. art. 17 (2)(b) ACWRC. The ECHR and the Banjul Charter lack such a provision.
461 Cf. art. 8 (d) SMR. Art. 10 (2) (b) and (3) ICCPR apply to persons detained within the criminal justice system only, while art. 37 (c) CRC applies to all forms of deprivation of liberty of children.
Commission found on the basis of article 5 (5) jo. 19 ACHR\textsuperscript{463} and with reference to article 37 CRC that ‘minors shall be housed separately from adults, in other words, in special juvenile facilities’ and that ‘cohabitation of juvenile and adult inmates is a violation of the human dignity of these minors and has led to abuses of the juveniles’ personal integrity’.\textsuperscript{464}

The CPT also included this requirement in its CPT Standards. The CPT has acknowledged that ‘as a rule’ juveniles in detention should be accommodated separately from adults.\textsuperscript{465} Finally, the EPR provide in rule 11.1 that ‘[c]hildren under the age of 18 years should not be detained in a prison for adults, but in an establishment specially designed for the purpose’ and according to rule 35.4 that ‘[w]here children are detained in a prison they shall be kept in a part of the prison that is separate from that used by adults unless it is considered that this is against the best interests of the child’. Apparently the EPR represent an approach similar to article 37 (c) CRC.

Schabas & Sax remark that ‘on the one hand, the principle of keeping children separate from adults ranks among the oldest of UN standards in the field of criminal justice, aiming at the prevention of a negative impact on the child in adult setting, but on the other hand, its compliance still meets persistent difficulties in States Parties practice’.\textsuperscript{466} According to the CRC Committee: ‘There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate’ (GC No. 10, para. 85). According to the UN Violence Study detention of children together with adults is common practice in many states, which places children at risk of being (sexually) abused and exploited.\textsuperscript{467}

Separation of children and adults is important in light of the multiple forms of protection of the child. In addition, it supports an environment specifically designed for children, which meets their special needs.\textsuperscript{468}

\textsuperscript{463} Art. 5(5) ACHR: ‘Minors while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors.’

\textsuperscript{464} Inter-American Commission, Case 11.491, Report No. 41/99, 10 March 1999 (Minors in Detention v. Honduras), paras. 125, 130 and 139.

\textsuperscript{465} CPT 9th General Report, para. 25. It also acknowledges that the requirement is an important part of the strategy to prevent the ill-treatment of children. It has provided some examples of a failure to respect this principle. These include: ‘adult male prisoners being placed in cells for male juveniles, often with the intention that they maintain control in those cells; female juveniles being accommodated together with adult women prisoners; juvenile psychiatric patients sharing accommodation with chronically ill adult patients’.

\textsuperscript{466} Schabas & Sax 2006, p. 92. They furthermore state that ‘[t]he CRC Committee has frequently reminded governments of their obligation to keep children separated, in order to ensure their protection from negative impact of adult offenders’; Ibid., p. 93 with reference to concluding observations of the CRC Committee.

\textsuperscript{467} UN Violence Study 2006, p. 17.

\textsuperscript{468} Van Bueren 1995, p. 220-221. Regarding detention and imprisonment under the juvenile criminal justice system a legal basis for this ‘special approach’ can also be found in art. 40 (3) CRC.
Addressing this (first) issue of separation, the question is raised: What does separation mean? Rule 13.4 Beijing Rules provides that children (in pre-trial detention) should be separated from adults and be housed in a separate institution ‘or in a separate part of an institution also holding adults’. In addition, rule 26.3 Beijing Rules states that ‘[j]uveniles in institutions shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults’. This implies that children and adults should be housed in different institutions or in separate facilities within the same institution.\footnote{According to the commentary to rule 26.3 Beijing Rules this ‘does not prevent States from taking other measures against the negative influences of adult offenders, which are at least as effective as the measures mentioned in the rule’}

The CRC Committee seems to be in favour of a strict approach by stating in rather absolute wording that ‘States [P]arties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel, policies and practices’ \(\text{(GC No. 10, para. 85).}\)

The principle of separation of children and adults is primarily prompted by the assumption that children must be protected against the negative and potential harmful influence of adults. Therefore, it is important to stress that even though children may be housed in an institution where there are departments for adults as well, they may never be exposed to any risk derived from the presence of these adults. In light of this, it is, for example, highly unfavourable to let the adult inmates work in the child units.\footnote{\textit{Cf} e.g. the HRC Comm. No. 27/1978 \(\text{(Pinkey v. Canada)}\) on the issue of separation of unconvicted and convicted prisoners; see below.}

This view is supported by rule 29 JDLs which provides in rather absolute wording that ‘[i]n all detention facilities juveniles should be separated from adults, unless they are members of the same family’.\footnote{The CPT has accepted ‘that there may be exceptional situations (e.g. children and parents being held as immigration detainees) in which it is plainly in the best interests of juveniles not to be separated from particular adults’. At the same time it pointed out that ‘to accommodate juveniles and unrelated adults together inevitably brings with it the possibility of domination and exploitation’; CPT Standards, para. 25.}

The JDLs allow only one exception: ‘Under controlled conditions, juveniles may be brought together with carefully selected adults as part of a special programme that has been shown to be beneficial for the juveniles concerned.’\footnote{\textit{Cf} Wolleswinkel 2002.}

The exception must be based on the key principle of the best interests of the child (art. 37 (c) jo. 3 CRC).

It is interesting to note that where article 37 (c) CRC leaves room for exceptions on the principle of separation of children and adults if required by the child’s best interests, article 10 ICCPR uses absolute wording; there are no exceptions. This has led to many reservations, mostly by Western (European) Countries, who believed
Chapter 3

that an absolute prohibition was inappropriate.\footnote{Nowak 2005, p. 243 and 252; Van Bueren 1995, p. 221. An indicator for the statement of Schabas & Sax earlier above; some countries resisted due to lack of adequate facilities, which according to Schabas & Sax ‘raises questions of the government’s commitment to ensure CRC standards’; Schabas & Sax 2006, p. 92. It is interesting to note that rule 11.1 of the EPR takes the separation as point of departure: ‘Children under the age of 18 years should not be detained in a prison for adults, but in an establishment specially designed for the purpose’.\footnote{Van Bueren 1995, p. 222.} She adds that ‘[w]hen assessing the child’s best interests the State party is under a duty to consult the child’ and that the CRC in this regard ‘provides a state with an impetus to admit to the existence of child prisoners in adult institutions and to recognise their entitlements’.\footnote{Schabas & Sax argue that this sentence of article 37 (c) CRC ‘qualifies this flexibility as child-focused exception only, excluding exceptions e.g. for budgetary considerations of the government’.\footnote{This approach has been confirmed by the CRC Committee which has stated that the exception to the separation of children from adults ‘should be interpreted narrowly; the child’s best interests does not mean for the convenience of the States Parties’ (GC No. 10, para. 85).}'} 474 This implies that the child’s best interests must be assessed when a State Party is (thinking of) making an exception to this principle in a particular case. Van Bueren argues that ‘[a]n example of non-separation in the best interests of the child is where there are inadequate facilities for detained children and to detain a child separately may be tantamount to solitary confinement’.\footnote{Schabas & Sax 2006, p. 92.} She adds that ‘[w]hen assessing the child’s best interests the State party is under a duty to consult the child’ and that the CRC in this regard ‘provides a state with an impetus to admit to the existence of child prisoners in adult institutions and to recognise their entitlements’; Schabas & Sax argue that this sentence of article 37 (c) CRC ‘qualifies this flexibility as child-focused exception only, excluding exceptions e.g. for budgetary considerations of the government’.\footnote{This approach has been confirmed by the CRC Committee which has stated that the exception to the separation of children from adults ‘should be interpreted narrowly; the child’s best interests does not mean for the convenience of the States Parties’ (GC No. 10, para. 85).} 475 It is remarkable that the EPR explicitly provide for conditions under which children are being imprisoned in an adult facility.

3.7.2.2 Children Deprived of Their Liberty Turning Eighteen

The scope of article 37 CRC is limited by the definition of the child embodied in article 1 CRC. In principle, ‘every human being below the age of eighteen years’ falls under the protection of this all other CRC provisions. However, what if the
child turns eighteen during the deprivation of liberty in the juvenile justice context? He becomes an adult, which raises the question: Can he stay in the facility meant for children (i.e. < 18 years) deprived of liberty or does the separation requirement of article 37 (c) CRC demand that he should be transferred to a facility for adults? The same question can be raised if the child turns eighteen during the legal procedures and before the deprivation of liberty is actually executed.

These questions, in particular the latter, are related to the fact that article 40 CRC is applicable to those who were a child while committing the (alleged) offence, based on what could be referred to as the ‘crime date criterion’. Even if the child turns eighteen during prosecution he remains entitled to be treated in accordance with article 40 CRC. As a consequence he also remains entitled to treatment in accordance with article 37 CRC (i.e. placement in a child facility in accordance with article 37 (b) CRC). This implies in the first place that both children and young adults who turn eighteen during the trial are entitled to imprisonment or detention that is lawful under article 37 (b) CRC, which includes that it may only be used a measure of last resort and for the shortest appropriate period of time.

Second, this implies that young adults are entitled to be placed in a youth facility or that they can stay there. According to the CRC Committee: ‘This rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns 18. Continuation of his/her stay in the facility for children should be possible if that is in her/his best interest and not contrary to the best interests of the younger children in the facility’ (GC No. 10, para. 86). This is an interesting position. From a legal perspective the best interests argument regarding the interests of individuals of eighteen and over is based on a fiction, since article 3 CRC is not applicable anymore. The CRC Committee apparently links article 3 CRC to the applicability of article 40 CRC.

In addition the CRC Committee indicates that the best interests of the children in the same facility should be of paramount consideration. This implies that the (young) adults should be transferred if their presence in the child detention centre or child prison is considered to affect the interests of the children negatively. In order to avoid transfer one should create separate units for young adults (which brings this practice into conformity with the requirement of separation of children from adults; see above). This should be favoured anyway in light of the recognition of differences between children according to age and maturity, and vulnerability to violence.

\[478\] Art. 40 CRC does explicitly provide for this criterion, but it is directly related to the ratio behind and legal foundation of a separate juvenile justice, which aims at responding to the child’s behaviour as a human being who is less culpable. Art. 37 (a) CRC is more explicit by providing that ‘[n]either capital punishment nor life imprisonment without the possibility of release shall be imposed for offences committed by persons below 18 years of age’.
If one opts for the approach that adults, who were children when they committed (alleged) offences and are tried accordingly (i.e. under article 40 CRC), should not be detained or imprisoned together with children at all, this means that they should be placed in facilities for adults. This may also be undesirable, which could be made less undesirable by establishing special facilities for young adults (e.g. for adults between eighteen and 22 years).

A related issue is the practice of transfer/waiver of children (generally of sixteen or seventeen) to adult criminal courts or sentencing them as adults, with subsequent deprivation of liberty in adult facilities. This practice could only be defended if prompted by the interests of the child (art. 37 (c) CRC). Application of such (not infrequently mandatory) laws for other (often retributive) reasons, clearly violates article 37 (c) CRC, and in addition has been show to be discriminatory (see GC No. 10, para. 38).479

3.7.2.3 Conclusion

The requirement of separation of children and adults can be considered a fundamental value of International Human Rights Law. It is well-founded in most of the international human rights standards, at both the international and regional level. The rationale behind the requirement is twofold. First, it must protect children from the negative influences and abusive practices of adults and second, the environment in which a child is placed (i.e. deprived of liberty) must meet the specific needs of persons of his or her age. This implies that ‘States Parties should establish separate facilities for children deprived of their liberty, which include distinct, child-centred staff, personnel and practices’ (GC No. 10, para. 85; cf art. 40 (3) CRC).

The issue of separation of children from adults has not only implications for children being placed in adult facilities, which is in principle prohibited, but also for children who turn eighteen during the juvenile justice process to which they are subject. There seems to be an ambiguity between the application of article 40 CRC and article 37 (c) CRC. Unfortunately, neither is the CRC clear on this, nor does the literature provide answers. The CRC Committee seems to proclaim the use of what could be called the ‘crime date criterion’ but could provide greater clarity.

Besides the fact that a strict interpretation of the scope of article 37 (c) CRC has (im)practical implications, for example regarding the separation of adults and children, this issue should preferably be approached from a more dogmatic perspective and that one should consider the actual deprivation of liberty within the context of the juvenile justice system, i.e. pre-trial detention and imprisonment as a part of the administration of juvenile justice. As a consequence, article 37 (c) (and

479 See also, e.g. KIDS COUNT 2008.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

(d)) should be interpreted in conjunction with article 40 CRC and a child who has (allegedly) committed a crime should keep his entitlements under article 37 (c) and (d) CRC; even if he (eventually) reaches the age of eighteen. It goes against the objectives of juvenile justice (art. 40 (1) CRC) to place an individual who was a child at the time of the crime in a facility (prison) for adults for the simple reason that he turns eighteen in the course of the justice process.

In particular, with regard to the separation issue of adults and children, this approach would lead to the conclusion that adults, who are detained (pre-trial) or imprisoned after conviction under the juvenile justice system, can be placed together with children who have not reached adulthood yet. Still, separate units should be favoured.

3.7.3 Separation Related to Needs, Age and Maturity

3.7.3.1 Differentiation According to Age and Maturity

The argument of protection of children against dominance, exploitation or other abusive practices raises issues regarding the international differentiation (i.e. housing inside institution) between younger and older children deprived of their liberty. It is rather unrealistic to approach the child merely as a non-adult, instead of acknowledging the need for protection of the younger and/or less mature children against the older and more mature ones.

In addition, addressing the specific needs of the child, a human being in development, may require different approaches dependent on the age and maturity of the child; a younger child has other specific needs than an older child.

The separation of adults and children on the basis of a fixed boundary, an age limit (i.e. eighteen years of age) remains arbitrary and creates inevitable ambiguity regarding cases just falling under or over the line. Nevertheless, it calls for the recognition of a child-specific approach, which is different from the approach regarding adults – the significance of which should not be underestimated. At the same time such a needs-based approach implies that one should approach the specific needs of each individual child. This may very well require further internal differentiation according to age and maturity.

3.7.3.2 Separation of Boys and Girls

The second issue of separation affects the question whether girls should be separated from boys, in light of addressing specific needs and adequate protection. The CRC does not provide for any specific guidance here. Rule 26.4 Beijing Rules

480 Like arts. 37 (b) and 37 (a) CRC. The latter is more explicit in this regard.
481 Van Bueren claims, e.g. that the impact of torture and other forms of ill-treatment is dependent on the developmental stage of the child in question; Van Bueren 1998, p. 58-60 and 65. Cf e.g. Richards 1998.

265
addresses the position of young female offenders and provides that if they are placed in an institution ‘deserve special attention as to their personal needs and problems’ and that ‘they shall by no means receive less care, protection, assistance, treatment and training than young male offenders’. In other words, ‘[t]heir fair treatment shall be ensured’. The child rights framework does not prescribe a strict separation between male and female children but apparently the international community found reason to stress the specific position of the young female offender. According to the commentary on rule 26.4 this rule is prompted by the assumption that ‘female offenders normally receive less attention than their male counterparts’. The CPT has explicitly expressed its approval of rule 26.4 Beijing Rules and stressed that ‘[i]t is particularly important that girls and young women deprived of their liberty should enjoy access to such activities on an equal footing with their male counterparts’. This position was based on the experience that ‘[a]ll too often, the CPT encountered female juveniles being offered activities which have been stereotyped as “appropriate” for them (such as sewing or handicrafts), while male juveniles are offered training of a far more vocational nature’.

The prohibition of discrimination according to gender is supported by the general non-discrimination provision, article 2 CRC, and rule 4 JDLs proclaiming that the JDLs ‘should be applied impartially, without discrimination of any kind as to [inter alia] (...) sex (...).’

Although the CRC, Beijing Rules and JDLs omit such a provision, the SMR provide in rule 8 (a) that ‘[m]en and women shall so far as possible be detained in separate institutions’ and that ‘in an institution which receives both men and women the whole of the premises allocated to women shall be entirely separate’. Thus, in rather firm wording the SMR proclaim separation for men and women.

The HRC has pointed in its General Comment on article 3 ICCPR (equality of rights between men and women; HRC GC No. 28), that ‘[a]s regards articles 7 and 10; States Parties must provide all information relevant to ensuring that the rights of persons deprived of their liberty are protected on equal terms for men and women. In particular, States Parties should report on whether men and women are separated in prisons and whether women are guarded only by female guards.’ In addition, ‘States Parties should also report about compliance with the rule that accused juvenile females shall be separated from adults and on any difference in treatment...”

482 Although the Beijing Rules do not mention this explicitly, this right to fair treatment should apply equally to female children in pre-trial detention.
483 CPT 9th General Report, para. 31.
484 The EPR do not represent a similar point of departure, although rule 34 EPR pays particular attention to the position of women and their ‘physical, vocational, social and psychological needs’, as has been done regarding children (rule 35), infants (rule 36), foreign nationals (rule 37) and ethnic or linguistic minorities (rule 38). The CPT addressed ‘Women deprived of their liberty’ in its 10th General Report (CPT/Inf (2000) 13) and calls for separate accommodation in order to protect women against others who wish to cause harm (para. 24).
between male and female persons deprived of liberty, such as access to rehabilitation and education programmes and to conjugal and family visits’. 485

It is remarkable that the children’s rights framework hardly mentions the differences in gender in this regard (the CRC remains absolutely silent), while the general international and regional human rights standards do. 486 Nevertheless, the represented point of departure (i.e. both protection of the girl child deprived of liberty as well as her recognition as holder of rights equal to boys) should be followed under the CRC as well.

3.7.4 Separation of Unconvicted from Convicted Children

Paragraph 2 (a) of article 10 ICCPR provides that save in exceptional circumstances ‘accused persons’ 487 shall (...) be segregated from convicted persons and shall be subjected to separate treatment appropriate to their status as unconvicted persons’. 488 This provision is unique in the sense that this kind of distinction, between convicted and unconvicted persons, has not been made in any other international or regional human rights treaty, including the CRC. 489 According to Nowak with reference to the drafting history ‘strict segregation was intended, which may only be departed in truly exceptional cases’. 489

Although the segregation was intended to be rigid, this does not necessarily mean – according to the historical background of article 10 (2) (a) – that accused

485 HRC GC No. 28, para. 15. Moreover, ‘the obligation of States Parties to protect children (art. 24) should be carried out equally for boys and girls’ and ‘States Parties should report on measures taken to ensure that girls are treated equally to boys in education, in feeding and in health care, and provide the Committee with disaggregated data in this respect. States Parties should eradicate, both through legislation and any other appropriate measures, all cultural or religious practices which jeopardize the freedom and well-being of female children’ (para. 28).

486 See also Part VII. ‘Women deprived of their liberty’ of the CPT Standards, in particular under 24, and Rule 18.8 (b) EPR which provide that ‘[i]n deciding to accommodate prisoners in particular prisons or in particular sections of a prison due account shall be taken of the need to detain (...) male prisoners separately from females’.

487 Nowak shows that the term ‘accused persons’ can be interpreted in two ways. A strictly literal interpretation would include pre-trial detainees in the term accused person only ‘as of the date on which an indictment, or at least an application to introduce the pre-trial procedure, is lodged’. A broader interpretation may include persons in police custody as well; Nowak 2005, p. 251-252. However one could question how many convicted individuals are placed in police custody; in other words what is the relevance of extending the scope of art. 10 (2) (a) to police custody as well? Important is that individuals in police custody (inc. children) are also entitled to treatment according to the presumption of innocence, the primary objective of this separation.

488 Note that unlike art. 10 (2) (b) and (3) ICCPR and art. 37 (c) CRC, this paragraph speaks of ‘segregation’.

489 Although, other standards (JDLs, SMR and EPR) provide for a number of provisions on this issue. Nowak 2005, p. 251. The HRC has found in only two cases violations of art. 10 (2) (a), namely HRC Comm. No. 330/1988 (Berry v. Jamaica) and HRC Comm. No. 493/1992 (Griffin v. Spain); Rodley 1999, p. 304. It therefore remains unclear what the meaning is of ‘exceptional circumstances’ in this regard.
and convicted individuals must be housed in separate buildings, or even in separate quarters. Nevertheless, the HRC ruled in the case Pinkey v. Canada (HRC Comm. No. 27/1978) that the ‘requirement of article 10(2)(a) of the Covenant (…) means that [accused and convicted individuals] shall be kept in separate quarters (but not necessarily in separate buildings)’ (para. 30). The HRC allowed an arrangement in which a remand prisoner, although placed in a cell in an area separated from the area of convicted persons, got his food served by a convicted prisoner. Furthermore, convicted prisoners worked as cleaners in the pre-trial detention unit. The HRC found this arrangement compatible with article 10 (2) (a) ICCPR, provided that contacts between the two classes of prisoners are kept strictly to a minimum necessary for the performance of their tasks (i.e. cleaning and serving food).

In addition, article 10 (2) (a) ICCPR provides that unconvicted and convicted persons must be treated differently, taking into account their status.

The rationale behind this segregation and different treatment is that pre-trial detainees must be treated in accordance with the presumption of innocence, one of the core elements of the right to a fair trial, adopted widely in International and Regional Human Rights Law. According to this principle pre-trial detention may not have a punitive nature and may not be imposed for punitive reasons.

The HRC has stated in General Comment No. 21 (para. 9) that ‘[a]rticle 10, paragraph 2 (a), provides for the segregation, save in exceptional circumstances, of accused persons from convicted ones. Such segregation is required in order to emphasize their status as unconvicted persons who at the same time enjoy the right to be presumed innocent as stated in article 14, paragraph 2. The reports of States Parties should explain how the separation of accused persons from convicted persons is effected and explain how the treatment of accused persons differs from that of convicted persons.’

According to the CRC Committee the child alleged or accused of having infringed the penal law has the right to be treated in accordance with the
presumption of innocence (art. 40 (2) (b) (i) CRC) and ‘it is the duty of all public authorities or others involved to refrain from prejudging the outcome of the trial’ (GC No. 10, para. 42). This has implications for the treatment of children in pre-trial detention and can be seen as an assignment for the administration of detention centres. The CRC Committee has taken the position that the ‘[u]se of pre-trial detention as a punishment violates the presumption of innocence’ (GC No. 10, para. 80). It may by no means imply an ‘advance payment’ on the outcomes of the case. \(^{495}\)

Although rule 17 JDLs provides that ‘[u]ntried detainees should be separated from convicted juveniles’, the CRC Committee has not explicitly taken this position.

Thus, strictly only States that have ratified the ICCPR are required to segregate unconvicted children and convicted children. This leaves unaffected that the presumption of innocence requires that the former group of children be treated differently than the latter. In the light of this, it may be advisable to create different units and to separate pre-trial detained children and imprisoned children (rule 17 JDLs). Otherwise, it would be difficult on a practical level to guarantee different treatment.

The SMR proclaim the separation between unconvicted and convicted prisoners and provide for specific guidance regarding inter alia the treatment of pre-trial detainees and the treatment or convicted prisoners. Although the JDLs do also contain a separate section regarding children in pre-trial detention (rule 17ff JDLs), the SMR provide for more detailed guidance (see also para. 2.7). It is interesting to take a closer look at the Standard Minimum Rules regarding pre-trial detainees (see rule 8 (b) and rule 85 (1) SMR).

The SMR provide that pre-trial detainees \(^{496}\) ‘shall benefit by a special regime’ and has worked out the particularities of such a regime, which includes the separation from convicted prisoners and separation of young pre-trial detainees from adults as a point of departure (rule 85 (1) and (2) SMR). \(^{497}\) Untried prisoners must – in principle – be allowed to sleep alone, ‘singly’, in separate rooms (rule 86

\(^{495}\) E.g. in the HRC case Cagas, Butin and Astillero v. The Phillipines (Comm. No. 788/1997) men were held in preventive detention for the ‘excessive period of nine years’, which according to the HRC ‘does affect the right to be presumed innocent and therefore reveals a violation of article 14(2) [ICCPR]’; para. 7.3. The HRC also found a violation of art. 9 (3) ‘trial within a reasonable time’ and art. 14 (3) (c) ‘trial without undue delay’. Cf the dissenting opinions of HRC members Quiroga and Possada who inter alia concluded that such an evident violation of the ICCPR should have led to the conclusion that the State Party ought to release the detainees immediately; para. (c).

\(^{496}\) Which includes persons in police custody; rule 84(1) SMR. The SMR speak of untried prisoners and convicted prisoners. Note that rule 84 (2) SMR uses the term ‘unconvicted prisoners’. See also rule 8 (d) and rule 13.3 Beijing Rules. For the particularities of the regime see rule 86ff SMR. Cf Part VII of the EPR (rules 94.1-101) for rules regarding the minimum conditions of detention for untried prisoners. The CPT Standards do not address the position of the pre-trial detainee specifically, but do address police custody; CPT 2nd General Report (CPT/Inf (92) 3).
Chapter 3

498 A reservation has been made regarding different local customs in respect to the climate. It is not clear why the local climate should allow an infringement of this principle of separation.

499 This may take place either through the administration or their family or friends, within the limits compatible with the good order of the institution. Otherwise the administration should provide their food.

500 C/f rule 36 JDLs which provides that clothing in no manner may be degrading or humiliating.

501 Note that this rule (and rule 87) mention the institution’s ‘good order’ as a ground to limit the freedoms of untried prisoners. This ground is not used in the general rules and rules regarding sentenced or insane prisoners.

502 It seems unacceptable to defend the dependence on legal aid on its availability.

Finally, it is important to reiterate at this point that the use of pre-trial detention of children should primarily be avoided as much as possible. In general, pre-trial detention can place children in danger of ‘criminal contamination’, a risk that...
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

According to the Beijing Rules ‘must not be underestimated’. Therefore, alternatives for pre-trial detention should be available and if necessary, it should be used only as a measure of last resort, for the shortest appropriate period of time (art. 37 (b) CRC) and while taking into account the special status of pre-trial detainees (inter alia segregation from convicted prisoners and treatment in accordance with the presumption of innocence).

3.7.5 Separation of Children Deprived of Liberty in the Context of Juvenile Justice and Other Contexts

As mentioned in the introduction of this paragraph, the CRC Committee has urged the Netherlands to avoid placement of children with behavioural problems (i.e. in need of care) in institutions for child offenders. International Human Rights Law and Standards, however, do not explicitly proclaim separation of these groups of children. According to rule 28 JDLs ‘[t]he principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being’. Besides, concerning the common needs of every child linked to childhood in general article 37 (c) CRC, the treatment during deprivation of liberty should be based on the more specific needs of the child, which could imply for example individual treatment for a psychiatric disorder. In other words, the type of care needed should be the principle criterion for separation of different groups of children, rather than the legal context. In this regard, it seems logical to defend the fact that if a child offender, sentenced to imprisonment, suffers a mental disease he is entitled to adequate mental health care during his imprisonment.

This implies that with the specific needs of each child as the point of departure, there is no real obligation for separation. Instead, diversity in treatment programmes based on each child’s individual needs is recommendable, supplemented by transfer to a more appropriate setting if required by the specific needs of the child.

The recommendations of the CRC Committee, although not clarified, seem to be prompted by worries about the inappropriateness of placement of children in need of care in institutions for youth offenders. These worries could be related to the assumption that such institutions are not fit for children in need of care – an assumption that denies the fact that youth institutions for children in conflict with the law should in essence be founded upon the same principles under International

503 Commentary to rule 13 Beijing Rules.
504 This may require for a placement outside the youth prison, e.g. in a psychiatric hospital. See also, e.g. rule 12.1 EPR, which provides that ‘[p]ersons who are suffering from mental illness and whose state of mental health is incompatible with detention in a prison should be detained in an establishment specially designed for the purpose’. However, ‘[i]f such persons are nevertheless exceptionally held in prison there shall be special regulations that take account of their status and needs’; rule 12.2 EPR.
In this regard, there seems little objection against detention of children in need of care together with unconvicted children. See rule 8 SMR which takes as the point of departure that ‘[t]he different categories of prisoners shall be kept in separate institutions or parts of institutions taking into account of their sex, age, criminal record, the legal reason for their detention [Italic – tl] and the necessities of their treatment’.

Although the differences between the legal systems (particularly regarding the objectives) should not be disregarded and the risk of ‘criminal contamination’ not excluded (see commentary to rule 13 Beijing Rules), there seems little objection against the non-separation of (these) different categories of children deprived of liberty, particularly given the ‘specific needs-based approach’ (rule 28 JDLs) and the fact that each child is entitled to the same human rights-based approach under the International Human Rights Framework (art. 37 (c) CRC). On the other hand, there is no need to proclaim mixing of both groups of children. De facto, it may not be that easy to take into account the (essential) differences between the different groups of children.

### 3.7.6 Conclusion

This paragraph discussed the most prominent issues of separation under the International Human Rights Framework. Article 37 (c) CRC serves as a point of departure when it comes to the treatment of children deprived of their liberty. It entitles each child deprived of his liberty to be treated with humanity, with respect
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

for his inherent dignity and in a manner that takes into account his needs as a child. In conjunction with article 40 (1) CRC and the general principles of the CRC it is fair to conclude that a child is not only entitled to recognition of his status as a child, an independent human being in development, but also as a child with specific characteristics and specific needs.

There are four issues of separation which deserve attention. First, article 37 (c) CRC provides that as part of the right to be treated with humanity, with respect for his inherent dignity and in a manner that takes into account his age, a child is entitled to be separated from adults unless it is not in his best interests to do so. This requirement of separation is represented widely in the other International and Regional Human Rights Standards and can therefore be regarded as a fundamental principle. It calls, as a minimum, for the creation of separate units and the prevention of inappropriate and uncontrolled mixing of adults and children, and is prompted by both the need for protection of the child against abuse, exploitation or other (more) serious forms of ill-treatment or violence, and the need to address the specific needs of a child. Where for example the ICCPR does not allow any exception to this principle, which has led to many reservations, the CRC allows deviation if required by the best interests of the child. The CRC Committee clearly stressed that this exception must be interpreted narrowly and it has not been adopted for the ‘convenience of the States Parties’. The rationale behind this requirement reveals that there is arguably a strong need for internal differentiation not only between adults and children but also between children of different ages and/or maturity, which was earlier, briefly addressed in this paragraph. In addition, the ambiguity between the scope of application between article 40 CRC (‘crime date criterion’) and article 37 CRC (applicable to children) may imply that adults, who were child offenders, are entitled to be detained or imprisoned in child facilities rather than in adult centres or prisons, which, although defendable, could cause tension with the requirement of separation.

A second issue of separation is the separation of girls and boys. The children’s rights framework does not require separation of boys and girls, but the HRC has stressed that States Parties should report on whether women are separated from men and whether they are guarded by female guards only. In addition, the SMR requires gender separation, as does the CPT. Besides separation, which primarily aims at protection of women deprived of their liberty, international and regional human rights instruments provide clearly that women deprived of liberty should be recognized as holders of the same rights as men. In addition, their particular needs should be recognized and addressed. Regarding girls deprived of their liberty the Beijing Rules represent this approach, while the CRC and JDLs merely and in general prohibit discrimination according to gender.
Chapter 3

The third issue of separation affects the separation of unconvicted and convicted children and is prompted by one of the key principles of juvenile justice and fair trial: the presumption of innocence. The CRC does not explicitly provide for a legal foundation for this separation, besides providing for the right to be presumed innocent until found guilty according to law (art. 40 (2) (b) (i) CRC). However, Rule 17 JDLs does provide for separation of ‘untried’ detainees and convicted juveniles. An explicit legal foundation for this type of separation is provided by article 10 (2) (a) ICCPR, which explicitly and strongly (i.e. allowing deviation only in exceptional cases and using the wording ‘segregation’) stipulates that these two groups of individuals deprived of liberty must be segregated. In addition, the SMR provide for detailed guidance on the specific treatment that must be granted to pre-trial detainees (and individuals in police custody). The JDLs are fully applicable to pre-trial detained children and contain additional rules regarding inter alia continuation of education, work or training and access to legal counsel. Both proclaim the recognition of the presumption of innocence and the fact that these individuals have to stand trial. The SMR in this regard for example and in particular provides for the need for criminal defence and the right to wear different clothing from that of convicted prisoners.

The final issue affects the separation of children deprived of liberty under (juvenile) criminal law and those deprived under other laws, an issue directly related to the call for a ‘specific needs-based approach’ represented by the CRC. The CRC Committee seems to object to placement of children with behavioural problems in youth institutions with youth offenders (see, e.g. concluding observations regarding the Netherlands). The main message of the child rights framework is that one must strive for treatment which meets the specific needs of the child without losing sight that the child is entitled to all rights under the CRC. One of these rights is the right to be treated with humanity, with respect for the inherent dignity and in a manner that takes into account the child’s needs, embodied in article 37 (c) CRC; this implies a positive obligation for States Parties to provide for minimum conditions of deprivation of liberty that guarantee such treatment for children.

The separation issues addressed in this paragraph need to be taken into account when determining the appropriate placement of the child in question. As rule 28 JDLs points out: ‘The detention of juveniles should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations. The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.’ However, one should not disregard the objectives of the legal system in which context the deprivation of liberty takes place.
Besides the implications of International Human Rights Law regarding these issues of placement, there are other general and more specific implications affecting the administrative aspects of placement. These will be addressed in the following paragraph.

3.8 ADMINISTRATIVE ASPECTS OF DEPRIVATION OF LIBERTY

3.8.1 Introduction

In addition to the issues of separation which must be taken into account when selecting the right placement for a child, a number of other administrative aspects of placement are also of relevance to a child’s legal status. These aspects are: selection, placement and transfer (para. 3.8.2), admission to the institution (para. 3.8.3), information for child and family (para. 3.8.4), and records and files (para. 3.8.5).

The right to be treated with humanity, with respect for human dignity and in a manner appropriate to the needs of a child should be served by careful selection and placement, the avoidance of arbitrary transfer, a carefully conducted process regarding admission procedures and subsequent appropriate instructions regarding the rights and duties of the child during his stay in the institution. The latter element is vital for the realization of both the substantial and procedural legal status of the child deprived of liberty; what is the point of having a legal status if a child is not aware of having one or if he does not know what it entails? Furthermore, the child’s family is entitled to be properly informed about the child’s placement, transfer and whereabouts (including, e.g. health situation). In addition, they should be informed about their possibilities and their child’s right to maintain contact with them through visits and correspondence (one of the particularities of art. 37 (c) CRC). This information can contribute to the prevention of solitary confinement or detention incommunicado. Furthermore, careful selection, placement and transfer should take into account the fact that the child can effectively keep in touch with his family, which implies that he should preferably be placed in the vicinity of the residence of his family.

The final administrative aspects concerning records and the child’s personal files are of eminent importance for the realization of the rights of the child and for the protection of the child against unlawful or arbitrary treatment. It contributes in particular to transparency of the institutional stay and serves as an important source for evidence of violations of the child’s rights, but also for the realization of the objectives of the deprivation of liberty.
Chapter 3

3.8.2 Selection, Placement and Transfer

3.8.2.1 Selection and Actual Placement

Deprivation of liberty starts with the selection of the institution in which the child will be placed; this should be distinguished from internal selection upon admission (see below). Selection and placement should be appropriate in light of the child’s right to be treated in a manner that meets the requirements of article 37 (c) CRC, which inter alia takes into account the child’s special needs, and in light of the objectives of deprivation of liberty as part of the juvenile justice system. Depending on the phase of the justice process (arrest/police custody, pre-trial detention or imprisonment as a disposition), the relevant elements for the selection are likely to differ. One particularity that should be taken into account, regardless of stage within the justice process, is the right of the child to maintain contact with his family (art. 37 (c) CRC). The CRC Committee has stressed ‘[i]n order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family’ (GC No. 10, para. 87).\(^{509}\) In addition, it is important to note that the right to maintain contact with the family can be limited if required by the best interests of the child (it should be respected ‘save in exceptional circumstances’; see below). This implies that the family’s residence is one of the key aspects that should be taken into account for the selection of the institution where the child will be placed.

Furthermore, the selection and placement must serve the objectives of the deprivation of liberty and should according to rule 28 JDLs ‘take full account of [the child’s] particular needs, status and special requirements according to [his] age, personality, sex and type of offence, as well as mental and physical health, which ensure [his] protection from harmful influences and risk situations’.\(^{510}\) This affects the internal placement and treatment the child receives during his institutional stay, but should also be seen as a guide regarding the selection of the appropriate institution and subsequent placement.

As pointed out in Chapter 2, the JDLs call for an integration of the institution and community. In this light the child should preferably be placed in a ‘decentralized’ institution (rule 30 JDLs) within his own community, which for example enables the child to continue to attend school or to eventually start a reintegration programme in his own neighbourhood. ‘Preferably’ means that there may be reasons to do otherwise, such as the protection of victims of the (allegedly) committed crimes, public safety or ongoing criminal investigations.

\(^{509}\) Cf rule 17.1 EPR: ‘Prisoners shall be allocated, as far as possible, to prisons close to their homes and places of social rehabilitation’. The latter element is important in light of the child’s eventual reintegration.

\(^{510}\) It is interesting to note that rule 28 JDLs remains silent about respecting the child’s freedom of thought, conscience and religion (art. 14 CRC; see rule 4 JDLs). This arguably should have implications for the placement.
Another aspect relevant in this regard is article 37 (b) CRC’s requirement that arrest, detention and imprisonment must be used only as a measure of last resort and for the shortest appropriate period of time. As addressed in paragraph 3.4, this implies that one should favour the use of the least restrictive (open rather than closed) facilities as much as possible and strive to place a child in closed institutions for the shortest appropriate period of time, with the objective of transferring the child to a more open setting as soon as appropriate. In light of this, it is important to reiterate that the JDLs call for the establishment and use of open institutions, preferably with ‘no or minimal security measures’ (rule 30 JDLs).\footnote{See further rule 30 JDLs for more demands regarding youth institutions.}

The above mentioned aspects should be taken into account when it comes to the decision of where to place the child. This requires careful selection. International Human Rights Standards do not provide guidance regarding the question of which authority should have the discretion to select and place children (e.g. should it be the enforcement authorities or a court?). This is dependent upon the domestic legal system. Furthermore, the stage of the justice process may be relevant. In the event that a child is arrested he may (and most likely will) be placed in a facility available (but not carefully selected). It therefore is necessary that the arrested child is transferred as soon as possible to a location that meets his needs or age.

3.8.2.2 Transfer

‘JUVeniles should not be transferred from one facility to another arbitrarily’ and transport to and from the detention facility ‘should be carried out at the expenses of the administration’ and ‘in conveyances with adequate ventilation and light, in conditions that should in no way subject them to hardship or indignity’, according to rule 26 JDLs. Based on rule 45 (1) SMR the transport itself must not take place in a way that leads to unnecessary ‘physical hardship’ and during the transport prisoners should have adequate ventilation and light. When prisoners are transported to or from an institution ‘they shall be exposed to public view as little as possible and proper safeguards shall be adopted to protect them from insult, curiosity and publicity in any form’ (rule 45 (1) SMR).\footnote{According to rule 45 (1) SMR the prison administration is primarily responsible for the transportation of prisoners. This rule is in essence meant to avoid prisoners from being charged for the costs of the transportation.} The conditions of transfer should be regarded as part of the conditions of deprivation of liberty and should therefore be in conformity with international human rights law as well, in particular article 37 (c) CRC, including the requirement of separation of children from adults.\footnote{See earlier above; cf Morgan & Evans 2001, p. 125.}
The child’s transfer to another placement may only take place after careful selection based on an assessment of the available, appropriate places and while taking into account the needs and best interests of the child.\textsuperscript{514} This requirement of non-arbitrariness of transfer implies that one should carefully select the appropriate place before placing the child there in the first place. If transfer is necessary, the parents, guardians or closest relative of the child should be informed without delay (rule 22 JDLs).\textsuperscript{515}

3.8.2.3 Child’s Participation

In light of article 12 CRC, the child who is capable of forming his views, should be heard when it comes the selection of the institution (for placement) or the decision to transfer, which can be part of a ‘judicial or administrative proceeding affecting the child’ (art. 12 (2) CRC). More importantly, the child should be enabled to make requests for transfer or file objections against the initial placement (rules 75 and 76 JDLs; see para. 3.11). Given the concept of the child’s evolving capacities the child’s parents or other caretakers should be granted this position if the child cannot or is not old or mature enough to form his own views regarding selection, placement or transfer. Neither the JDLs, nor other legal standards provide for specific rules in this regard,\textsuperscript{516} which is a lacuna given the significance of the right selection and placement in light of the right to be treated in conformity with article 37 (c) CRC and the realization of the objectives of the placement (art. 40 (1) CRC). Under article 12 (2) CRC, procedural rules concerning the participation of the child in this regard should be adopted in national law.

3.8.3 Admission to an Institution

A child should only be admitted to an institution on the basis of a valid order of a judicial, administrative or other authority (rule 20 JDLs).\textsuperscript{517} This aims at preventing deprivations of liberty without such order, which may indicate the unlawful or arbitrary use of deprivation of liberty (prohibited by article 37 (b) CRC).

\textsuperscript{514} Cf rule 27ff JDLs. This rule may also imply that a child should not be released by simply opening the institution’s gate. It may be assumed that the institution will have to provide a bus or train ticket to the nearest town centre. Institutions are rarely situated next to ‘the city center’, a more rural place (woods, desert, industrial zone) is more likely, and transport may not be easily accessible.

\textsuperscript{515} Regarding release, this information should preferably be given before the release date so that the family or relative can pick up the child.

\textsuperscript{516} Regarding lodging complaints, the JDLs do stipulate that every child should have the right to request assistance from ‘family members, legal counselors, humanitarian groups or others where possible’ (rule 78 JDLs).

\textsuperscript{517} Cf rule 14 EPR which uses firmer wording: ‘No child shall [Italic – it] be admitted or held in a prison as a prisoner without a valid commitment order, in accordance with national law.’
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

Upon admission, the institution should provide the child with the most appropriate placement within the institution. Again article 37 (c) CRC, the objectives of the deprivation of liberty, and rule 28 JDLs are guiding, which implies that the child’s particular needs, status and special requirements according to their age, personality, sex and type of offence should be taken into account. In addition, one should take full account of the special requirements according to the child’s mental and physical health. Finally, the internal accommodation should protect the child from ‘harmful influences and risk situations’. In this regard, it is important to reiterate the institution’s duty to protect the child against the most heinous forms of treatment or punishment prohibited under article 37 (a) CRC (i.e. torture or other forms of cruel, inhuman or degrading treatment or punishment), inflicted by either institution staff or other inmates. Second, the institution must take into account the different separation issues as addressed in paragraph 3.7., as rule 28 JDLs stresses: ‘The principal criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being.’

In order to determine each child’s particular needs, the child should be interviewed as soon as possible after admission (rule 27 JDLs). In addition, a psychological and social report should identify ‘any factors relevant to the specific type and level of care and programme required by the juvenile’ (rule 27 JDLs). Moreover, a medical report must be prepared after an examination of the child by a medical officer. In this regard it is important to reiterate that each child has the right to be examined ‘immediately upon admission to a detention facility, for the purpose of recording any evidence of prior ill-treatment and identifying any physical or mental condition requiring medical attention’ (rule 50 JDLs).

All reports, psychological, social and medical, should be sent to the director of the institution, who should determine ‘the most appropriate placement for the juvenile within the facility and the specific type and level of care and programme required and to be pursued’ (rule 27 JDLs). If the child requires ‘special rehabilitative treatment (…) trained personnel of the facility should prepare a written individualized treatment plan’. Although the JDLs do not elaborate on

---

518 According to rule 30 JDLs individualized treatment should be made possible by the number of children detained. Child facilities should be ‘as small as possible’. They should be of a size that enables integration into the ‘social, economic and cultural environment of the community’. In addition, they should be decentralized, which stimulates the favoured integration of institution and community; see Chapter 2.

519 See further para. 3.9.3. This medical check is also relevant to the investigation of alleged ill-treatment of the child during his deprivation of liberty.

520 Rule 27 JDLs. As a consequence of this wording, there seems to be no need for a plan if special rehabilitative treatment is not required. One could raise the question whether art. 37 (c) jo. 40 (1) CRC requires a plan-based approach for each child individually. At the same time the length of stay in the facility may make it impossible to create an individualized plan. When the stay is too
Chapter 3

this, one may assume that ‘trained personnel’ implies that they must be trained in line with rule 85 JDLs which provides that ‘personnel should receive such training as will enable them to carry out their responsibilities effectively’. Rule 85 JDLs in particular mentions training in child psychology and child welfare. In addition, personnel should be enabled to ‘maintain and improve their knowledge and professional capacity by attending courses of in-service training, to be organized at suitable intervals throughout their career’ (rule 85 JDLs). Depending on the specific characteristics of the child and the specific issues, personnel include inter alia a psychologist, a psychiatrist, social workers or educators (rule 81 JDLs).

The plan should specify ‘the treatment objectives’ as well as ‘the time-frame and the means, stages and delays with which the objectives should be approached’ (rule 27 JDLs). The JDLs do not provide the evaluation, review and follow up of these plans. However, if treatment is one of the objectives of the child’s deprivation of liberty, this treatment should be subject to periodic review under article 25 CRC.

Again the question must be raised whether a child should be enabled to participate in the internal placement and other procedures upon admission. Under article 12 CRC a similar plea for participation as highlighted above regarding selection and decisions of placement or transfer should be held here: a child who is capable of forming his views should be enabled to express his views freely (he should be heard; art. 12 (2) CRC) in all relevant matters affecting his position and these views should be given ‘due weight in accordance with the age and maturity of the child’, which emphasizes the potential role of the child’s parents.

3.8.4 Information for Child and Family

3.8.4.1 Information for the Child

On admission the child must receive documents that are of importance for (the enforcement of) his legal position (rule 24 JDLs).521 First, he must be given ‘a copy of the rules governing the detention facility’ and, second, ‘a written description of their rights and obligations in a language they can understand, together with the address of the authorities competent to receive complaints, as well as the address of public or private agencies and organizations which provide legal assistance’.522 Moreover, the CRC Committee has stressed particularly regarding the right to file

---

short – e.g. in the case of suspension of pre-trial detention, there simply is no time to make all the efforts for a plan. However, this should not imply that the programme should not meet the specific requirements of the juvenile.

521 The vast importance is also pointed out by the drafters by using the rather ‘hard international law wording’ “shall be given”.

522 Cf rule 35 SMR for a similar instruction; see also rule 30 EPR.
complaints and to make requests that ‘children need to know about and have easy access to these mechanisms’ (GC No. 10, para. 89).523

The child must be able to understand the information. It should ‘be conveyed in a manner enabling full comprehension’ (rule 24 JDLs) in particular to those children who are illiterate or who cannot understand the language in written form. This may imply, as rule 35 (2) SMR provides, that in the event of illiteracy ‘the (...) information shall be conveyed to [the child] orally’. In the latter event it may be best to translate the materials in advance. This might be suitable if children who speak a foreign language are well represented in the institution(s). Otherwise, the institution should provide ‘an interpreter free of charge’, since rule 6 JDLs provides that ‘[j]uveniles who are not fluent in the language spoken by the personnel of the detention facility should have the right to services of an interpreter free of charge whenever necessary, in particular during medical examinations and disciplinary proceedings’.

In the event translation is required on a more occasional basis the information could be given orally in the language that the child understands. However, this must be done in a way that the child receives all the required information. In this regard it is interesting to note that rule 51 SMR obliges the director, his deputy and the majority of the other personnel of the institution to be able to speak the language of the greatest number of prisoners or a language that is understood by the majority of them.524

Another question in this regard is what should be done with children who do speak the language, but nevertheless do not understand the content of the information? This question has different dimensions. First, the question addresses the issue that information should be ‘child-friendly’. Second, children may vary due to age, developmental level and intelligence, which may require different approaches. Finally, there may be children with a limited mental capacity or mental health disorders, which deprive them of the capability to understand the provided information. All these different dimensions must be taken into account, because for adequate implementation of the rules regarding the child’s legal status it is important that the child fully understand what his legal status entails. The information in this regard should be ‘translated’ in general in a way that a child is able to fully understand. That is the only way to guarantee ‘full comprehension’.

Rule 25 JDLs elaborates further on the content of full comprehension by stating that ‘[a]ll juveniles should be helped to understand the regulations governing the internal organization of the facility, the goals and methodology of the

523 The relevance of information for children has also been acknowledged by the UN Study on Violence against Children, which recommended that States should '[e]nsure that children in institutions are aware of their rights and can access the mechanisms in place to protect those rights'; UN Violence Study 2006, p. 30.
524 Whenever necessary the services of an interpreter shall be used; rule 51(2) SMR. Cf rule 6 JDLs.
In light of the assumption that children (in the European region) run the greatest risk of being tortured or ill-treated during police custody, the CPT finds it ‘essential that all persons deprived of their liberty (including juveniles) enjoy, as from the moment when they are first obliged to remain with the police, the rights to notify a relative or another third party of the fact of their detention, the right of access to a lawyer and the right of access to a doctor’. In addition, the CPT welcomes the approach, present in some jurisdictions, that the police must ensure (i.e. a formal obligation) that inter alia the child’s relatives are informed, as an additional safeguard prompted by the child’s ‘inherent vulnerability’ (while the CPT is silent regarding the child’s views and interests in this regard); CPT 9th General Report, para. 23. Furthermore, the CPT welcomes the approach that ‘police officers are not entitled to interview a juvenile unless (…) an appropriate person and/or a lawyer is present’.

Above all, the child’s full comprehension of the rights and duties in the institution is vital for the realization of the child’s legal status as protected by the CRC, more in particular by article 37 CRC. Children must be made fully aware of their minimum rights and the possibilities of challenging unlawful or arbitrary treatment. This can also contribute to the institution’s transparency and the level of quality of treatment awarded to the children in the custody of the institution’s administration.

3.8.4.2 Information for the Family

Furthermore, it is important that the child’s family (including parents) receives information. Based on article 9 (4) CRC the child’s parents (or if appropriate another member of the family) are entitled – upon request – to ‘essential information concerning the whereabouts’ of their child from whom they are separated as a result of State’s action, such as detention or imprisonment. The only exception to this rule can be found in the well-being of the child. Furthermore, the wording ‘upon request’ weakens the provision in the sense that it does not place a States Party under the obligation to outreach and provide the parents with information about the child, on its own initiative.

The JDLs go further and provide that the child’s parents and guardians or closest relative be informed on admission, placement, transfer and release ‘without delay’ (rule 22 JDLs).

This provision is of significance in respect to the child and family’s mutual right to family life (art. 16 CRC) and for the realization of the child’s right to maintain contact with his family through correspondence and visits (art. 37 (c) CRC). Furthermore, it is vital for the prevention of detention incommunicado, which can amount to violation of article 37 (a) CRC’s prohibition of torture and other cruel, inhuman or degrading treatment or punishment (see para. 3.6).525

In light of the assumption that children (in the European region) run the greatest risk of being tortured or ill-treated during police custody, the CPT finds it ‘essential that all persons deprived of their liberty (including juveniles) enjoy, as from the moment when they are first obliged to remain with the police, the rights to notify a relative or another third party of the fact of their detention, the right of access to a lawyer and the right of access to a doctor’. In addition, the CPT welcomes the approach, present in some jurisdictions, that the police must ensure (i.e. a formal obligation) that inter alia the child’s relatives are informed, as an additional safeguard prompted by the child’s ‘inherent vulnerability’ (while the CPT is silent regarding the child’s views and interests in this regard); CPT 9th General Report, para. 23. Furthermore, the CPT welcomes the approach that ‘police officers are not entitled to interview a juvenile unless (…) an appropriate person and/or a lawyer is present’.

525
The JDLs also provide rules regarding notification of the family or child (vice versa) in case of illness, injury or death. Rule 56 JDLs stipulates ‘the right to be informed of the state of health of the juvenile on request’ to the family, as well as the right to be informed ‘in the event of any important changes in the health of the juvenile’. The latter can be considered a positive obligation for the institution’s administration. More particularly, the director of the facility ‘should notify immediately the family or guardian of the juvenile concerned, or other designated person, in case of death, illness requiring transfer of the juvenile to an outside medical facility, or a condition requiring clinical care within the detention facility for more than 48 hours’. Thus, on the one hand the family has a right to receive information on request regarding the state of health of the child concerned. On the other hand the director has an outreach responsibility in the case where the child has died or in the event of more severe forms of illness (requiring transfer or long-term (more than 48 hours) clinical care). If this is the case regarding a foreign child then the consular authorities of the State of which he is a citizen should be notified as well.

If a child dies during the deprivation of liberty or within six months after his release and there is reason to believe that the death is related to the deprivation of liberty, ‘the nearest relative should have the right to inspect the death certificate, see the body and determine the method of disposal of the body’ (rule 57 JDLs). There should also be ‘an independent inquiry into the causes of death’ and the report of this inquiry should be made available to the nearest relative. This rule is of particular importance in order to be able to determine whether there may have been a violation of the child’s right to protection against torture or other cruel, inhuman or degrading treatment or punishment or of his right to life or to be protected from violence during deprivation of liberty.527

Vice versa, a child deprived of his liberty ‘should be informed at the earliest possible time of the death, serious illness or injury of any immediate family member’. Furthermore, the child ‘should be provided with the opportunity to attend the funeral of the deceased or go to the bedside of a critically ill relative’ (rule 58 JDLs).528

526 This includes for the purpose of this paragraph parents, guardians and others (or designated by the juvenile or closely related to him).

527 Arts. 37 (a) and 6 CRC; cf arts. 7 and 6 ICCPR. This is also important in light of States Parties’ obligation to prosecute the perpetrators of infringements on these fundamental human rights and to guarantee the right to remedy and compensation of the surviving relatives. Cf Mowbray 2004 regarding arts. 2 en 3 ECHR in particular.

528 This rule makes reference to both the child’s ‘immediate family member’ and ‘relative’ in this provision; the latter arguably includes the former.
3.8.5 Records and Personal Files

A final significant aspect for the administration of youth institutions is the requirement to establish and maintain a ‘confidential individual file’ (rule 19 JDLs). This file should contain ‘[a]ll reports, including legal records, medical records and records of disciplinary proceedings, and all other documents relating to the form, content and details of treatment’ and it should be ‘kept up to date, accessible only to authorized persons and classified in such a way as to be easily understood’. When a child is released the file must – ‘shall’ – be sealed and removed (expunged) after an appropriate time. Furthermore, the child should be able to contest any fact or opinion in his file and any ‘inaccurate, unfounded or unfair [statement]’ should be permitted to be rectified. This implies that specific rules should exist regulating access to the file for the child and procedures for correcting information (including the ability to complain in the case where access or correction is denied).

The HRC case Zheludkov v. Ukraine (HRC Comm. No. 726/1996) illustrates that a denial of access to medical records may lead to the assumption that there has been a breach of article 10 (1) ICCPR. The HRC concluded in this case that ‘the consistent and unexplained denial of access to medical records to Mr. Zheludkov must be taken as sufficient ground for finding a violation of article 10, paragraph 1, of the Covenant’. Access to medical or other personal records must be seen and recognized as a fundamental right of an individual deprived of his liberty. It is actually one of the sources that delivers information on the question whether article

529 Cf rule 7 SMR and rule 15.1 EPR. See also art. 16 CRC and GC No. 10, para. 64 and 66.
530 As cited in Joseph, Schultz & Castan 2004, p. 286. It must be noted that this judgment is based on the specific circumstances that the State Party had failed to provide an explanation for the alleged denial of access to the medical records. The HRC also considered that it ‘is not in a position to determine what the relevance of the medical records in question would be for the assessment of the conditions of Mr. Zheludkov’s detention, including medical treatment afforded to him’. Mrs. Cecilia Medina dissented and stated among other things that this reasoning of the HRC ‘excessively restricts the interpretation of article 10, paragraph 1 by linking the violation of that provision to the possible relevance which the victim’s access to the medical records might have had for the medical treatment that he received in prison’. She was of the opinion that ‘States have [based on article 10(1) ICCPR] the obligation to respect and safeguard all the human rights of individuals, as they reflect the various aspects of human dignity protected by the Covenant, even in the case of persons deprived of their liberty’. Additionally ‘[a] person’s right to have access to his or her medical records forms part of the right of all individuals to have access to personal information concerning them’, according to Mrs. Medina; Ibid., p. 286. However Mr. Rivas Posada with Messrs. Bhagwati and Ando agreeing with him, dissented from Mrs. Medina and argued that ‘the interpretation of article 10, paragraph 1, of the Covenant should [not] be stretched that far. To conclude that the denial of access to medical records to a person deprived of his liberty, assuming such denial is proved, constitutes ‘inhuman’ treatment and is contrary to ‘respect for the inherent dignity of the human person’ goes beyond the scope of the said paragraph and runs the risk of undermining a fundamental principle which must be above whimsical interpretations’; Ibid., p. 287.
10 (or article 7) ICCPR has been breached or not. One should at the same time realize that if a violation of article 10 (or 7) has taken place (deliberately) this may not be recorded in a medical or other personal files.

Moreover, procedures regarding the access of an appropriate third party to the file and the consultation of the file on request should be established. One may assume that if necessary the child should be allowed to file a request before a competent, independent and impartial body.

Obviously, this can be considered an important procedural safeguard as well. It is fair to say that a child exists because he has a file. A properly recorded file is of the utmost importance for the protection of the legal status of the juvenile for many reasons. One of these reasons is to verify what happened in the event of the child’s death or alleged ill-treatment. One should not overestimate the practical value of the file, however. The competent authorities are dependent on who keeps the file up to date. Most likely, this is done by the institution’s administration or staff members. In the event of serious human rights violations it is unlikely that such behaviour will have been recorded in the child’s file. This makes the right to contest the content of the file of significant value.

Rule 21 JDLs provides that ‘a complete and secure record’ concerning each child should be kept in every place where children are detained. In this record information on the identity of the child should be kept and ‘[t]he fact and reasons for commitment and the authority therefore’. Furthermore, the day and hour of admission, transfer and release should be registered and the ‘[d]etails of the notifications to parents and guardians on every admission, transfer or release of the juveniles in their care at the time of commitment’. Details of known physical and mental health problems, including drug and alcohol abuse’ should also be registered in the record of the child concerned. In addition rule 23 JDLs provides that ‘[a]s soon as possible after reception, full reports and relevant information on the personal situation and circumstances of each juvenile should be drawn up and submitted to the administration’. If a child enters the institution, which can only

531 Although the JDLs do not mention this explicitly, it may be assumed that the content of the file should ‘follow’ the child when he is transferred. The former institution should however keep a record that the child has been detained there for a certain period, in order to prevent the child from ‘disappearing’.

532 These notifications should be made ‘without delay’, according to rule 22, and include also to the closest relatives of the juvenile concerned. According to Van Bueren ‘[s]afeguards concerning admission and transfer were incorporated into the rules specifically to avoid repetitions of the illegal smuggling of babies out from detention centers by member of the Argentinean armed forces during the junta’; Van Bueren 1989, p. 2-3.

533 It may be assumed that this rule wants all of this information to be recorded in the personal file of the juvenile, even if it is not mentioned explicitly in rule 21 JDLs.
take place on the basis of ‘a valid commitment order of a judicial, administrative or other public authority’, the details of this order should be registered immediately.534

Again, keeping secure and complete records of every individual child is of the utmost importance for the protection of his legal status. It can help to establish alleged arbitrary treatment during the deprivation of liberty.535 Second, it can be useful to establish the specific needs of the child, which information is relevant in light of composing the daily programme that meets the requirements of these needs. In essence a file means that a child exists and can be found, which is important in light of the prohibited practice of detention incommunicado or enforced disappearances (see para. 3.6).

3.8.6 Conclusion

There are a number of administrative aspects concerning deprivation of liberty of children that are relevant in light of the quality of treatment that must be granted under article 37 (c) CRC and for the realization of the objectives of the deprivation of liberty. These aspects are: selection, placement and transfer, admission, information for child and family, and records and files. In particular, the JDLs provide guidance regarding appropriate placement both external as well as internal (i.e. within the institution), transfer and procedures upon admission. These rules aim at the placement of the child in the appropriate institution where he can receive the approach that he needs and which supports him in his return to society. In addition, the child’s right to effectively maintain contact with his family has implications for the selection and placement of the child (i.e. in the vicinity of his family). However, this is not the only element that should be taken into account. Others are the objectives of the juvenile justice system, including the protection of society and victims and the child’s reintegration into society.

Particular attention should be given to the child’s right to participate regarding all decisions taken in this regard (art. 12 CRC).

Furthermore, this paragraph asserts that the child’s full comprehension of the rights and duties in the institution is vital for the realization of the child’s legal status as protected by the CRC, more particularly by article 37 CRC. Children must be made aware of their minimum rights and the opportunity to challenge unlawful or arbitrary treatment. This also contributes to the institution’s transparency and the level of quality of treatment awarded to the children in the custody of the institution’s administration. In addition, the child’s family should be informed properly.

534 Cf rule 20 JDLs which adds that ‘[n]o juvenile should be detained in any facility where there is no such register’. Cf rule 7 SMR.
535 The file can be based on false premises and it is therefore important that the child can challenge the content of the file, although it is not clear where he can do that. See the remarks earlier regarding rule 19 JDLs.
Finally, the maintenance of personal records and files is of eminent importance for the quality of treatment inside the institution, the realization of the objectives and the promotion of transparency. Additionally, the child’s files serves as an important source to check alleged violations of the child’s fundamental rights and freedoms. Respect for the child’s human dignity is well served by transparency of the institution’s climate and the treatment of each child individually.

3.9 CONDITIONS OF DEPRIVATION OF LIBERTY AND ENJOYMENT OF RIGHTS

3.9.1 Introduction

In the previous paragraphs various general and protective provisions important for the quality of the execution of deprivation of liberty have been presented and discussed such as the treatment with humanity and inherent dignity, prohibition of torture and other forms of ill-treatment (including, e.g. corporal punishment), separation issues, like separation of children from adults and administrative aspects, such as placement, provision of information and files.

This paragraph will focus on the provisions of the legal status of the child deprived of liberty important for his daily life in an institution and includes his enjoyment of rights such as the right to an adequate standard of living, health care, education, privacy and to maintain contact with his parents and family. The significance of the conditions of deprivation of liberty is stressed by the UN Violence Study, which pointed to the increased risk of violence against children deprived of their liberty due to inter alia overcrowding, squalid conditions and lack of supervision.536

As pointed out in paragraph 3.5, every child deprived of his liberty is entitled to all rights under the CRC and that the enjoyment of these rights may only be limited if required by the deprivation of liberty, while taking into account the general principles of the CRC. One of the key provisions of the CRC for the overall treatment of children in institutions (and daily institutional life) is article 27, recognizing in its first paragraph ‘the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development’. Paragraph 2 of this article states that parents or others responsible for the child have the primary responsibility to secure (…) the conditions of living necessary for the child’s development. When a child is deprived of liberty ‘the others responsible’ are the staff of the institution. Article 27 (3) CRC requires States Parties to take appropriate measures to assist ‘others responsible for the child’ to implement the child’s right to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development. This includes ‘material assistance and

536 UN Violence Study 2006, p. 16.
support programmes, particularly with regard to nutrition, clothing and housing’. 537

The JDLs contain a number of provisions that provide more specific guidance regarding the implications of the relevant CRC provisions in this regard.

This paragraph addresses successively: housing, accommodation and physical environment (para. 3.9.2), the quality of care, in particular personal care and health care (para. 3.9.3), education, training and leisure/recreation (para. 3.9.4), religion (para. 3.9.5) and contact with the wider community, including the family (para. 3.9.6).

One remark should be made here. Living up to all the following requirements may be difficult taking into account States Parties’ level of development and available resources (in addition it may lead to differences in quality of life inside and outside institutions). This should certainly be taken into account (see art. 4 CRC and art. 27 (3) CRC), but it is also important to reiterate that the quality of the conditions of deprivation of liberty are of direct relevance for the right of the child to be treated with respect for his dignity and humanity. This right should be upheld at all times, regardless of States Parties’ available resources and level of development. 538

3.9.2 Housing, Accommodation and Physical Environment

The physical environment and accommodation should be designed in a way that acknowledges and respects the child’s ‘right to facilities and services that meet all the requirements of health and human dignity’ (rule 31 JDLs). When designing detention facilities the following aspects should be kept in mind, according to rule 32 JDLs. First, the ‘rehabilitative aim of residential treatment’ should be respected. Second, ‘the need of juveniles for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure–time activities’ should be regarded (see GC No. 10, para. 89 and rule 47 JDLs, which refer to arts and craft skills). Furthermore, the building should be designed and structured in a way that minimizes the risk of fire and must ensure ‘safe evacuation from the premises’, including an effective alarm system in case of fire, as well as ‘formal and drilled procedures to ensure the safety of the juveniles’. One can think of evacuation plans, fire safety instructions and sufficient and appropriate fire equipment. Rule 32 JDLs finally, mentions that ‘[d]etention facilities should not be located in areas where there are known health or other hazards or risks’. Thus, many different aspects should be taken into account when designing and building an institution for children deprived of liberty. The general rule is however that the detention facilities for children should be designed and built in a way that meets the

537  This must be done ‘in accordance with national conditions and within their means’; see below.
538  See para. 3.13 for more on this.
specific requirements of children and respect the overall objective of an eventual reintegration of the child.  

The CPT has also elaborated on the special treatment adolescents should receive in this regard. According to the CPT: ‘Adolescence is a period marked by a certain reorganization of the personality requiring a special effort to reduce the risks of long-term social maladjustment. While in custody, adolescents should be allowed to stay in a fixed place, surrounded by personal objects and socially favourable groups. The regime applied to them should be based on intensive activity, including socio-educational meetings, sports, education, vocational training, escorted outings and the availability of appropriate optional activities.’

In particular, rules 33 and 34 JDLs provide rules regarding sleeping accommodation and sanitary installations. First, sleeping accommodation should ‘normally consist of small group dormitories or individual bedrooms’, while taking into account local standards. Furthermore, there should be regular supervision during sleeping hours. This should however be ‘unobtrusive’, which seems to rule out the use of (constant) camera observation.

Rule 9 SMR also allows two forms of accommodation: cells or rooms in which a ‘prisoner’ is detained individually during the night (para. 1) or dormitories (para. 2). If the institution’s administration finds special reason to depart from this rule, for example in the event of ‘temporary overcrowding’, ‘it is not desirable to have two prisoners in a cell or room’.

The use of dormitories requires that prisoners are carefully selected ‘as being suitable to associate with one another in those conditions’, a provision the JDLs do not provide. Subsequently, regular supervision by night is required, while taking into account the nature of the institution. The SMR does not limit the size of the dormitory, while the JDLs aim at ‘small’ ones. Neither of these instruments provide for guidance on limitations of the group size. This arguably is a matter of balancing efficiency, the privacy of the inmates and safeguarding order and safety.

539 In this regard it is important to reiterate that the JDLs are based on a community-based approach. The rules favour open detention facilities that have preferably ‘no or minimal security measures’ and in which ‘the population should be as small as possible’ (rule 30 JDLs). Individualized treatment should not be influenced negatively by the number of children detained (this part of rule 30 JDLs refers to closed facilities only, but arguably applies to all facilities in which children are deprived of liberty). Additionally, detention facilities should be decentralized and be of a size that enables integration into the ‘social, economic and cultural environment of the community’.


541 The implications of this rule are not clear. Does this imply that there can be more than two prisoners in a private cell? Or are there reasons to believe that three prisoners in one cell is better than two? The answer to the latter question may be positive. In any event, the drafters tried to address overcrowding of institutions, which unfortunately is not uncommon; see, e.g. UN Violence Study 2006.
The EPR follow more or less the same approach as the SMR, but are in principle not in favour of dormitories (rule 14 (1) and (2) EPR). The CPT has been particularly critical of large-capacity dormitories [whether overcrowded or not] which combine sleeping facilities, living areas and sanitary facilities and which are found in many central and east European countries and traditionally used for all but short-term “administrative detention”.\(^{542}\) The main reason for this position is that when it comes to multiple occupancy there is a lack of privacy and an ‘increased risk of inter-prisoner predatory behaviour’.\(^{543}\)

International Human Rights Law provides little guidance regarding the size of cells or dormitories, although the CPT Standards can be of assistance in this regard. Based on the CPT reports there is an indication that the desirable size of a prison cell occupied by one person would be around 9 to 10\(\text{m}^2\), a standard that seems to be approved by the ECHR.\(^{544}\) Morgan & Evans have provided an overview of the findings in these reports.\(^{545}\) In general, ‘the [CPT] appears to have adopted a toleration threshold of approximately 9 sq. m. for two-person cells’. Restrictive but acceptable arrangements were found in Slovakia, namely cells of 9 to 10\(\text{m}^2\) for two persons, cells of about 12\(\text{m}^2\) for three persons and cells of 16 to 17\(\text{m}^2\) for four persons. In Greece, rooms of 21\(\text{m}^2\) were found acceptable if they accommodate no more than five, preferably four, people. Regarding Austria and Slovakia the CPT found respectively that rooms of 25\(\text{m}^2\) should accommodate no more than six people and rooms of 35\(\text{m}^2\) a maximum of seven and 60\(\text{m}^2\) a maximum of twelve people. Altogether Morgan & Evans argue that ‘[t]his suggests that large rooms, in spite of the [CPT’s] general reservations, may be considered acceptable if they provide at least 3 to 3.5\(\text{m}^2\) per person’.\(^{546}\) ‘[A]lthough, they add, ‘even less space might be tolerable: the [CPT] said that a juvenile [Italic – tl] facility in Turkey in which 28 inmates were housed in a dormitory of 76 \text{sq. m.} “could hardly be described as generous” and expressed the view that “it would be desirable to reduce [this] somewhat”.’\(^{547}\)

Thus, small-scale dormitories seem to be accepted by International Human Rights Standards. Dorms should be of reasonable size in light of the children’s right to

---

544 Murdoch 2006, p. 214 with reference to CPT/Inf (2005) 13 (Austria), para. 112 and to ECtHR, Judgment of 11 March 2004, Appl. No. 40653/98 (Iorgov v. Bulgaria), para. 80: ‘Turning to the conditions of the applicant’s detention, the Court notes that the cells in which the applicant was detained throughout the relevant period measure 6 or 8 \text{sq. m.} Between 1995 and 1998 he was the sole occupant of a cell of that size, an accommodation standard which appears acceptable.’ The CPT offered no guidance in its 2nd report; Ibid., p. 100.
545 Ibid., p. 100-101.
546 Ibid., p. 100.
547 This rather reluctant position of the CPT is more or less justified by Morgan & Evans by the argument that ‘these dormitories were used for sleeping only and would probably not have been considered acceptable had they been used for purposes other than sleeping’; Ibid., p. 100-101.
privacy and their protection against ill-treatment of other children. In light of article 37 (c) CRC, rule 27 JDLs and article 10 (2) and (3) ICCPR it is necessary to keep an eye on the separation issues, especially when it comes to (small group) dormitories (see para. 3.7).

The question what is acceptable can be dependent on how the dormitory is used; if the children live outside their dorms regularly, a smaller amount of square metres per child seems to be accepted by the CPT only.

Furthermore, the CPT considers it important that prisoners should be able to attract the attention of staff and prison guards. Preferably, there should be some kind of call system that is linked to a central monitoring point. It is not enough that the prisoner can attract attention through ‘calling or banging at the cell doors’.\(^{548}\) Although the CPT has provided the ideal temperature for the accommodation, according to Morgan & Evans ‘the [CPT] has made it clear that there should be heating able to cope with wintry conditions and that excessive heating, whether artificial or natural, is also to be avoided’.\(^{549}\)

Regarding the design of cells and dorms a couple of issues are relevant, namely interior and hygiene. Every child should receive separate, sufficient and clean bedding.\(^{550}\) Again the local or national standards should be kept in mind, which, one may assume, implies that blankets are not necessary in the deserts of Arizona but are in Siberia. In addition, according to rule 34 JDLs, the sanitary installations should be of sufficient standard and located in a way that children can comply ‘as required’ with their physical needs in privacy and in a clean and decent manner.\(^{551}\) The JDLs lack sufficient details on the demands of the accommodation. The SMR provide more guidance and takes as a point of departure that all accommodation, in particular the sleeping accommodation, should ‘meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation’ (rule 10 SMR).\(^{552}\) In all places where prisoners are required to live or work there must be windows, large enough to enable prisoners to read or work by natural light. These windows must be constructed in a way that also allows entrance of fresh air that can reach the prisoners. If there are not any or enough windows, artificial ventilation is required. Furthermore, artificial light must be provided for prisoners to read or work, ‘without injury to eyesight’ (rule 11 (b) SMR).

\(^{548}\) Morgan & Evans 2001, p. 102 with reference to CPT/Inf (92) 5 (Malta), para. 37.

\(^{549}\) Ibid., p. 102.

\(^{550}\) Rule 33 JDLs. This implies that each child should have a separate (bunk)bed; rule 19 SMR prescribes this explicitly. The CPT has also stressed that this is of high priority; Ibid., p. 102 with reference to CPT/Inf (99) 2 (Turkey), para. 110.

\(^{551}\) This fits the requirement of treatment with respect for the child’s human dignity. Although this is not mentioned explicitly, unobtrusive supervision may be appropriate in this regard as well.

\(^{552}\) Cf Rules 11-14 SMR.
Sanitary installations must be ‘adequate to enable every prisoner to comply with the needs of nature when necessary and in a clean and decent matter’ (rule 12 SMR)\(^{553}\), and with regard to bathing and shower installations, which must be available so that every prisoner can have a bath or shower, ‘at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region’ (rule 13 SMR). However every prisoner in a temperate climate should be enabled to take a shower or bath in an adequate bathing or shower installation ‘at least once a week’ (rule 13 SMR). Finally, the prison administration should at all times properly maintain and keep ‘scrupulously clean’ all parts of the institution that are regularly used by prisoners (rule 14 SMR).

3.9.3 Quality of Care: Personal Care and Health Care

3.9.3.1 Personal Care

The duty of care of the institution’s administration encompasses different aspects of the general and daily treatment of children and can be divided into two groups: personal care and health care (see below).

Personal care basically is the care for every child’s personal needs or better: the necessities of life, such as food and drinking water. ‘Every detention facility shall ensure that every child receives food that is suitably prepared and presented at normal meal times and of a quality and quantity to satisfy the standards of dietetics, hygiene and health and, as far as possible, religious and cultural requirement’, according to rule 37 JDLs.\(^{554}\) In addition, ‘clean drinking water should be available to every juvenile at any time’. By using the strong wording ‘shall ensure’ this can be regarded as a strong positive obligation to provide food and drinking water (c.f. art. 27 CRC).\(^{555}\)

A second aspect of personal care is related – again – to hygiene. Under the SMR prisoners are under the obligation to keep themselves clean and therefore the institution should have access to water and to ‘such toilet articles as are necessary

---

\(^{553}\) The CPT takes a similar position and adds that ‘[e]ither a toilet facility should be located in cellular accommodation (preferably in a sanitary annex) or means should exist enabling prisoners who need to use the lavatory to be released from their cells without undue delay at all times, including at night’; CPT 2nd General Report, para. 49.

\(^{554}\) This implies that, e.g. kosher or halal food should be made available (see further below; freedom of religion). ‘Normal meal times’ means that the local customs should be taken into account. It can be assumed that one should seek regularity, like breakfast, lunch and dinner; c.f. rule 20 SMR which speaks of the ‘usual hours’. Moreover, food should be nutritious (and may not lead to an inappropriate loss of or increase in weight); rule 20 SMR.

\(^{555}\) Note that regarding drinking water softer wording (‘should’) has been used. C.f. rule 20 SMR and the CPT, which has also paid close attention the prisoner’s food regarding quality and quantity; Morgan & Evans 2001, p. 103.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

for health and cleanliness’ (rule 15 SMR).\textsuperscript{556} Every child should be enabled to wash himself and keep himself clean. As discussed earlier there should be sanitary installations of sufficient standard so that children can comply ‘as required’ with their physical needs in privacy and in a clean and decent manner (rule 34 JDLs).\textsuperscript{557} Bathing and shower installations must be available so that every prisoner can have a bath or shower, ‘at a temperature suitable to the climate, as frequently as necessary for general hygiene according to season and geographical region’ (rule 13 SMR).\textsuperscript{558} However every prisoner in a temperate climate should be enabled to take a shower or bath in an adequate bathing or shower installation ‘at least once a week’.\textsuperscript{559} According to Morgan & Evans the CPT in general seems to consider twice-weekly access to bathing facilities satisfactory for non-working prisoners and daily access for working prisoners.\textsuperscript{560}

The JDLs do not explicitly provide for daily enjoyment of fresh air as part of the duty to provide for a healthy institutional climate, although this can be seen as one of the necessities of life for children (deprived of liberty); rule 11 SMR does provide that the windows of each cell should be large enough to allow entrance of fresh air. Nevertheless, each child should be allowed to daily free exercise outside (see rule 47 JDLs below; rule 21 (1) SMR ‘adds’ that there should be a minimum of one hour daily exercise in open air).

Another aspect of personal care is the possession of personal effects. According to rule 35 JDLs ‘[t]he possession of personal effects is a basic element of the right to privacy and essential to the psychological well-being of the juvenile’ (cf art. 16 CRC). By adopting the JDLs, such an important aspect of the child’s right to privacy was acknowledged for the first time.\textsuperscript{561} Indeed, the SMR, e.g. does not mention personal effects, other than clothing.

\textsuperscript{556} Note that according to rule 16 facilities must be provided ‘for the proper care of the hair and beard, and [that] men must be enabled to shave regularly’. This rule links personal hygiene directly to the maintenance of ‘a good appearance compatible with their self-respect’. The SMR holds prisoners responsible to keep themselves clean and neat; cf e.g. rule 88 (1) SMR which allows unconvicted prisoners to wear their own clothes provided that they are clean and suitable.

\textsuperscript{557} The CPT has particularly addressed the situation in which prisoners must appear before court. In that event efforts should be made to enable prisoners to appear before court ‘in a manner which respects their human dignity’, i.e. clean and tidy; Morgan & Evans 2001, p. 101 with reference to CPT/Inf (98) 7 (France), paras. 105 and 107. Cf rule 12 SMR.

\textsuperscript{558} The CPT has stressed, e.g. regarding Romania that in especially warm weather, twice-weekly access to a shower may be insufficient, particularly for prisoners engaged in work; see Romania 1, para. 110 as referred to in \textit{Ibid.}, p. 101.

\textsuperscript{559} Note that the JDLs are silent in this regard. Rule 18 EPR does contain similar requirements. The CPT finds it desirable that running water is available within the cell accommodation; CPT 2nd General Report, para. 49.

\textsuperscript{560} \textit{Ibid.}, p. 101 with reference to CPT/Inf (97) 12 (Italy), para. 111.

\textsuperscript{561} Van Bueren 1989, p. 3.
Personal effects can include specific articles, like a watch, jewellery, music, books, money or clothing. The possession of personal effects is a right of every child and includes the right to have adequate storage facilities for them, which 'should be fully recognized and respected'. If personal effects are confiscated (i.e. cannot be taken into or held in the institution) or the child does not want to take them inside, they should be placed in safe custody, after the child has signed an inventory. The institution should take steps to keep the personal effects in good condition. Upon release, all effects should be returned to the child, which stresses the need for an inventory (rule 35 JDLs).563

Personal effects include clothing. As mentioned above clothing is of significance in light of the principle of respect for the dignity of the child and may not be degrading or humiliating (rule 36 JDLs). In addition, clothing can be important regarding the separation of unconvicted and convicted children (see para. 3.7). According to rule 88 SMR for example, unconvicted individuals should be allowed to wear their own clothes, if clean and suitable and they may not be forced to wear the same prison clothing as convicted prisoners (rule 88 SMR).

According to rule 36 JDLs each child (convicted or not!) should have the right to use his own clothing ‘[t]o the extent possible’. This clause leaves room for deviation, which seems to be limited to the situation in which it is not possible to let the child wear his own clothes, for example because he has none. Although this rule has not been clarified, one could argue that the exception may be also be based on reasons of an organizational or logistical nature, for example when the child does not have suitable personal clothing (e.g. for sports) or when there is no ability to maintain or to wash the child’s clothing. In addition, one could think of the situation when it is in the best interests of the child (temporarily) not to allow him to wear his own clothes, for example due to the child’s mental condition.

However, there seems to be less room to limit a child’s privacy in this regard for (potentially pragmatic) reasons of maintaining order or safety in the

562 E.g. in the Netherlands the possession of money is prohibited; if there is any money it should be booked on a personal account.
563 The institution’s obligation to keep the personal effects in safe custody and return them upon release is valid ‘except in so far as he or she has been authorized to spend money or send such property out of the facility’. Specific reference has been made to medicines: ‘If a juvenile receives or is found in possession of any medicine, the medical officer should decide what use should be made of it.’ Rule 43(2) SMR provides that when the institution has found it necessary to destroy any article of clothing on hygienic grounds, it is allowed to do that and as a result it should not return these goods to the prisoner. The SMR also regulate that a prisoner should sign for his returned goods; rule 43(2) SMR.
564 Rule 17 SMR represents a similar approach by providing: ‘Every prisoner who is not allowed to wear his own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to keep him in good health. Such clothing shall in no manner be degrading or humiliating.’ Although, the wording of rule 17 (3) SMR: ‘In exceptional circumstances, (…), [the prisoner] shall be allowed to wear his own clothing (…)’ seem to indicate that the SMR acknowledge the use of prisoner clothing.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

institution. Moreover, depriving a child of his personal clothes for disciplinary reasons seems unacceptable. The limitation of the child’s right to wear his own clothes (or the keep its other personal effects), as part of the child’s right to privacy, should be necessary and proportionate under the circumstances (art. 16 CRC).

As a minimum ‘[d]etention facilities should ensure that each juvenile has personal clothing suitable for the climate and adequate to ensure good health, and which should in no manner be degrading or humiliating’. This can be considered the general rule in this regard and implies that when it is not possible to let the child wear his own clothes, the institution’s administration is under the duty of care to provide for suitable and clean clothing. The SMR are more explicit in this regard and elaborates on this in rule 17 (2), placing institutions under the duty to keep all clothing clean and in proper condition. Moreover, ‘[u]nderclothing shall be changed and washed as often as necessary for the maintenance of hygiene’ (rule 17 (2) SMR).

Furthermore, suitable and non-degrading or non-humiliating clothing seem to imply that the clothing should fit the child and should be made personal as much as possible.

Finally, every child should be allowed to wear his own clothes when he leaves the facility or when he has been removed, for instance in case of transfer to another institution or for example to court. But one must also think of the situation in which a child participates in a reintegration programme. This provision fits the requirement to avoid the child’s stigmatization. Again, if the child does not have any or suitable clothes, the institution should provide for clothing which is not stigmatizing, degrading or humiliating.

3.9.3.2 Health Care

A child deprived of his liberty is not deprived of his right ‘to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health’ (art. 24 (1) CRC). In addition, States Parties are under the obligation ‘to strive to ensure that no child is deprived of his or her right of access to such health care services’. In the first place, this has implications for the living conditions in institutions. The institution’s administration should guarantee a healthy climate, which has implications for accommodation (housing, hygiene and sanitary facilities), treatment of the children (food, water, clothing and personal hygiene) and parts of the daily programme (sports and recreation).

---

565 Rule 36 JDLs; cf rule 17 SMR.
566 Rule 36 JDLs. According to rule 17 (3) SMR a prisoner, whenever he is removed outside the institution for an authorized purpose, ‘shall be allowed to wear his own clothing or other inconspicuous clothing’.
567 Art. 23 CRC addresses the disabled child in particular; see below.
Second, health care services should be available to the child while he is deprived of his liberty. According to the CRC Committee (GC No. 10, para. 89): ‘Every child has the right to be examined by a physician upon admission to the detention/correctional facility and shall receive adequate medical care throughout his/her stay in the facility, which should be provided, where possible, by health facilities and services of the community.’ Thus, medical care of children deprived of their liberty implies a medical check upon arrival (or arrest) and medical care and back up during police custody, detention or imprisonment.

The medical examination by a physician upon arrival (rule 50 JDLs) is important because it provides the recording of (physical) traumas resulting from prior ill-treatment and the identification of any physical or mental condition requiring medical attention (see also para. 3.8.3). Children deprived of liberty may have lived on the streets for a significant period of time and even if the children were living at home before their incarceration, they may have been deprived of proper medical care, including dental care. It also serves the interests of the other inmates.\textsuperscript{568} In addition, if a child, upon arrival, has medication which he wishes to take with him inside the institution, he is entitled to an assessment by the medical officer in order to ‘decide what use should be made of it’ (rule 35 JDLs).\textsuperscript{569}

The child’s entitlement to ‘adequate medical care, both preventive and remedial’ during his deprivation of liberty is embodied in rule 49 JDLs.\textsuperscript{570} Such medical care includes ‘dental, ophthalmological and mental health care, as well as pharmaceutical products and special diets as medically indicated’. Where possible this medical care should be provided through the appropriate health facilities and services of the community in which the facility is located. The rationale behind this is ‘to prevent stigmatization of the juvenile and to promote self-respect and integration into the community’. Again, this represents one of the fundamental principles of the JDLs which can be found in other JDLs’ medical care provisions as well. For example rule 51 JDLs provides a clear assignment for the medical services that ‘should seek to detect and should treat any physical or mental illness, substance abuse or other condition that may hinder the integration of the juvenile into society’; clearly the objective is reintegration. In addition, special attention

\textsuperscript{568} According to rule 24 SMR the medical check upon admission is meant to discover of mental or physical illness which may require segregation from other prisoners in order to prevent the spreading of ‘infectious or contagious’ diseases. Another additional objective is the prisoners’ ‘physical capacity (...) for work’, which cannot be regarded as appropriate regarding children.

\textsuperscript{569} Cf rule 43 (4) SMR.

\textsuperscript{570} Compared to art. 24 (1) CRC, rule 49 JDLs uses rather strong wording. The substantive rules regarding medical care can be found in rule 51ff JDLs. The CPT has also paid particular attention to medical care in its 3\textsuperscript{rd} General Report; see for more on this Morgan & Evans 2001, p. 117ff.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

571 The drug programmes should take into account the different ages, gender or other requirements of children. It should be possible to adapt the programmes to the specific needs of the child concerned. In addition, if a child is dependent on drugs or alcohol ‘detoxification facilities and services staffed by trained personnel’ should be made available to him.

572 Note that children deprived of liberty in the context of juvenile justice can suffer a mental disorder that in one way or the other is related to the offence and which may have been reason to order the deprivation of liberty and medical treatment (c.f. para. 3.2).

implication a large institution, although not favoured by the JDLs, may be best served with its own hospital inside or nearby the institution,\textsuperscript{574} while for a smaller institution it may be easier to use the facilities of the surrounding community. In addition, the staff must be trained in ‘preventive health care and the handling of medical emergencies’ (rule 51 JDLs).

Furthermore, the illness (or alleged illness) of children should be taken seriously. According to rule 51 JDLs: ‘Every juvenile who is ill, who complains of illness or who demonstrates symptoms of physical or mental difficulties should be examined promptly by a medical officer.’\textsuperscript{575} The wording ‘promptly’ means immediate action. Staff have therefore a significant responsibility in this regard. They should pick up the signals and consult the medical officer as soon as possible after receiving the first signals. The JDLs do not elaborate on the required reaction, but it may be assumed that the child should be provided with the necessary medical care. The SMR are more explicit on this. The medical officer ‘should daily see all sick prisoners, all who complain of illness, and any prisoner to whom his attention is specially directed’ (rule 25 (1) SMR). If a sick prisoner requires specialist treatment, he must be transferred to specialized institutions or even to civil hospitals (rule 22 (2) SMR). Furthermore, rule 6 JDLs provides that ‘[j]uveniles who are not fluent in the language spoken by the personnel of the detention facility should have the right to services of an interpreter free of charge whenever necessary, in particular during medical examinations and disciplinary proceedings’.

One could think of the situation in which a child’s mental or physical health will be or has been negatively affected by the continued deprivation of liberty or the conditions of detention. In such situations, the medical officer who has reason to believe that the child’s health is ‘injuriously affected by continued detention, a hunger strike or any condition of detention’\textsuperscript{576} should inform (report) the institution’s director immediately.\textsuperscript{577} Moreover, the medical officer should inform ‘the independent authority responsible for safeguarding the well-being of the juvenile’.\textsuperscript{578} Although, the JDLs – again – do not elaborate on this, one may assume

\textsuperscript{574} If so the hospital facility’s ‘equipment, furnishings and pharmaceutical supplies shall be proper for the medical care and treatment of sick prisoners’; rule 22 (2) SMR.

\textsuperscript{575} The JDLs do not define ‘medical officer’. This may include a doctor, a general practitioner but it may very well be a nurse. Rule 55 JDLs speaks of qualified medical personnel, which arguably includes all kinds of personnel. Therefore it is likely that the term ‘medical officer’ implies a doctor, a general practitioner or, e.g. a psychiatrist, but not nursing staff.

\textsuperscript{576} Regarding the latter one may think of a situation in which a child is confined solitarily or when he suffers from harmful or severe forms of bullying or misbehaviour of other inmates. Another situation can be the temporary placement of a child with mental health problems in a regular institution awaiting placement in a specialized institution (rule 53 JDLs). In addition, uncertainty about this future placement may also lead to injurious consequences to his physical or mental health.

\textsuperscript{577} Cf rule 25 (2) SMR, which does not mention ‘hunger strike’.

\textsuperscript{578} See for more on independent supervision para. 3.11.
that this should subsequently lead to action, implying transfer of the child to an appropriate hospital or institution or to appropriate treatment inside the current institution. As a minimum the well-being of the child may benefit from psychological assistance.579

In light of the general well-being of the child, the medical officer according to the SMR also has the general task to inspect ‘[t]he quantity, quality, preparation and service of food’, ‘[t]he hygiene and cleanliness of the institution and the prisoners’, ‘[t]he sanitation, heating, lighting and ventilation of the institution’, ‘[t]he suitability and cleanliness of the prisoner’s clothing and bedding’, and ‘[t]he observance of the rules concerning physical education and sports, in cases where there is no technical personnel in charge of these activities’.580 Thus, the SMR stipulate a broad responsibility for the medical officer. This requires frequent, if not permanent, presence of the medical officer in the institutions.

Finally, the use of medication inside the institution should be addressed here. ‘The administration of any drug should always be authorized and carried out by qualified medical personnel’, according to rule 55 JDLs, and ‘[m]edicines should be administered only for necessary treatment on medical grounds and, when possible, after having obtained the informed consent of the juvenile concerned’. The use of the wording ‘when possible’ indicates recognition of potential situations in which a child’s informed consent cannot be obtained, for example if his medical condition does not allow consultation of the child. Medical treatment thus can imply the administration of medication without consent (and maybe even against the child’s will). This ‘forced medication’ is a serious limitation of the child’s privacy and physical integrity, and calls for additional safeguards.581 One should prevent abuse of ‘health care’, used against the interests of the child. The UN Violence Study, for example, reported that ‘[d]rugs may be used to control children’s behaviour and make them more “compliant”’, leaving them less able to defend themselves against violence’.582 The JDLs provide requirements regarding the use of force (or restraint) against the child in rules 63 and 64 JDLs; force may only be used in exceptional cases, as a measure of last resort and only if explicitly authorized and specified by law and regulation (rule 64 JDLs; see for more details para. 3.10.2; cfr art. 16 CRC).

579 According to rule 81 JDLs each institution should have ‘counselors, social workers (…) and psychologists’ available.
580 Rule 26 (1) (a)-(e) SMR; the institution’s administration must take these reports into consideration and in the event that the medical officer has provided recommendation, it must ‘take immediate steps to give effect to those recommendations’, either directly or through higher authority; rule 26 (2) SMR.
581 A related issue is the issue of forced feeding (see also above regarding, e.g. the situation of a hunger strike). For more on this see, e.g. Rodley 1999, p. 300 and 303.
582 UN Violence Study 2006, p. 16-17; although, the study particularly refers to children with disabilities in residential institutions, it is not excluded that this occurs regarding children in penal institutions as well.
In addition, the child should have the right to remedy forced (medical) treatment (see rule 76 JDLs).

Rule 55 JDLs furthermore provides that medication should not be administered ‘with a view to eliciting information or a confession, as a punishment or as a means of restraint’ (cf art. 37 (a) CRC) and that children must never be used as ‘testees in the experimental use of drugs and treatment’ (cf art. 7 ICCPR).\textsuperscript{583}

Another situation may be that the child is not capable of forming his views or understanding the provided information (art. 12 CRC). In such situation the child’s parents or guardian(s) should be consulted instead. This touches the concept of the child’s evolving capacities, which should lead to parental participation regarding medical treatment in general (i.e. consultation of a general practitioner or dentist and subsequent medical treatment) depending on the child’s age and maturity (art. 5 CRC).

Medical personnel arguably covers the medical officer and other staff such as pharmacists and nurses. Qualified personnel implies that medical personnel should be qualified in general and to cope with particular situations, for example in the event of mental health disorders. In such an event, which may require the administration of specific medicines, qualified personnel implies the involvement of a youth psychiatrist. Rule 81 JDLs in general elaborates on the presence of qualified personnel which should ‘include a sufficient number of specialists such as (...) psychiatrists and psychologists’\textsuperscript{584} who should be ‘normally employed on a permanent basis’. It is interesting to note that medical officers are not mentioned here which arguably is in line with the JDLs’s preference to provide for medical care within the community as much as possible.\textsuperscript{585}

Under the ECHR the former European Commission found that article 3 ECHR included a positive obligation to provide for adequate medical treatment for detainees.\textsuperscript{586} The ECtHR has, according to Mowbray, been ‘rather cautious in

\textsuperscript{583} The JDLs do not refer to the child’s consent, which seems to rule out medical experiments with consent too.

\textsuperscript{584} The latter may also be of specific significance for the child’s well-being and for preventive health care. Rule 81 JDLs also mentions inter alia counselors and social workers.

\textsuperscript{585} Cf rule 22(1) SMR which provides that every institution must have medical services available of ‘at least one qualified medical officer, who should have some knowledge of psychiatry’. At the same time the SMR proclaim that medical services must be organized in close connection to the general health administration of the community or the state. According to rule 52 (1) SMR: ‘In institutions which are large enough to require the services of one or more full-time medical officers, at least one of them shall reside on the premises that of the institution or in its immediate vicinity.’ ‘In other institutions the medical officer shall visit daily and shall reside near enough to be able to attend without delay in cases of urgency’; rule 52 (2) SMR.

finding states have failed to provide adequate medical care for detainees.\footnote{Mowbray 2004, p. 58.} Mowbray explains: ‘Violations of this Duty under Article 3 have tended to be found where there were defects in the medical treatment combined with other unacceptable action, such as serious assaults by state agents (as in Ilhan\footnote{ECtHR, Judgment of 27 June 2000, Appl. No. 22277/93 (Ilhan v. Turkey).}) or the imposition of severe disciplinary punishment (as in Keenan\footnote{ECtHR, Judgment of 3 April 2001, Appl. No. 27229/95 (Keenan v. UK).}). The [ECtHR] has not always been strict in evaluating the significance of defects in the follow-up care of detainees (e.g. in Tas and Rehbock\footnote{ECtHR, Judgment of 14 November 2000, Appl. No. 24396/94 (Tas v. Turkey); ECtHR, Judgment of 28 November 2000, Appl. No. 29462/95 (Rehbock v. Slovenia).}). Whilst, from the perspective of states, they can best seek to satisfy this positive obligation by ensuring that they provide medical care as soon as possible after it is requested by the detainee (Rehbock), or it becomes apparent that the detainee is unwell (Ilhan), and that where necessary specialist medical experts are involved in the treatment of detainees (Kudla\footnote{ECtHR, Judgment of 26 October 2000, Appl. No. 30210/96 (Kudla v. Poland).}).’\footnote{Ibid., p. 59.}

3.9.4 Education, Leisure and Recreational Activities

3.9.4.1 Introduction

The institution’s daily programme is another aspect of the (quality of the) conditions of deprivation of liberty and its significance is prompted by the fact that the stay in an institutional setting must serve the child’s eventual reintegration into society (art. 40 (1) CRC). It is assumed that this objective is not served by the (mere) placement of children in private cells or in dorms. The CPT for instance has considered that juvenile detention centres should be specifically designed in order to meet the needs of children. Failure to do so may be detrimental.\footnote{Morgan & Evans 2001, p. 125.} According to the CPT: ‘(…) it is especially harmful for juveniles, who have a particular need for physical activity and intellectual stimulation. Juveniles should be offered a full programme of education, sport, vocational training, recreation and other purposeful activities. Physical education should constitute an important part of the programme’.\footnote{CPT 9th General Report, para. 31.} Moreover, the principle that a child is entitled to all rights under the CRC in conjunction with the desirability of continuity of the child’s upbringing (art. 20 (3) CRC) requires a daily programme similar to every other child in society. As a point of departure this implies contact with the other inmates through the programme and through daily activities. In particular, it includes (the right to)

\footnotesize

\begin{thebibliography}{99}
\bibitem{587} Mowbray 2004, p. 58.
\bibitem{588} ECtHR, Judgment of 27 June 2000, Appl. No. 22277/93 (Ilhan v. Turkey).
\bibitem{589} ECtHR, Judgment of 3 April 2001, Appl. No. 27229/95 (Keenan v. UK).
\bibitem{590} ECtHR, Judgment of 14 November 2000, Appl. No. 24396/94 (Tas v. Turkey); ECtHR, Judgment of 28 November 2000, Appl. No. 29462/95 (Rehbock v. Slovenia).
\bibitem{591} ECtHR, Judgment of 26 October 2000, Appl. No. 30210/96 (Kudla v. Poland).
\bibitem{592} Ibid., p. 59.
\bibitem{593} Morgan & Evans 2001, p. 125.
\bibitem{594} CPT 9th General Report, para. 31.
\end{thebibliography}
education and vocational training, sports and recreation. This paragraph will address these parts of daily institutional life.595

3.9.4.2 Education

Article 28 CRC embodies the fundamental right to education for all children.596 Based on this provision States Parties are under the obligation to provide in particular for compulsory primary education,597 free of charge for all children. According to article 4 CRC States Parties must implement this right to the maximum extent of its available resources; the right to education must be implemented ‘with a view to achieving [it] progressively’ (art. 28 (1) CRC).Arguably, this implies that States Parties are under the ‘status quo / stand still’ obligation, meaning that a worsening of the implementation of this basic right is not acceptable. Once a certain level of implementation has been reached that level becomes the new standard.598

The States Parties’ responsibilities regarding secondary and higher education are less clear. Article 28 (1) (b) CRC calls for an encouragement of the development of different forms of secondary education, which should inter alia be made available and accessible to every child. Furthermore, appropriate measures must be taken, such as the introduction of free education. According to Vermeulen, States Parties cannot be considered to be under an obligation to realize secondary education free of charge.599 Higher education must be made accessible only ‘on the basis of capacity by every appropriate means’. In practice, however, this may not be

595 Due to the fact that the daily programme for children should be different from the programme for adults, for example with an emphasis on education, main guidance in this paragraph is provided by the JDLs. The SMR address the components of the daily programme per group of prisoners (inter alia convicted and unconvicted prisoners) separately and respectively in rule 71ff (work) and rule 77ff (education and recreation), and in rule 89 (work) and rule 90ff (recreation). The most important difference is that sentenced prisoners according to rule 71 (2) SMR are required to work (although ‘prison labour must not be of an afflictive nature’; rule 71 (1) SMR; cf e.g. art. 4 ECHR), while children are not (neither are unconvicted prisoners according to rule 89 SMR). Nevertheless, the rules regarding work provided in rule 71ff SMR enshrine many detailed rules which can be of significance in the event that children choose to work. These rules include for example the observance of safety and health regulations. However, most of these rules are not suitable for labour in youth institutions.

596 Cf art. 26 UDHR and art. 13 ICESCR as the foundation of art. 28 CRC; Detrick 1999, p. 475-476. Cf e.g. art. 13 of the Protocol of San Salvador, art. 17 (1) Banjul Charter and art. 2 Protocol no. 1 to the ECHR. The added value of the CRC provision is that it provides that States Parties are under the obligation to ‘[m]ake educational and vocational information and guidance available to all children’ and to ‘[t]ake measures to encourage regular attendance at schools and the reduction of drop-out rates’; art. 28 (1) (d) and (e) CRC (cf art. 11 ACRWC).

597 There seems to be a paradox between the right to education and primary education that is compulsory. The term ‘compulsory’ implies that children may not be refrained the enjoyment of primary education; Vermeulen 2005, p. 776 with reference to Hodgson 1996, p. 241.


599 Ibid., p. 777.
relevant to children. Many children may have passed the age of maturity before making use of higher education. Although article 28 CRC does not define the different forms of education, vocational education falls within the scope of secondary education.

This right to education applies equally to children deprived of liberty. Rule 38 JDLs provides that ‘[e]very juvenile of compulsory school age has the right to education [Italic – tl]’. This entitlement covers education that suits the needs and abilities of the child and that should be designed to prepare him for his reintegration into society.\footnote{600} If possible, education should be provided in community schools outside the institution.\footnote{601} Even if this is not possible and education takes place inside the institution, it should ‘in any case’ be provided by ‘qualified teachers through programmes integrated with the education system of the country so that, after release, juveniles may continue their education without difficulty’. Implicitly this means that the child should be enabled to obtain diplomas or educational certificates which are valid after his release. In order to avoid stigmatization it is important that diplomas or certificates awarded to children deprived of liberty should in no manner indicate that they have been incarcerated (rule 40 JDLs).

Furthermore, children of foreign origin or with particular cultural or ethnic needs should receive special attention from the institution’s administration and a right to special education should be given to children who are illiterate or who have cognitive or learning difficulties.

Although the JDLs seem to follow a non-discriminatory approach, a weak point of rule 38 seems to be that it limits the right to education to children deprived of liberty ‘of compulsory school age’.\footnote{602} This refers to the domestic legislation which is likely to differ from country to country. It stipulates equal treatment between institutionalized children and children in the community at the national level, but according to its wording its scope is limited compared to International Human Rights Law. Article 28 CRC places States Parties under the obligation to recognize the right to education for all children regardless of the domestic compulsory school age. In conjunction with article 2 CRC’s prohibition of discrimination different treatment of children deprived of their liberty from children in the community in this regard is hard to legitimize. This does not mean that article 28 CRC places

\footnote{600} This rule was included after Defence for Children International reported in its study on children in prisons that this right was not being observed in a number of countries; Van Bueren 1989, p. 3.

\footnote{601} Specifically regarding pre-trial child detainees rule 18 (b) JDLs provides that they should be enabled to ‘continue education or training’. The realization may require special leave arrangements or a form of conditional release. It may not lead to the continuation of detention, according to rule 18 (b) JDLs. It is interesting that rule 18 JDLs explicitly states that children ‘should not be required to do so’, which may be in conflict with the (domestic) age of compulsory education (cf art. 28 (1) (a) CRC).

\footnote{602} Cf rule 77 (1) SMR which provides that ‘[t]he education of (…) young prisoners shall be compulsory’. 
States Parties under the obligation to provide free and compulsory education for each child, but they should provide compulsory and free primary education and ‘encourage’ forms of secondary education (including general and vocational training), which should be made available and accessible to every child, including the child deprived of his liberty (art. 28 (1) (a) and (b) CRC.

Rule 38 JDLs should be interpreted in light of this CRC provision (see also GC No. 10, para. 89 as highlighted below). Additionally, rule 39 JDLs provide that children older than the compulsory school age ‘should be permitted and encouraged’ to continue their education if they wish to and the institution should do its utmost to provide them with ‘appropriate educational programmes’.

In light of the institutions’ assignment to prepare every child well for his return to society, they (or high authority responsible for institutions) are under the duty to provide educational facilities as part of the daily programme (art. 40 (1) jo. 28 CRC; see below). Moreover, the ‘needs and abilities’ of the child require an individual assessment of the level of the child’s education which facilitates the development of an individualized programme. In light of this, ‘[e]very detention facility should provide access to a library that is adequately stocked with both instructional and recreational books and periodicals suitable for juveniles’. Subsequently the administration should encourage and enable the juveniles to make full use of the library (rule 41 JDLs).

The main message of these JDLs provisions is that each child deprived of liberty should not be deprived of education, which is an essential part of the child’s eventual reintegration. This approach is defended by the CRC Committee, which proclaims that ‘[e]very child of compulsory age has the right to education suited to his/her needs and abilities, and designed to prepare him/her for return to society’ (GC No. 10, para. 89). The child’s needs and abilities are determined to a certain extent by his already received or completed education. In this regard it is interesting to note that article 13 (2) (d) ICESCR provides that if children have not had the opportunity to receive or complete primary education ‘fundamental education shall be encouraged or intensified as far as possible’.

3.9.4.3 Vocational Training and Labour

Vocational training as preparation for future employment should be a right accorded to the child as part of the right to education. Although rule 42 JDLs has been formulated in a softer way – ‘[e]very juvenile should have the right to receive vocational training’ – vocational training must be considered part of the child’s right to education as enshrined in article 28 CRC and fits the objectives of deprivation of liberty under article 40 (1) CRC. Every child should be allowed to choose the type of work he would like to perform in the future, although the requirements of institutional administration and a proper vocational selection must be taken into account (rule 43 JDLs). According to the CRC Committee every child
should in addition to his right to education and when appropriate ‘receive vocational training in occupations likely to prepare him/her for future development’ (GC No. 10, para 89).

Moreover, ‘[a]ll protective national and international standards applicable to child labour and young workers should apply to juveniles deprived of their liberty’ (Rule 44 JDLs). This implies for example that training and related labour should in no manner be of an exploitative nature (art. 32 CRC).603

Rules 45 and 46 JDLs, elaborate further on labour during (youth) imprisonment. ‘Wherever possible, juveniles should be provided with the opportunity to perform remunerated labour’, according to rule 45. If possible, this should take place within the local community ‘as a complement to the vocational training provided in order to enhance the possibility of finding suitable employment when they return to their communities’. One obvious example is an internship with a local company. Again there is this explicit reference to the child’s reintegration in conjunction with the principle to establish open institutions instead of well designed, fully equipped closed facilities, substituting society and replacing the child’s community.604

The type of work should benefit the child after release and he should be trained appropriately. In order to prepare the child for ‘the conditions of normal occupational life’ the way the work will be offered in the institution ‘should resemble as closely as possible those of similar work in the community’. This should arguably be true for working hours, remuneration and responsibilities. Preferably this implies that the child should be allowed to work within the community which is likely to be his future community.

The remuneration has been worked out in rule 46 JDLs. It provides that ‘[e]very juvenile who performs work should have the right to an equitable remuneration’. This implies, at a minimum, that the remuneration should be equitable in relation to (the nature of) the labour performed.

In light of this one must take into account that the possession of too much cash money in the institution can lead to problematic situations, like inequality, violence, abuse of power, trade, etc. Therefore, an option could be to keep the remuneration in an account which will be available to the child upon his release.605 The alternative would be to limit the remuneration, which is unfavourable because

603 Cf art. 32 CRC (and also e.g. arts. 31 and 36 CRC); cf e.g. art. 4 ECHR.

604 Specifically regarding pre-trial detainees rule 18 (b) JDLs provides that children should be enabled ‘to pursue work, with remuneration (…), but should not be required to do so’ (see also above regarding education). Rule 89 SMR provides that unconvicted prisoners must be offered the opportunity to work with remuneration, but that they are not required to (contrary to convicted prisoners according to rule 71 (2) SMR).

605 See rule 46 JDLs: ‘Part of the earnings of a juvenile should normally be set aside to constitute a savings fund to be handed over to the juvenile on release’ and ‘[t]he juvenile should have the right to use the remainder of those earnings to purchase articles for his or her own use or to indemnify the victim injured by his or her offence [juvenile justice only – tl] or to send it his or her family or other persons outside the detention facility’.
Chapter 3

...it may not be equitable. Thus, the remuneration should be equitable in light of the performance and should also fit the child’s right to treatment with respect for his dignity. Work and vocational training ‘should not be subordinated to the purpose of making a profit for the detention facility or a third party’.

3.9.4.4 Aims of Education

A brief look at the aims of education indicates that the primary aim of education in general is to direct ‘the development of the child’s personality, talents and physical abilities to their fullest potential’, which includes the development of basic skills like literacy and numeracy, but also life skills such as: the ability to make well-balanced decisions; to resolve conflicts in a non-violent manner; and to develop a healthy lifestyle, good social relationships and responsibility, critical thinking, creative talents, and other abilities which give children the tools needed to pursue their options in life.606

Besides this primary objective of education, article 29 CRC provides that education must be directed towards more ‘higher’ goals, like for example the development of respect for human rights and fundamental freedoms and it should prepare the child for responsible life in free society, in the spirit of understanding, peace, tolerance, etc.607 These aims and objectives are of relevance to children deprived of their liberty in the context of juvenile justice as well and fit article 40 (1) CRC’s requirement that a child within the juvenile justice system must be treated in a manner that inter alia ‘reinforces the child’s respect for the human rights and fundamental freedoms of others’ (cf GC No. 10, para. 13). The achievement of this objective of the juvenile justice system is well served by an appropriate system of education for children deprived of liberty (see further para. 3.12).

As mentioned before, the education of the child deprived of liberty should centrally aim at his preparation for his return to society. By implication this includes the aims mentioned in article 29 CRC.

---

606 GC No. 1, para. 9. In this regard art. 17 CRC addresses the role of the mass media and States Parties’ obligation to ensure that children have access to ‘information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health; cf art. 17 (a) jo. 29 CRC and art. 13 CRC’s freedom of expression.

607 Art. 29 (1) (b)-(e) CRC. Vermeulen criticizes the CRC Committee for its too high expectations of the implementation of these aims of education as elaborated in GC No. 1. According to his view this leaves too little room for the liberty of individuals and authorities at the domestic level to establish and direct educational institutions, as acknowledged by art. 29 (2) CRC; Vermeulen 2005, p. 778-779.
3.9.4.5 Leisure and Recreational Activities

The daily programme should not only be filled with education, vocational training or labour. There should be time for leisure and recreational activities. Article 31 CRC stipulates that ‘States Parties [must] recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life [see further art. 31 (2) CRC] and the arts’. 608

Rule 47 JDLs provides that ‘[e]very juvenile should have the right to a suitable amount of time for daily free exercise, in the open air whenever weather permits, during which time appropriate recreational and physical training should normally be provided’. It is difficult to judge what constitutes ‘a suitable amount of time’; rule 21 SMR provides for a minimum of ‘one hour’ daily. However, the term daily implies that children should have the right to free exercise in the open air on a daily basis. The weather is the only legitimate reason to decline free exercise outside, according to the JDLs. 609

In light of the enjoyment of this right, the institution should provide for ‘[a]dequate space, installations and equipment’ for these activities. One can think of a playground or a gym with equipment to play basketball, soccer or other sports. 610

Furthermore, the institution ‘should ensure that each juvenile is physically able to participate in the available programmes for physical education’. To children who need it, remedial physical education and therapy should be offered, under medical supervision. The significance of physical and recreational training during the period of exercise has also been acknowledged by the SMR, which highlight this specifically for young prisoners in rule 21 (2). 611

608 In this regard art. 17 CRC aiming at the function of mass media for the dissemination of information and material of social and cultural benefit of the child, such as children’s books, art. 13 CRC’s freedom of expression and art. 29 CRC’s aims of education are also of value. For more information on art. 31 CRC see David 2006.

609 In this regard one may expect that institutions do their utmost to enable children to be outside, which may, e.g. require that there are outside facilities which can be used even if the weather is bad or that additional clothing is provided. There may be other reasons to limit the exercise of this right, when, e.g. the health situation of the child does not allow free exercise (in the open air).

610 The CPT once criticized the Dutch Youth Institution, Alexandra (in Almelo) for not having sports facilities. There was no outdoor playing field or gymnasium which was considered as ‘a serious shortcoming … bearing in mind the age ranges [14 to 16-year-olds] of those detained’; Morgan & Evans 2001, p. 126 with reference to CPT/inf (93) 15 (Netherlands), para. 111. The CPT was also critical regarding the Feltham Young Offender Institution and Remand Prison in the UK. The majority of inmates had to spend between four and eight hours out of their cells each day, but these hours were ‘too often spent on activities such as games and watching television. Further, as regards those inmates who did have an occupational activity, this was not always of a vocational nature’; Morgan & Evans 2001, p. 126 with reference to CPT/inf (96) 11 (UK), para. 148.

611 Rule 78 SMR also links recreational and cultural activities with the mental and physical health of prisoners.
Physical exercise is not the only way to partake in recreation. Moreover, it may be (seen as) part of the educational programme. Recreation can also embody other activities. Both article 31 CRC and rule 47 JDLs provide that children should have additional time for daily leisure activities and if they would like to, part of these activities should be devoted to arts, crafts skill development and participation in cultural life. In general, one could think of all kinds of activities meant to develop one’s talents (sports, music, drawing, poetry, dance or theatre) or other group or leisure activities, meant to stimulate the well-being of the child and the child as a participant in a social environment.  

Finally, it is interesting to note the presence of ‘generalised incentive schemes, which allow juveniles to attain additional privileges in exchange for displaying good behaviour’. According to Morgan & Evans '[t]he CPT has refrained from expressing a view about “the socio-educative value of such schemes”, but it is concerned that the “base-level regime” is adequate and whether the allocation of incentives by staff “includes adequate safeguards against arbitrary decision-making by staff”’.  

3.9.5 Religion

A child deprived of liberty keeps his entitlements under article 14 CRC which guarantees the child’s freedom of thought, conscience and religion (hereinafter referred to as religion). Some specific implications have been worked out in the JDLs.

Regarding the freedom of religion in particular, rule 48 provides that ‘[e]very juvenile should be allowed to satisfy the needs of his or her religious and spiritual life’. In particular, a child should be allowed to attend services or meetings provided in the institution, or he should be allowed to conduct his own services. Furthermore, the child should have possession of the necessary literature or ‘items

612 The rule that '[e]very detention facility should provide access to a library that is adequately stocked with both instructional and recreational books and periodicals suitable for juveniles' and the administration should encourage and enable children to make full use of the library (rule 41 JDLs) is of significance in this regard as well; see also rule 62 JDLs regarding newspapers, magazines, movies, etc. Cf rule 40 SMR which uses the same wording. Regarding pre-trial detainees rule 18 (c) JDLs provides that '[j]uveniles should receive and retain materials for their leisure and recreation as are compatible with the interests of the administration of justice'. A contrario, this implies that if not compatible the distribution and use of these materials can be limited. Rule 90 SMR provides that untried prisoners must be allowed to purchase books, newspapers, writing materials and other means of occupation at their own or at third parties' expense. This may be limited if required by the administration of justice or by the perseverance of good order in the institution. The latter ground is absent in the JDLs. It may be assumed that regarding untried children their best interests must be taken into account as well. One can think of the situation in which a child pre-trial detainee wants to purchase pornography.

614 Ibid., p. 126; CPT 9th General Report, para. 34.
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

of religious observance and instruction of his denomination’. Every child should also have ‘the right to receive visits from a qualified representative of any religion of his or her choice, as well as the right not to participate in religious services and freely to decline religious education, counseling or indoctrination’. Thus, every child should have the right to enjoy his right to freedom of religion (art. 14 CRC jo. rule 48 JDLs; cf e.g. art. 18 ICCPR), which includes substantive elements like access to special services or food prepared and presented according to religious and cultural requirements (e.g. kosher or halal food; rule 37 JDLs as addressed in para. 3.9.3), but also the freedom from any imposed religion or religious conviction.

The institution’s administration has the positive responsibility to provide the appointment or approval of ‘one or more qualified representatives of [a certain] religion’, the allowance ‘to hold regular services’ and ‘to pay pastoral visits in private to juveniles at their request’, if the facility houses ‘a sufficient number of juveniles’ of that religion. This can be seen as a rather pragmatic solution to the enjoyment of the every juvenile’s right to practice the religion of his choice. It is quite understandable that the enjoyment of the right to freedom of religion can cause practical problems, but it is of utmost importance to keep in mind that institutions have a special responsibility to safeguard human rights and fundamental freedoms.

3.9.6 Contact with the Family and the Wider Community

3.9.6.1 Right to Maintain Contact with the Family (Art. 37 (c) CRC)

One of the explicit particularities of the right to be treated with humanity, with respect for the inherent dignity and in a manner that takes into account the child’s needs (art. 37 (c) CRC), is that the child has the right to maintain contact with his family through correspondence and visits. It serves different objectives, including respect for the child’s and family’s family life, the child’s reintegration and the visibility of children, which is important for, for example, the prevention of detention incommunicado and ill-treatment, abuse or neglect of children – contact with the family contributes to the transparency of institutions where children are deprived of their liberty.

Although article 10 ICCPR does not entail a similar provision, the HRC has commented that ‘[a]llowing visits, in particular by family members, is also such a measure, which is required for reasons of humanity’. In Angel Estrella v. Uruguay (HRC Comm. No. 74/1980) the HRC stressed that ‘prisoners should be allowed under necessary supervision to communicate with their family and

615 Rule 41ff SMR represents a similar approach.
616 For both family and children, contact must also been seen as their mutual right to family life (see, e.g. art. 16 CRC or art. 8 ECHR).
617 HRC GC No. 9, par. 3. Interestingly, the HRC deleted this phrase in GC No. 21, which replaced No. 9.
reputable friends at regular intervals, by correspondence as well as by receiving visits'. 618

The right of the child to maintain contact with his family is not absolute. On the initiative of the representative of The Netherlands, the phrase ‘save in exceptional circumstances’ has been added. 619 The rationale behind this initiative was the assumption that a State Party ought to have discretion to set aside this principle if the child’s best interest requires doing so, for example to avoid exposing the child to bad influences. 620 It is remarkable, however, that the clause uses the wording ‘save in exceptional circumstances’, without any reference to the child’s interests. Nevertheless, Van Bueren argues that “[i]t is clear that it is an exception, which should be exercised only in accordance with the child’s best interests and not imposed as a disciplinary measure or as a means of securing the child’s cooperation”. 621

The CRC Committee has not elaborated on the specific implications of ‘exceptional circumstances’ in its General Comment on Juvenile Justice; it has provided that the exceptional circumstances that may limit the contact between the child and his family ‘should be clearly described in the law and not left to the discretion of the competent authorities’ (GC No. 10, para. 87). In other words, domestic (statutory) law should prescribe exhaustively how (e.g. limitations on visits or sending letters) and on which grounds (e.g. traumatic exposure to abusive family members) the child can be limited in his contact with his family. 622 In light of this, it is of importance to provide the child with an effective remedy to challenge such a limitation (see in general rule 76 JDLs).

Article 37 (c) CRC’s explicit provision that the child deprived of liberty has the right to maintain contact with his family, is supported by other provisions of international human rights law and fits in the requirement that a child deprived of liberty in principle must be entitled to all rights under the CRC. As mentioned in paragraph 3.2 deprivation of liberty of children implies a separation from his parents (art. 9 CRC), which places States Parties under the obligation regarding *inter alia* the child’s right to maintain personal relations and direct contact with his parents (unless contrary the child’s best interests; art. 9 (3) CRC) and to provide information on their reciprocal whereabouts (including information on illness,

---

618 Joseph, Schultz & Castan 2004, p. 285. This case dealt with the censorship of correspondence. The HRC referred to the importance of family contact by referring to art. 17 ICCPR in conjunction with article 10(1) ICCPR.


621 *Ibid.*, p. 220. *Cf* art. 9 (3) CRC and see further rules 59ff JDLs that elaborate on this requirement and rule 67 JDLs that prohibits the denial of contact with the family as a disciplinary measure.

622 It is hard to be more specific than general criteria for limitation of contact such as the enforcement of the child’s treatment programme, the child’s mental and physical development or the protection of the child or other children (see para. 4.8 for examples in Dutch law).
The latter element implies *inter alia* that the child’s parents must be informed where the child is deprived of liberty (see above para. 3.8).

As mentioned above, the maintenance of contact between the child and his family is of significance for the child’s reintegration. Its significance is confirmed by the fact that family contact is one of key principles of the JDLs (see para. 2.7.3). That not all countries are aware of the importance of the aspect of the right to humane treatment, can be derived from a number of the concluding observations of the CRC Committee. The CRC Committee has occasionally raised this issue, by ‘expressing rather general concern about the lack of access or recommending to ensure ‘regular contact’ with their families’ and by expressing its concern over the ‘“[t]he absence of a formal obligation to inform parents about the detention’ of the child’ and subsequently, ‘recommending introduction of such a provision’.” In addition, the CRC Committee stressed that “[i]n order to facilitate visits, the child should be placed in a facility that is as close as possible to the place of residence of his/her family’ (GC No. 10, para. 87).

Although this recommendation seems reasonable, it could cause tension with other objectives of the child’s deprivation of liberty, such as finding the most appropriate place. ‘As close as possible’ implies that the other relevant factors regarding placement should be taken into account as well (see para. 3.8). In this regard it is important to reiterate that article 37 (c) CRC explicitly refers to contact ‘through correspondence and visits’. This implies that if visits are not possible, for example due to the fact that the child is placed outside the vicinity of his habitual residence (and that of his parents), this does not necessarily lead to violation of article 37 (c) CRC, because it does not exclude contact through correspondence. However, if visits are not possible, the cumulative wording of article 37 (c) CRC indicates that if the child can correspond with his parents (either through mail or telephone) this does not preclude the authorities’ obligation to facilitate family visits (either in the institution or through leave; see below).

It is important to stress that it is the child who is entitled to maintain contact with his family, as part of his right to be treated in accordance with article 37 (c) CRC.

---

623 * Cf regarding art. 9 CRC Doek 2006, p. 21ff; see also para. 2.7.4.
624 * See, e.g. rule 56ff JDLs. One of the consequences of, e.g. death, serious illness or injury of a family member should be that the child ‘should be provided with the opportunity to attend the funeral of the deceased or go to the bedside of a critically ill relative’; a form of special leave embodied in rule 58 JDLs; see also rule 44 (2) SMR.
625 * Cf e.g. rule 79 JDLs according to which the child’s return to the community includes *inter alia* ‘family life’.
626 * Schabas & Sax 2006, p. 93 with reference to the concluding observations regarding the Russian Federation (CRC/C/15/Add. 4), Nigeria (CRC/C/15/Add. 61), Morocco (CRC/C/15/Add. 211, 2003), Pakistan (CRC/C/15/Add. 217) and Burkina Faso (CRC/C/15/Add. 193).
627 * This may for example imply that the child’s family should be (financially) supported, if it does not have the resources to travel all the way to the facility.
Nevertheless, the child and his parents’ mutual right to family life implies that the child’s parents have a similar right to contact as well, since deprivation of liberty implies an infringement of their family life (art. 9 CRC).

One could question whether the child’s entitlement to maintain contact with his family through visits, is limited to the reception of visits only? Or whether this includes that he should be enabled to pay a visit to his family outside the institution? No further guidance has been provided. However, in light of the JDLs’ community-based approach and the objective of reintegrating the child into society, the possibility to pay visits and participate in leave arrangements are to be recommended.

Even though article 37 (c) CRC explicitly mentions the child’s right to have contact with his family, it is considered to be in the child’s right and interests to be allowed to have contact with others as well. This is supported by the JDLs principle of integration between institution and community. One can think of relatives but one must think of legal and other assistants under article 37 (d) CRC or of inspection and supervisory bodies (see para. 3.11). In general, the child should be enabled to maintain contact with the wider community into which he eventually must reintegrate.

The CPT also finds the children’s contact with the outside world of eminent importance; because many children deprived of liberty have ‘behavioural problems related to emotional deprivation or a lack of social skills’. Contacts therefore should be promoted, instead of being restricted, for example for disciplinary purposes.

628 Cf e.g. rule 37 SMR which is clearer in this regard and explicitly provides that prisoners shall be allowed to keep contact with their family ‘both by correspondence and by receiving [italic – tl] visits’.

629 Realistically, this will be dependent on various factors, such as the phase of the imprisonment or the risk the child imposes to society as a whole or to victims or witnesses in particular. The JDLs contain rules in this regard; see below. This includes reintegration arrangements (rule 79 JDLs).

630 Rule 38 SMR provides rules for prisoners who are foreign nationals. These prisoners must be allowed reasonable facilities to communicate with ‘the diplomatic and consular representatives of the State to which they belong.’ If there are no such representatives of his State present, or if he is a refugee or a stateless person, he must be allowed to have contact with the diplomatic representative of the State that takes charge over his interests, or with ‘any national or international authority whose task it is to protect such persons.’; rule 38 (2) SMR.

631 Morgan & Evans 2001, p. 126-127. The possibility of remaining in touch with the outside world should neither be ‘restricted or denied as a disciplinary measure’ nor be limited on grounds other than ‘security concerns of an appreciable nature or considerations linked to available resources’; CPT 9th General Report, para. 34. Morgan & Evans argue that ‘[t]his suggests that contacts should be more generous than those typically allowed adults’; Morgan & Evans 2001, p. 127.
3.9.6.2 Right to Have Contact with the Wider Community

Rule 59 to 62 JDLs focus on the requirement that a child should be able to maintain contact with the community (cf GC No. 10, para. 89). Rule 59 JDLs recognizes communication with the outside world as ‘an integral part of the right to fair and humane treatment and (...) essential to the preparation of juveniles for their return to society’. It provides that ‘[e]very means should be provided to ensure that juveniles have adequate communication with the outside world’. Therefore, children should in the first place be allowed ‘to communicate with their families, friends and other persons or representatives of reputable outside organizations’. Subsequently, they should be allowed to leave the facility ‘for a visit to their home and family’ or ‘receive special permission’ to leave the detention facility for educational, vocational or other important reasons’. If the child is serving a sentence the leave arrangements should be counted as served time and should, in other words, not suspend, and eventually prolong, the sentence (rule 59 JDLs).

Rule 60ff JDLs provides for minimum standards with regard to the implementation of the right to have contact with the outside world. Concerning visits inside the institution, rule 60 JDLs provides that children should have ‘the right to receive regular and frequent visits’. These visits should be allowed to take place ‘in principle once a week and not less than once a month’ and ‘in circumstances that respect the need of the juvenile for privacy’. Furthermore, ‘[e]very juvenile should have the right to communicate in writing or by telephone at least twice a week with the person of his or her choice’.

---

632 This implies that the child should apply for special permission; for example in the event of a short leave to visit a deceased or seriously ill family member (rule 58 JDLs). Rule 59 JDLs does not provide who should decide upon an application and what should be the criteria for granting special permission. The JDLs do not answer this question and leave this to the discretion of the domestic legislator.

633 This seems to be prompted by respect for the child’s family life and should imply that the child should be allowed to correspond freely and in private with his family, unless it is not in the child’s interests to do so. It is important to stress that it is the child’s right to privacy; the term ‘need’ is rather weak.

634 See art. 37 (c) and (d) CRC. This has a strong juvenile justice connotation. By implication other legal assistance should be regarded as being included as well. Furthermore, the place where these visits take place should respect the confidential nature of these conversations. Rule 93 SMR provides that ‘[i]nterviews between the prisoner and his legal adviser may be within sight but not within the hearing of a police and institution official’. In addition, one may wonder whether visits of legal counsellors or family members should be limited by time or certain regulations regarding visiting hours. It certainly is defensible that under article 37 (d) CRC a juvenile should be able to maintain contact with his legal representative if he wishes to do so.
according to rule 61, ‘unless legally restricted’. What this legal restriction clause may entail has not been worked out. However, one could imagine that the prosecutor may want to limit the communication of a child under arrest or in pre-trial detention, on the ground that this contact may interfere negatively with the criminal investigation (i.e. for reasons of the administration of juvenile justice). Whatever the reason for any restriction, it should be based on law and by implication its use should be minimal and certainly not arbitrary. This ground for legal restriction should never be used regarding the child’s correspondence with his legal and other assistance (art. 37 (d) CRC). Moreover, the correspondence with the child’s family may only be limited in exceptional circumstances (art. 37 (c) CRC).

Finally, the institution should assist the child as necessary in exercising this right effectively and juveniles should also have the right to receive correspondence (rule 61 JDLs).

Another aspect of the right to have contact with the wider community (in the broadest sense) is the opportunity for the child to keep himself informed ‘regularly of the news by reading newspapers, periodicals and other publications, through access to radio and television programmes and motion pictures’. In addition the child should also be able to receive visits of ‘representatives of any lawful club or organization in which the juvenile is interested’ (rule 62 JDLs). A couple of final remarks should be made in this regard. Although this is not addressed explicitly in the JDLs, contact with the wider community should always respect the best interests of the child (art. 3 CRC). These best interests may require limiting the child’s contact. One can think of a situation in which a child remains in touch with people who (allegedly) caused/stimulated his criminal behaviour or in which a girl child remains in contact with her lover-boy or pimp. As mentioned earlier, the child’s right to maintain contact with his family can, based on article 37 (c) CRC itself, be limited if required by the child’s best interests. One could think of contact with parent(s) whose presence or contact may be harmful for the child’s well-being or eventual reintegration. Again, limitations should be reduced to the minimum and should not be used arbitrarily (i.e. there should be a high threshold).

635 Could telephone contact be considered a form of correspondence under article 37 (c) CRC? And does this include correspondence through new technologies such as the internet and e-mail? These forms obviously did not exist during the drafting of the JDLs, but should be utilized for communication.

636 Rule 92 SMR provides explicitly for restrictions and supervision of the contact with family and friends only if necessary ‘in the interests of the administration of justice and of the security and good order of the institution’.

637 Cf rule 18 (a) JDLs and rule 93 SMR.

638 This element can also be considered part of the child’s right to education and recreation. See also rule 39 SMR.
The second remark is related to the closed character of the institution in the context of the juvenile justice system. Taking into account the reality and purpose of this closed nature, most likely related to the administration of justice, one can imagine that there are situations in which the institution’s administration should be able to screen letters, phone calls or visitors for the benefit of the order and safety of the children inside. This screening or inspection should always be based on legal grounds and may not be used arbitrarily. However, rule 59ff JDLs do not seem to acknowledge this reality. The legal basis for such a limitation of the child’s human rights can be found in the special condition of the child.

The CPT seems to be more realistic, because it does for example acknowledge this specifically in paragraph 34 of its 9th General Report, stating that ‘any restrictions on [contact with the outside world] should be based exclusively on security concerns of an appreciable nature or considerations linked to available resources’. Although this might represent a more realistic approach, the second ground for limitation should never be used pragmatically (para. 3.13). In addition, according to Morgan & Evans ‘[t]he CPT accepts that all contacts between prisoners and the outside world must be controlled’. However, limitations must not be disproportionate or arbitrary and should be subject to review. Furthermore, they may never be used as disciplinary measures.

3.9.7 Conclusion

A child deprived of his liberty is in principle entitled to all rights under the CRC. In the first place this implies that each child deprived of liberty is entitled to the substantial rights embodied in the CRC. These were addressed in this paragraph and enshrine the right to an adequate standard of living (nutrition, clothing and housing), to health care, to education and to remain in contact with the child’s family, one of the explicit particularities of article 37 (c) CRC. During the deprivation of liberty, children fall under the care of the State and in particular of the institution’s administration. The JDLs and other international and regional human rights standards provide detailed guidance regarding the minimum implications of the primarily economic, social and cultural rights that should be guaranteed for children deprived of their liberty. Living up to these standards may, however, be regarded as a utopian dream. Therefore, one should take into account the available resources and the local level of development in order to prevent too large a difference between life inside and life outside the institution (see for more on this paragraph 3.13).
Living up to the human rights standards is however of significance for the quality of treatment that should be awarded to children deprived of liberty in the context of juvenile justice. There can be no justification for a lesser standard of living for these children. Where the special condition these children are in may require limitation of the enjoyment of fundamental rights and freedoms, the imposition of limitations of the substantial rights as previously highlighted should be used reticently. Prominent issues of limitation particularly include the child’s right to maintain contact with his family (and with the wider community as a whole), in terms of safeguarding the institution’s order and safety and most prominently the child’s best interests.

Furthermore, it is important to reiterate that the JDLs proclaim integration between life in the institution and the community, which is considered of significance for the (eventual) reintegration of the child into society, as one of the main objectives of juvenile justice. Therefore, one should not solely strive for the establishment of institutions which fully provide for all the substantive rights of the children inside. Instead, one should use the resources available in the community to guarantee each child the substantial elements of his legal status, by integrating him into institutional life.

3.10 MEASURES TO MAINTAIN ORDER IN INSTITUTIONS

3.10.1 Introduction

Arrest, detention or imprisonment of a child already implies a significant limitation of his fundamental right to liberty of the person. During deprivation of liberty there may be justifiable reasons to (further) limit the child’s freedom of movement (although not explicitly recognized in the CRC; see, e.g. art. 12 ICCPR) or his privacy, in particular his physical integrity (art. 16 CRC). However, above all, the child must be treated with humanity, with respect for his inherent dignity and in a manner that takes into account his needs as a child (art. 37 (c) CRC). Limitations are only allowed if required by the special condition of the child, while taking into account the principle of lawfulness and non-arbitrariness, including the principle of proportionality, and the child’s right to participate (art. 12 CRC). Moreover, the best interests of the child must be a primary consideration (art. 3 CRC).

As mentioned before, the UN Violence Study showed that children in closed institutions often are victims of violence as the result of illegitimate use of force or prohibited forms of ill-treatment, such as torture or other cruel, inhuman or degrading treatment or punishment (arts. 37 (a) and 19 CRC). In this regard it is important to reiterate that a child deprived of his liberty finds himself in a particularly dependent situation, often due to a lack of transparency, and therefore
become easy victims of ‘[v]iolence by institutional staff, for the purpose of “disciplining” children’.  
However, at the same time the reality is that the administration of the institution wants to maintain a certain order in the interests of (the safety of) all children and of staff working with them. It means that specific measures can be taken against an individual child whose behaviour is disruptive, a danger for others and himself. It also means that violation of the rules by a child should be addressed and that is usually done through disciplinary measures.

International Human Rights Standards provide for rules regarding the use of force or restraint and disciplinary measures, implying (far-reaching) limitations of the child’s freedom of movement, right to privacy and physical or mental integrity. Although limitations may be justifiable, they may by no means amount to violation of the child’s right to protection against prohibited treatment or punishment under International Human Rights Law (see para. 3.6). This on the one hand calls for a clear understanding of the prohibited forms of treatment or punishment during the child’s stay in the (closed) facility; on the other it requires clear specific guidance (based on clear rules) regarding the use of restraint, force or disciplinary measures (see also para. 3.13). This paragraph addresses the rules of International Human Rights Standards and provides details on their implications.

3.10.2 The Use of Restraint or Force

The first topic that should be addressed is the use of force or physical, mechanical or medical restraint. According to the CRC Committee: 'Restraint or force can be used only when the child poses an imminent threat of injury to him or herself or others, and only when all other means of control have been exhausted' (GC No. 10, para. 89). The CRC Committee has –firmly – taken the position that restraint and force may be only used as a measure of last resort and only then when the child’s best interests (or others if the child is a danger to them) require so doing. This position seems slightly narrower than for example the one represented in the JDLs. Although, rule 63 JDLs’ point of departure is that ‘[r]ecourse to instruments of restraint and to force for any purpose should be prohibited’, this may be set aside ‘in exceptional cases, where all other control methods have been exhausted and failed, and only as explicitly authorized and specified by law and regulation’ (rule 64 JDLs). The exceptional situations are mentioned explicitly: the prevention of the

---

643 UN Violence Study 2006, p. 16.
644 The use of restraint or force is not limited to the institutions or centres in which police custody, pre-trial detention or imprisonment are enforced. It may include arrest and transportation as well. See, e.g. Tobin 2001, p. 220ff for an analysis of the use of restraint in each particular stage of the juvenile justice proceedings. He also addresses the use of restraint in educational institutions or in the event of deprivation of liberty for welfare and/or medical reasons; Tobin 2001, p. 222-223.
645 Forced medical treatment has also been mentioned briefly in para. 3.9.3.
child from inflicting self-injury, injuries to others or serious destruction of property.\textsuperscript{646}

It is clear that the use of restraint or force should have its foundation in law and regulation\textsuperscript{647} and should be a measure of last resort. The wording of rule 64 JDLs implies that the institution’s administration has the burden of proof that they have exhausted all other means. The adding of the wording ‘and failed’ indicates that these means must have been tried first. This should arguably not imply that one cannot respond immediately in the most appropriate way even if it is the most far-reaching limitation. The burden of proof implies that the administration of the institution must justify (if unavoidable immediately afterwards) why it has (or had) to resort to force or restraint.

Furthermore, the JDLs provide that the use of restraint or force must be restrictive and only for the shortest possible period of time.\textsuperscript{648} This implies that the use of restraint or force should be terminated as soon as possible in light of the permitted objectives. This also indicates that these instruments may never be imposed indefinitely or for a specific term determined in advance. On the contrary, it requires a constant evaluation of whether the need for using force or restraint still exists. In addition, this implies that these instruments may never be used for disciplinary purposes.\textsuperscript{649}

Above all rules 63 and 64 JDLs call for an assessment in each individual case of the needs of the use of such far-reaching instruments, implying a serious limitation of the child’s human rights and freedoms.\textsuperscript{650}

\textsuperscript{646} The situation has not been mentioned explicitly by the CRC Committee. The SMR allow the use of restraint, besides for the prevention of self-injury, injury of others or damage to property, ‘[a]s a precaution against escape during a transfer, provided that they shall be removed when the prisoner appears before a judicial or administrative authority’ (rule 33 (a) SMR) and ‘[o]n medical grounds by direction of the medical officer’ (rule 33 (b) SMR). See also rules 64.1 and 69.1 EPR; the EPR distinguishes rules regarding the use of force and the use of restraint. The just mentioned grounds can be found in neither the JDLs nor other child rights instruments, nor in GC No. 10, which raises the question whether the use of restraint regarding children in these situations can be considered permitted. The CPT has recognized that the use of force or restraint can be inevitable on occasion to control prisoners or to safeguard the physical integrity of staff members or other inmates or to prevent serious damage to property; Morgan & Evans 2001, p. 104.

\textsuperscript{647} The EPR contains specific recommendations for the legislator regarding the establishment of procedural rules regarding the use of force; see rules 65 EPR.

\textsuperscript{648} Cf rule 34 SMR.

\textsuperscript{649} The CRC Committee explicitly stressed that force and restraint must never be used for punishment (GC No. 10, para. 89). Cf rule 33 SMR.

\textsuperscript{650} Cf Tobin 2001, p. 214. Tobin concludes with reference to rule 63 JDLs that ‘any general policy for [the use of restraints] will be in breach of international law’ and that ‘there is a presumption under international law against the use of restraints on a child’, which presumption is ‘rebuttable provided a number of requirements is satisfied’. Tobin analyzes the use of restraints, in particular leg irons and handcuffs, under International Human Rights Law; Tobin 2001.
Rule 64 JDLs furthermore, provides that the use of restraint or force must be ordered by the director of the administration.\textsuperscript{651} This makes staff members not competent to make decisions in this regard, which contributes to a certain level of objectivity and may contribute to the prevention of arbitrary decisions. Moreover, the director carries the overall (and final) responsibility for the safety and well-being of children in his institution.\textsuperscript{652}

If the director orders recourse to instruments of restraint or force he should ‘at once consult medical and other relevant personnel and report to the higher administrative authority’ (rule 64 JDLs). This requirement is of significance for the transparency of the decision-making in this regard and the need for medical or other checks and balances; although, one could wonder whether a report to the higher administrative authority really contributes to more transparency; an additional duty to report to an independent authority is recommended in this regard, by the JDLs (see below). The CRC Committee has provided that ‘the use of restraint and force, including physical, mechanical and medical restraints should be under close and direct control \textemdash \textit{italics added} of a medical and/or psychological professional’ (GC No. 10, para. 89).

In light of the transparency of the decisions and decision-making process it is furthermore important that the use of force or restraint is registered in the child’s file. The JDLs are not explicit on this, neither are the SMR.\textsuperscript{653}

International Human Rights Standards do not provide for other procedural safeguards either, such as the child’s right to be heard, including a hearing afterwards if the child is in the situation that he cannot be heard adequately before using force or restraint. However, article 12 CRC is applicable in this regard, which implies that each child capable of forming his views must be enabled to express his views regarding these matters. In this regard the JDLs do not refer to information or involvement of the child’s parents, for example regarding forced medical treatment (see para. 3.9.3).

The CPT has called for specific safeguards in its 2\textsuperscript{nd} General Report in the event that force has been used. It calls for an immediate (confidential and formally recorded) examination by a medical doctor. If restraint is imposed, the prisoner must be kept ‘under constant supervision’.\textsuperscript{654}

\textsuperscript{651} Cf rule 34 SMR. According to the SMR, a medical officer can order the use of restraint on medical grounds; rule 33 (b) SMR.

\textsuperscript{652} Note that the CRC Committee does not explicitly refer to the director’s absolute competence in this regard. Furthermore, the director’s absolute competence may meet with difficulties in practice. Cf Chapter 4.

\textsuperscript{653} Rule 19 JDLs merely provides that the child’s file includes medical records, which seems to imply that the use of restraint or force for medical reasons requires recording. Cf rule 65 (e) EPR which provides that domestic law must provide for rules \textit{inter alia} regarding reports that must be completed after the use of force.

\textsuperscript{654} CPT 2\textsuperscript{nd} General Report, para. 53. In addition, restraints should be removed at the earliest possible opportunity and never be applied as a punishment. Furthermore, a record should be kept registering ‘every instance of the use of force against prisoners’. Morgan & Evans argue that these
safeguards apply only to prisons, since it would be ‘unrealistic’ to require these from the police authorities; Morgan & Evans 2001, p. 106.

655 Cf rule 81ff JDLs; rule 46ff SMR. The CPT pointed out that ‘the best guarantee against ill-treatment of prisoners was the presence of a properly trained and thoroughly professional staff whose inter-personal skills were such that they would be able successfully to carry out their duties “without having recourse to ill-treatment”’; Morgan & Evans 2001, p. 104 with reference the CPT 2nd General Report, para. 59.

656 Cf rule 68.1 EPR. According to Tobin the use of leg irons regarding children is likely to violate International Human Rights Law, in particular the prohibition of torture, cruel, inhuman or degrading treatment or punishment and the rights to privacy, liberty and to be treated with humanity; Tobin 2001, p. 214.

657 The CPT has not explicitly specified which forms of restraint or force are acceptable or not. This is dependent on the circumstances; see Morgan & Evans 2001, p. 104ff.

658 The adoption of this rule can be regarded as one of the innovations of the JDL; Van Bueren 1989, p. 3.

659 The EPR does prohibit the carrying of ‘lethal weapons within the prison perimeter’ (rule 69.1), but allows, other weapons, including batons, if required for safety and security in order to deal with a particular incident.
Finally, the CRC Committee proclaims that ‘members of the staff who use restraint or force in violations of the rules and standards should be punished appropriately’ (GC No. 10, para. 89).660

Instruments for screening have not been addressed separately by either the JDLs or the SMR, although it is arguable that they should be regarded as a form of force (e.g. being forced to allow others to conduct a body search). The EPR does provide a set of specific rules regarding ‘Searching and controls’ of places where a prisoner lives, works or congregates, of prisoners, visitors and staff (rule 54.1ff EPR). The domestic legislator should provide procedural rules and describe the situations in which such searches are required as necessary. Furthermore, staff should be trained to carry out these searches, which imply an infringement of an individual’s privacy. This arguably calls for a proportionate use if there are no other means available to screen the prisoner. Two potential grounds for searching can be found in rule 54.3; the search may be required to detect or prevent any attempt to escape or to hide contraband.

Internal physical searches of a prisoner’s body are not allowed by prison staff (rule 54.6), but ‘intimate examination’ may only be conducted by a medical practitioner (rule 54.7). Furthermore, a search may never be humiliating or infringe the prisoner’s dignity and prisoners must therefore be searched by a staff member of the same gender only (rule 54.5).

3.10.3 Disciplinary Measures

‘Any disciplinary measures and procedures should maintain the interest of safety and an ordered community life and should be consistent with the upholding of the inherent dignity of the juvenile,’ according to rule 66 JDLs, which provides the fundamental principles regarding the imposition of disciplinary measures and procedures. In addition, disciplinary measures should be consistent with ‘the fundamental objective of institutional care’, which is ‘instilling a sense of justice, self-respect and respect for the basic rights of every person’.

Disciplinary measures, thus, should serve to safeguard safety and ordered life only and should not infringe the child’s human dignity (cf. art. 37 (c) CRC). A contrario, a disciplinary measure may only be imposed if a child has committed an act which infringes order and safety.661 In addition, it should serve the objectives of

---

660 See further para. 3.13.
661 Rule 66 JDLs is not very clear in this regard. Cf. e.g. rule 57.1 EPR: ‘Only conduct likely to constitute a threat to good order, safety or security may be defined as a disciplinary offence.’ This may be clearer. Note that the use of the word ‘likely’ implies that the institution’s administration may discipline in order to prevent an offence that may be a threat to order and safety.
deprivation of liberty, which seems to imply that the drafters of the JDLs considered discipline useful in this regard (cf. art. 40 (1) CRC).\footnote{Note that this is the only explicit reference in the JDLs to the objectives of institutional care and clearly has a juvenile justice connotation, while the JDLs apply to all forms of deprivation of liberty. Cf rule 27 SMR which provides that ‘[d]iscipline and order shall be maintained with firmness, but with no more restriction than is necessary for safe custody and well-ordered community life’.}

In stronger wording rule 67 JDLs provides that ‘[a]ll disciplinary measures constituting cruel, inhuman or degrading treatment shall [Italic – tl] be strictly prohibited’. This includes ‘corporal punishment’,\footnote{Cf art. 28 (2) CRC which stipulates that States Parties must take ‘all appropriate measures to ensure that school discipline is administered in a manner consistent with the child’s human dignity and in conformity with the present Convention’. According to the CRC Committee this implies that corporal punishment as part of the educational system is prohibited; GC no. 1, para. 8. See para. 3.6.} 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’.\footnote{Cf GC No. 10, para. 89. The SMR are more lenient in this regard. According to rule 32 (1) SMR: ‘punishment by close confinement or reduction of diet shall never be inflicted unless the medical officer has examined the prisoner first and certified in writing that he is fit to sustain it’. The same applies to forms of punishment ‘that may be prejudicial to the physical or mental health of a prisoner’; para. (2). The JDLs provide for more protection in this regard. However, it is interesting that rule 32 (3) SMR explicitly provides that a medical officer must visit prisoners on a daily basis who have been punished in a way that might damage their health, and he must advise the director to terminate or to alter the punishment if the mental or physical health of the prisoner requires to do so. The JDLs lack such a provision. The CPT has also expressed its particular concern about solitary confinement as disciplinary measure; Morgan & Evans 2001, p. 127. Resort to such a measure should be highly exceptional (!) and only for the shortest possible period of time; 9th General Report, para. 35. The CPT therefore does not exclude its use, but provides for safeguards instead. It provides that ‘in all cases, they should be guaranteed appropriate human contact, granted access to reading material and offered at least one hour of outdoor exercise every day’.} These remarks are interesting, because they give content to ‘cruel, inhuman or degrading treatment’. Other disciplinary measures ‘[t]he reduction of diet and the restriction or denial of contact with family members should be prohibited for any purpose’. Although, the JDLs use softer wording in this regard, restriction or denial of the child’s contact with family members as a disciplinary measure is inconsistent with article 37 (c) CRC, which provides the child’s right to maintain contact with his family when he is deprived of his liberty. This right can be only limited in ‘exceptional circumstances’, which implies that limitation must be required by the child’s best interests and exclude limitations through a disciplinary measure.\footnote{Van Bueren 1995, p. 220. See para. 3.9.6.} The JDLs do not exclude limitation of contact with other members of the community.

Furthermore, labour should not be imposed as a disciplinary sanction, because it must ‘always be viewed as an educational tool and a means of promoting
the self-respect of the juvenile in preparing him or her for return to the community’ (rule 67 JDLs).

Rule 67 JDLs embodies two procedural safeguards. The first safeguard is the *ne bis in idem* clause, a principle of criminal law, meaning that ‘no juvenile should be sanctioned more than once for the same disciplinary infraction’.

Secondly, ‘[c]ollective sanctions should be prohibited’. This arguably implies that no child can be disciplined for being a member of a group or for the conduct of others. It does, however, not imply that all members of a group cannot be punished separately for an infraction committed as (members of) a group. Nevertheless, collective punishment is prohibited.

There are a number of questions that could be raised here. What constitutes an act that justifies a disciplinary measure? Are other principles of substantive criminal law applicable as well, like intent, guilt, statutory defences and the capacity of being an offender (MACR)? Who is competent to order disciplinary measures? And what procedures should be followed? Instead of providing direct answers, rule 68 JDLs calls for ‘[l]egislation or regulations adopted by the competent administrative authority’ in which norms should be established concerning: (a) conduct constituting a disciplinary offence, (b) type and duration of disciplinary sanctions that may be imposed, (c) the authority competent to impose such sanctions and (d) the authority to consider appeals.

Thus, the domestic legislator must draw up legislation specifically designed for the use of disciplinary measures on children deprived of their liberty. Regarding the conduct constituting a disciplinary offence the domestic legislator should conform to rule 66 JDLs providing that disciplinary measures should serve the interests of order and safety. As mentioned above, rule 66 JDLs seems to indicate that only offences constituting a threat to order and safety legitimize a disciplinary response. Furthermore, domestic law must provide for the types and duration of disciplinary sanctions. These types may not amount to measures prohibited under International Human Rights Law, such as cruel, inhuman or degrading punishment, including corporal punishment and solitary confinement (art. 37 (a) CRC; rule 67 JDLs; see para. 3.6), and may not be in conflict with the requirement that every child must be treated with humanity and with respect for the inherent dignity of the human person (art. 37 (c) CRC; rule 66 JDLs).

666 See also rule 63 EPR.
667 The SMR do not provide for this safeguard; see rule 30 SMR.
668 This only is relevant if a child is deprived of liberty under the MACR (e.g. as part of the child protection system).
669 As with the use of restraint or force, the severity of the impact of disciplinary measures calls for a basis in (statutory) law.
Furthermore, the domestic legislator should take ‘full account of the fundamental characteristics, needs and rights of juveniles’, which implies that the legislation must be child-specific and differ from that regarding adults. This has for example implications for the duration of disciplinary sanctions (proportionality; cf e.g. rule 60.2 EPR) and for the procedural aspects, such the hearing of a child, which should be done in conformity with article 12 CRC. Moreover, the exclusion of closed or solitary confinement as disciplinary measures (see rule 67 JDLs) can be seen as child-specific since neither the SMR nor the EPR (see rule 60.5 EPR) embody a similar prohibition.670

Rule 69 and 70 JDLs provide for procedural safeguards.674 First, if misconduct is being observed, ‘a report of misconduct should be presented promptly to the competent authority’. This authority should decide on it without undue delay and after a ‘thorough examination of the case’ (rule 69 JDLs). It is likely that the group leaders or other staff member will witness most of the misconduct. Nevertheless,

670 Rodley argues that placement in a dark cell is likely to refer to solitary confinement; Rodley 1999, p. 294. Given the wording of rule 67 JDLs, which explicitly distinguishes between these forms of placement it is however more likely that it does not.

671 One can raise the question whether a group leader, security officer or other staff member should be competent to conduct an examination and order a disciplinary measure if necessary. It would fit the rationale behind rule 66ff JDLs, to avoid disabuse of disciplinary measures and to prevent the child from being punished arbitrarily to make the director primarily competent, who has more distance (i.e. a higher degree of objectivity). However, staff members need some competence in this regard as well (see, e.g. Chapter 4 in this regard).

672 The SMR lacks a similar procedural safeguard. Cf 57.2 (e) EPR which does refer to an appellate process.

673 Cf rule 60.6 EPR which explicitly provides that ‘[a] prisoner who is found guilty of a disciplinary offence shall be able to appeal to a competent and independent higher authority’.

674 Cf rule 59 EPR which also provides for similar procedural safeguards.
one can assume that if the competent authority witnesses the misconduct, he may respond to the situation immediately.\textsuperscript{675}

Second, rule 70 JDLs stipulates that disciplinary sanctions may only be imposed on children if this happens ‘in strict accordance with the terms of the law and regulations in force’.\textsuperscript{676}

In addition, a child should first be informed of the alleged infraction ‘in a manner appropriate to the full understanding of the juvenile’. This implies that the competent authority should provide information that is child-friendly and should also be translated if necessary (rule 6 JDLs).\textsuperscript{677} Again objectivity is of the utmost importance. A child should furthermore be given ‘a proper opportunity of presenting his or her defence, including the right to appeal to a competent impartial authority’.\textsuperscript{678} ‘[A] proper opportunity’ implies that the right of the child to be heard must be effective. In other words, the child should be enabled to effectively participate and express his or her views freely, if he or she is capable (art. 12 CRC). In this regard it is important to reiterate that every child deprived of liberty is entitled to legal and other assistance (art. 37 (d) CRC), which places the institution under the positive obligation to facilitate the child’s contact with his or her legal assistance. In addition, the child should be (made) aware of his or her rights.

All disciplinary proceedings should be fully recorded (rule 70 JDLs), which is of importance for the appeal procedure and in light of the inspection and supervision of institutions (see para. 3.11). Records are vital for combating ill-treatment and other violations of human rights and for improving the transparency of institutional life.\textsuperscript{679}

Finally, rule 71 JDLs states that children should not ‘be responsible for disciplinary functions except in the supervision of specified social, educational or sports activities or in self-government programmes’. The SMR represent a similar approach. According to rule 28 (1) SMR: ‘No prisoner shall be employed, in the

\begin{footnotesize}
\begin{footnotes}
\item[675] Rule 69 JDLs furthermore seems to have the point of departure that the one who witnesses misconduct and reports to the competent authority is not the competent authority himself. This could be considered another argument to make a director exclusively competent to order disciplinary measures.
\item[676] Which more or less is an open door after having provided the need for legislation.
\item[677] See earlier above regarding the information on admission. Rule 30 (3) SMR explicitly entitles the prisoner to make his defence through an interpreter, whenever necessary and practicable. The latter element weakens the prisoner’s entitlement, but is understandable in light of the practical difficulties that may occur if, e.g. a measure of discipline should be imposed during the evening or the weekend and the presence of an interpreter cannot be arranged quickly enough.
\item[678] Cf rule 30 (2) SMR.
\item[679] Cf CPT 9th General Report, para. 35. The EPR do not refer to the requirement of recording decisions in this regard. They do not refer to records and personal files at all.
\end{footnotes}
\end{footnotesize}
service of the institution, in any disciplinary capacity. The primary objective is clear; children should not act as prison guards in institutions for children. However, at the same time, the JDLs leave room for initiatives based on pedagogical approaches that favour supervision of children over other children (but children disciplining other children should not be part of such programme, e.g. ‘peer restraint’ should be prohibited).

In conclusion, the imposition of disciplinary measures limits the child’s fundamental rights and freedoms. Therefore, discipline must have its legal basis in domestic (statutory) law, which should provide for procedural safeguards as well. The JDLs provide for rules in this regard (which by and large can also be found in other international or regional human rights standards). Above all, domestic law must be child-specific and take into account the relevant children’s rights concepts (e.g. evolving capacities and participation) and the differences between children and adults, which have implications for the types of disciplinary measures and duration.

The JDLs is silent regarding the use of disciplinary measures as last resort (unlike with regard to use of force or restraint which is in principle rejected) but it may only be used as a last resort if required for the realization of objectives set by rule 66 JDLs (i.e. to maintain order and safety in an institution). One should always seek the least infringing ways, within the outer boundaries set by inter alia the prohibition of ill-treatment (art. 37 (a) CRC jo. 67 JDLs).

Finally, information for the child regarding this specific element of his procedural legal status is of eminent importance. Furthermore, it is recommended, although this is not mentioned explicitly in International Human Rights Standards, that the child be provided with the decisions affecting him in writing, with explicit reference to his right to appeal, including information on the appeal procedure.

### 3.10.4 Conclusion

Besides the fact that a child deprived of his liberty is significantly limited in one of his fundamental rights: his right to liberty of the person, there may be reason to (further) limit his rights, in particular his right to privacy, freedom of movement

---

680 Cf rule 28(2) SMR which provides that ‘[t]his rule shall not, however, impede the proper functioning of systems based on self-government under which specified social, educational or sports activities or responsibilities are entrusted, under supervision, to prisoners who are formed into groups for the purposes of treatment’.

681 The EPR explicitly provide that disciplinary measures must be used as such (rule 56.1 EPR). See also CPT 9th General Report, para. 35 in which the CPT considers that ‘resort to such a measure must be regarded as highly exceptional’. Instead one must ‘[w]henever possible’ use ‘mechanisms of restoration and mediation to resolve disputes with and among prisoners’ (rule 56.2 EPR); this could be considered an invitation for the use of restorative justice. Furthermore, the imposed disciplinary measure must be proportional (see rule 60.2 EPR).
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

and physical or mental integrity. The two most prominent limitations are the use of restraint or force and the use of disciplinary measures.

International Human Rights Standards do provide rules in this regard, but primarily call upon the domestic legislator and/or enforcement authorities to adopt legislation regarding the use of force and restraint, which should in principle be rejected, and the use of disciplinary measures. Regarding the latter the JDLs, supported by the SMR and EPR, provide detailed instructions for the legislator. One must adopt legislation, which preferably should be (statutory) legislation, providing for (a) conduct constituting a disciplinary offence, (b) type and duration of disciplinary sanctions that may be imposed, (c) the authority competent to impose such sanctions and (d) the authority to consider appeals.

Furthermore, this legislation should be child-specific, which implies that it should take into account the fact that the measures will be used against children, which requires special skills and further limitations in terms of types (corporal punishment, solitary confinement and limitation of contact with family are prohibited), duration and procedural safeguards (i.e. information, legal and other appropriate assistance and appeal).

Besides drawing up legislation, International Human Rights Standards provide some guidance regarding the enforcement. The outer limits are provided for by the prohibition of cruel, inhuman or degrading punishment (art. 37 (a) CRC; see para. 3.6) and the requirement of treatment with humanity and with respect for the child’s inherent dignity. Furthermore, the use of disciplinary measures should not interfere negatively with the objectives of deprivation of liberty (art. 40 (1) CRC). On the contrary, it should be used to contribute to ‘instilling a sense of justice, self-respect and respect for the basic rights of every person’ (rule 66 JDLs). This is certainly not supported by an institution’s administration which proves to violate the child’s fundamental rights in this regard.

Finally, it is fair to say that it is remarkable that while international human rights standards are rather detailed regarding substantial provisions, they leave much discretion with the domestic authorities when it comes to the further limitations of the rights and freedoms of a child deprived of his liberty. This makes the need for further detailed elaboration in domestic law more prominent. Furthermore, the standards are not always clear or consistent. This requires further attention in the future, for example by the CRC Committee.\footnote{See further Chapter 5.}
3.11 EFFECTIVE REMEDIES: INSPECTION, SUPERVISION AND COMPLAINTS PROCEDURES

3.11.1 Introduction

This paragraph will analyze the International Human Rights Standards relevant to the protection of the rights of the child deprived of his liberty. In order to protect the child deprived of his liberty against unlawful and arbitrary treatment or punishment, one should in the first place seek to make life inside the institution more transparent. Second, the child should have effective remedies to challenge violations of his rights and freedoms.

Rule 7 JDLs provides that ‘[w]here appropriate, States should incorporate the [JDLs] into their legislation or amend it accordingly and provide effective remedies [Italic – tl] for their breach, including compensation when injuries are inflicted on juveniles’. Furthermore, States should monitor the application of the JDLs.

The CRC does not explicitly embody the right to effective remedies, while the ICCPR does in article 2 (3).683 This general human rights provision stipulates that States Parties should ensure an effective remedy for every person whose rights or freedoms have been violated, before a competent judicial, administrative or legislative authority, even if committed by persons acting in an official capacity. This is of significance for the protection of children in institutions for violations committed by the institutions’ staff.

The CRC instead provides in rather general terms, although formulated as a positive obligation in article 3 (3) CRC, that ‘States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in de number and suitability of their staff, as well competent supervision’.684

In 1996 the CRC Committee called upon States Parties to provide complaints procedures and remedies available to the child, in particular to the child in an institution.685 The CRC Committee adopted recommendations regarding access of children to complaints procedures in 2000 and stressed the importance of periodic visits and independent monitoring of institutions.686 More recently, the UN Study

683 See also, e.g. art. 13 ECHR. Cf the HRC’s comments regarding the effective application of art. 10 (1) ICCPR in HRC GC No. 21, para. 7.
684 Cf Detrick 1999, p. 95.
685 CRC/C/58 of 20 November 1996, para. 61.
686 Hodgkin & Newell 2002, p. 546 with reference to respectively the Committee report on the twenty-fifth session, September/October 2000, CRC/C/100, p. 134 (following the General Discussion on State violence against Children) and the Committee report on the tenth session, October/November 1995, CRC/C/46, para. 229 (following the General Discussion on the
on Violence against Children concluding that children in institutions are particularly vulnerable to human rights violations and abusive practices, recommended to ‘[e]stablish effective and independent complaints, investigation and enforcement mechanisms to deal with cases of violence in care and justice systems’ and to ‘[e]nsure effective monitoring and regular access to care and justice institutions by independent bodies empowered to conduct unannounced visits, conduct interviews with children and staff in private, and investigate allegations of violence’. 687 Last but not least, the CRC Committee stressed the importance of the presence of such mechanisms for children deprived of liberty in GC No. 10 (see below).

A child deprived of his liberty should have effective remedies to combat violations of his rights. In addition, States Parties are under the obligation to supervise, inspect and/or monitor the enforcement of (inter)national legal standards. The latter element calls for the establishment of independent inspection and supervisory bodies to review (daily) practices in institutions, children’s position and legal status in practice and compliance with (inter)national law. These bodies, as well as the child’s right to family contact, serve as a window of society. 688

The above mentioned elements, inspection and supervision, and the right to file complaints, are vital for the protection of the rights of the child deprived of his liberty, as will be addressed in the following paragraph successively.

3.11.2 Inspection and Supervision

Rule 72ff JDLs aim at the establishment of an independent inspection mechanism. 689 Rule 72 JDLs provides that ‘[q]ualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should
be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative. Additionally, they should ‘enjoy full guarantees of independence in the exercise of the function’. During these visits the inspectors ‘should have unrestricted access to all persons employed by or working in any facility where juveniles are or may be deprived of their liberty, to juveniles and to all records of such facilities’. Based on this rule there should be an independent inspection mechanism that is entitled to visit the institutions regularly and unannounced to conduct inspections.

What should be the purpose of these inspections? This has been established by rule 73 JDLs. The inspections should serve to evaluate ‘compliance with the rules concerning the physical environment, hygiene, accommodation, food, exercise and medical services, as well as any other aspect or conditions of institutional life that affect the physical and mental health of juveniles’. By implication this includes the use of force or restraint and the imposition of disciplinary measures, which may not be in contradiction with the child’s physical and mental health (see, e.g. rule 66 JDLs).

In order to be able to conduct these inspections, rule 73 JDLs stipulates that qualified medical officers attached to the inspecting authority or the public health services should participate in the inspections. The JDLs do not provide for any other requirement regarding the composition of the inspection authority. Furthermore, ‘[e]very juvenile should have the right to talk in confidence to any inspecting officer’ (rule 73 JDLs). The CRC Committee urges the independent and qualified inspectors to place ‘special emphasis on holding conversations with children in the facilities, in a confidential setting’ (GC No. 10, para. 89).

The inspecting authority should be required to submit a report on the findings, after completion of the inspection (rule 74 JDLs). This report should include an evaluation on the question whether the detention facility is in compliance with the JDLs and with ‘relevant provisions of national law’. The confidentially proclaimed by rule 73 JDLs and by the CRC Committee means that the report does not contain any particularity on the child or any issue addressed during his conversation with the child. This also implies that these inspections do not aim at

---

690 In addition, rule 14 JDLs provides that the quality of institutions in terms of the realization of the ‘objectives of social reintegration’ should also be subject to *inter alia* regular inspections by a competent authority, not belonging to the institution.

691 *Cf* rule 36 (2) SMR which also provides that prisoners must have to opportunity to talk to the inspector – or to any other inspecting officer – without the director or other staff members being present. However, the term confidence used by the JDLs makes the provision stronger because it implies that the conversation and the issues addressed during that conversation must be and must remain confidential. In addition, it is interesting that rule 36 (2) SMR explicitly provides the right to make requests and to file complaints to the inspector of prisons during his inspections, which seems to aim at a more formal way of communicating.

692 *Cf* art. 3 (3) CRC.
addressing individual complaints but at assessing compliance with the JDLs and domestic law.

The report should also contain ‘recommendations regarding any steps considered necessary to ensure compliance’ as mentioned before. If the inspector discovers any indications that legal provisions affecting the rights of children (which includes both national and international law) or the regulations in relation to the operation of a juvenile detention facility have been violated, he should report this to the competent authorities for investigation and prosecution (rule 74 JDLs).

Neither the JDLs nor the SMR provide guidance regarding the national organization of the inspection mechanism. For example, should there be an independent supervisory body for each institution separately or one national or regional authority? Obviously, this is strongly dependent on the size and infrastructure of each State Party. In particular in the larger countries one should strive for decentralization. In any event one should realize an effective independent inspection mechanism and its effectiveness should not be hampered by organizational barriers.

The call for an independent inspection mechanism can also be found in the CPT Standards in which the CPT ‘attaches particular importance to regular visits to all juvenile establishments by an independent body (for example, a visiting committee or a judge) with authority to receive – and, if necessary, take action on – juveniles’ complaints and to inspect the accommodation and facilities’ (CPT 9th General Report, para. 36). The EPR also call for supervision of ‘conditions of detention and the treatment of prisoners by an independent body or bodies whose finding shall be made public’ (rule 93.1 EPR). The latter element refers to public scrutiny, which has not been provided for by the JDLs, but which certainly contributes to more transparency. Furthermore, it is important to stress that rule 93.2 EPR explicitly encourages national independent supervisory bodies to cooperate with international bodies entitled to visit institutions. Obviously, one could think of the CPT in light of this rule. In addition, one could think of the UN Subcommittee on Prevention of Torture, which also has a mandate to visit the places where persons are deprived of their liberty (see para. 2.5.2.1).

Under the CRC there is no such mechanism, which is a particular pity given the fact that it also lacks an individual communication procedure. A subcommittee of the CRC Committee or a special rapporteur or representative for children deprived of liberty visiting States and (inter)national institutions where children are detained in order to examine the conditions and the rights of children under International Human Rights Law and Standards, could be of particular value.

693 See also UN Violence Study 2006, p. 30.
Finally, the independence of the above mentioned inspection mechanism deserves some attention. Rule 72 JDLs provides that independence is primarily safeguarded by the fact that the authority does not belong to the institution’s administration. In addition it should ‘enjoy full guarantees of independence in the exercise of this function’. Independence also implies that the authority or the inspectors conducting the visits should not have any hierarchical link with the central institution’s administration and should not receive any payments other than reimbursement for their expenses. This leaves untouched the fact that the government itself could establish inspection mechanisms. These can however not replace the one(s) provided for by International Human Rights Standards.694 The above mentioned CPT Standards substantiate the independent body by providing that it could, for example, be a visiting committee or a judge. Finally, independence also implies that the authority and the inspectors individually are free to report (publicly) independently and are not bound by any instruction.

3.11.3 Right to Submit Requests and to File Complaints

The JDLs also provide the opportunity to make requests or to file complaints (rule 75ff JDLs). Rule 75 JDLs stipulates as a rule that ‘every juvenile should have the opportunity of making requests or complaints to the director of the detention facility and to his or her authorized representative’. This means that there should be an opportunity for children to formally communicate with the institution’s administration and the latter should facilitate this.695

In addition, rule 76 JDLs provides that ‘every juvenile should have the right to make a request or complaint, 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’.696 In essence, rule 76 JDLs proclaims that every child should have the right to file a complaint (or to make requests) to an organ outside the institution, not the institution’s administration. One could think of a request for transfer or leave or a

---

694 See, e.g. rule 92 EPR which proclaims regular inspections by a governmental agency ‘in order to assess whether [institutions] are administered in accordance with the requirements of national and international law, and the provision of the [EPR]’, besides the call for the establishment of an independent supervisory mechanism (rule 93 EPR).

695 See also rule 36 (1) SMR which stipulates that every prisoner must have such opportunity ‘each weekday’. Cf rule 70.1 EPR.

696 See also GC No. 10, para. 89. Rule 36 (3) SMR provides a similar right but requires that it must be ‘in proper form’. Moreover, rule 36 (4) SMR provides that the competent authority must deal with the request or complaint promptly and must reply to it without delay, unless it is ‘evidently frivolous or groundless’. This implies some kind of pre-assessment which can be defended for many reasons, but should by no means lead to undermining of the prisoner’s right. Cf CPT 9th General Report, para. 36 and rule 70.1 EPR. Cf rule 70 JDLs providing the right to appeal regarding the imposition of disciplinary measures. The use of the term ‘appeal’ is a bit confusing. It implies, i.e. that the child has the right to challenge the imposition of the disciplinary measure.
complaint regarding violation of his rights, for example an accusation of ill-treatment. 697

The prohibition of censorship as to substance is apparently meant to allow the child to bring all the facts and circumstances he regards as relevant to his complaint before the competent authority outside the institution. One must bear in mind that this is one of the few possibilities of the child to communicate with the outside world and to formally challenge his treatment behind bars. Depending on the nature of the request or complaint, the appropriate organ/authority should be made available. Although the JDLs do not provide examples, one can think of the central prison administration, which may be the appropriate authority to decide on a request for transfer, but is inappropriate for hearing complaints. One could also think of a complaint affecting the receipt or denial of medical treatment, with regard to which a medical authority would be appropriate only.

Rule 76 JDLs leaves questions unanswered, such as which organs should be available? Or to what extent should a child be enabled to complain or make requests? The primary objective is the establishment of a legal procedure meant to protect the child from arbitrary and unlawful treatment and to remedy violations of his legal rights. However, for an effective remedy it would have been advisable to demand explicitly that the organ competent to hear the child’s complaints should be independent from the (central) institution’s administration and at a minimum be impartial. The JDLs merely provide that ‘efforts [Italic – tl] 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 JDLs). The achievement of equitable settlements can be considered the ultimate objective in settling disputes between child and institution. It leaves room for other forms of dispute resolution, such as mediation (see, e.g. rule 70.2 EPR which proclaims the initial use of mediation if appropriate; cf rule 56.2 EPR), provided that this does not imply an undermining of the child’s right to have his complaint investigated thoroughly. 698 In this regard, one should distinguish between the objectives of dispute resolution and of granting effective remedies to address (serious) violations of the child’s human rights. Allegations of the latter nature should be taken seriously in the sense that the ultimate objective is a thorough examination of the extent to which the allegations are true, to prevent

697 See also the commentary the rule 70.1 EPR. Cf rule 77 JDLs.

698 Cf the CRC Committee’s concern with the establishment of the right to mediation for children in Dutch youth institutions; Concluding Observations of the Committee on the Rights of the Child: Netherlands, 26/10/99, CRC/C/15/add. 114, para. 25. The CRC Committee welcomed ‘the information provided on the improvements that the Youth Custodial Institutions Act will introduce to deal, as quickly as possible, with complaints regarding ill-treatment’. However, the CRC Committee also recommended ‘that due attention be given to ensuring that efforts to settle such complaints promptly through a mediation procedure will not result in less than thorough investigations’.

333
violation of children’s rights, and to remedy breaches of (inter)national law. As the CPT provides ‘[e]ffective complaints and inspection procedures are basic safeguards against ill-treatment in juvenile establishments’ (9th General Report, para. 36).

Thus, under International Human Rights Standards a child deprived of liberty is entitled to file complaints or make requests to the central prison administration or other appropriate (judicial) authorities. The JDLs do not strongly call for the establishment of an independent judicial body competent to hear complaints and issue legally binding decisions (e.g. rule 70.3 EPR does; see below). Independence and impartiality are vital for the effectiveness of the right to complain.

Although the JDLs (and other standards) proclaim independence regarding the inspection authority, it lacks such a clear claim regarding the authority competent to hear the child’s complaints. This is rather curious, because what would be the added value of a complaints procedure before an authority that cannot be considered independent? It is interesting to note that the JDLs do provide for a right to appeal before a competent impartial authority for the child who has been sanctioned for a disciplinary purpose (rule 70 JDLs). More importantly perhaps is that the CRC Committee points out that ‘[e]very child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority’ (GC No. 10, para. 89), which seems to indicate that the CRC committee requires independence in this regard.

The question of independence is only one of the questions which have not been answered by the different human rights instruments. They leave much room for the establishment of effective complaint (and request) procedures. Therefore their implementation is strongly dependent on the domestic legislator, which can be considered under an obligation to adopt legislation regarding complaints procedure(s) (see para. 3.13).

As just mentioned, neither the JDLs, nor the other Human Rights Standards provide adequate guidance regarding the procedural aspects of the right to file complaints or to make requests. The point of departure should be that the child’s right to participate as embodied in article 12 CRC must be fully protected. This implies that

---

699 According to rule 70.4 EPR a prisoner may not be punished for having made a request or for filing a complaint. The CPT Standards provide that a child is entitled to ‘confidential access to an appropriate authority’; 9th General Report, para. 36.

700 In light of this it is interesting to note that rule 36 (2) SMR provides the right to make requests and file complaints to the prison inspectors. This would be rather efficient, but the JDLs does not explicitly provide for such possibility.

701 In this regard one could argue that fair trial principles should be applicable (e.g. under art. 6 ECHR); see, e.g. the discussion in this regard concerning the complaints procedures in the Netherlands (para. 4.10).
every child who is capable of forming his own views has the right to express those views freely and that these views must be given due weight in accordance with the age and maturity of the child.

This implies that the procedure must enable the child to exercise his right to complain or make requests, while taking into account his age and maturity. The latter element implies that the child's parents have a role in this regard and should be entitled to make requests or lodge complaints on behalf of their child, with or without the consent of the child depending on his age and maturity. The JDLs do not make any reference to the concept of age and maturity and acknowledge each child as being legally capable to file complaints or make requests. Nevertheless, the JDLs stipulate that every child should have the right to request assistance in order to make a complaint from ‘family members, legal counselors, humanitarian groups or others where possible’ (rule 78 JDLs). In addition, International Law implies that the child should be (legally) assisted where necessary (art. 37 (d) CRC).

Explicit reference is also made to illiterate children. They should be provided ‘with assistance should they need to use the services of public or private agencies and organizations which provide legal counsel or which are competent to receive complaints’. Although it has not been mentioned explicitly, one may assume, based on rule 6 JDLs, that if a child does not speak or understand the language spoken in the institution, he should be assisted by an interpreter in order to be able to file a complaint and to fully participate in the complaints procedure. In this regard it is important to stress that there is no rule that prescribes that the notice of complaint should be in writing; orally filed complaints should therefore be admissible as well, which is of particular significance for illiterate children.

Finally, the JDLs are silent regarding the right to lodge an appeal after a first (initial) decision upon a request or complaint. The EPR do provide the right to appeal to an independent authority (rule 70.3), particularly for the situation in which a request is denied or a complaint is rejected.

3.11.4 Conclusion

This part of procedural rights and safeguards is of significant importance for enforcement and protection of the child’s legal status. Therefore, it is rather disappointing that these rights apparently lack careful consideration. Moreover, one could raise the question whether a complaints procedure as provided by the JDLs

---

702 The JDLs do not mention the right to make requests in this regard (see earlier para. 3.8). Cf rule 70.7 EPR. The EPR also provide that the authority competent to hear complaints must take into account any complaints from relatives of a prisoner ‘when they have reason to believe that a prisoner’s rights have been violated’ (rule 70.5). Even third parties (organizations or legal representatives) can file complaints, but only if the prisoner consents (rule 70.6 EPR).

703 Compare, e.g. rule 24 JDLs on information on admission which addresses both the illiterate child and the child who does not speak or understand the language spoken.
can be considered an effective remedy.\textsuperscript{704} In particular, the absence of rules regarding the independence and impartiality of the competent authority are weak points in this regard. So is the absence of clarity regarding the competence to issue legally binding decisions.

However, it is important to keep in mind that these rules should be interpreted in light of article 37 (c) CRC, which means that its implications should serve an effective right to humane treatment. This requires an independent supervisory system including the right to file complaints before a competent, independent and impartial body.

This has been recognized by the CRC Committee, which has pointed out that ‘[e]very child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or other proper independent authority’ (GC No. 10, para. 89). Moreover, it stresses that ‘children need to know about and have easy access to these mechanisms’ (GC No. 10, para. 89), since information regarding these rights is vital for their use.

Furthermore, a number of questions remain unanswered but should receive attention. Such as: Is there a possibility to appeal after the first decision on the complaint or request? The EPR grant the right to appeal in the situation where the complaint is rejected or the request is denied at first instance; the JDLs do not mention appeal as a second remedy.

In addition: Can the right to file a complaint be limited to certain decisions? For example only to decisions that affect the child individually? Can other procedural rules imply limitations to this right? For example by prescribing certain time limits for filing complaints? Should there be other procedural rules in order to safeguard due process in this regard? For example, regarding the composition of the authority, regarding the (public or private) hearing or regarding the decision? Also, what happens if the complaint is considered well-founded? Is the child entitled to a new decision or to compensation? The latter question has been answered by rule 7 JDLs which provides that an effective remedy includes ‘compensation when injuries are inflicted on juveniles’. However, compensation may also be appropriate in the event of any other violations of the child’s legal status, but when the child is not injured. In other words, compensation could have a wider scope than provided for by rule 7 JDLs.

Finally, it is important to stress that the right to file complaints or make formal requests leaves unaffected the fact that there are other less formal ways to address violations of the child’s rights or to settle disputes (either internally or through the independent or supervisory authority). The right to file complaints or to make requests is at the child’s disposal, but the institution’s administration (and staff) should always seek to promote the ongoing communication between them and the child in order to prevent the child finding it necessary to formally lodge a

\textsuperscript{704} See, e.g. art. 2 ICCPR.
complaint. This may however not lead to the denial of the child’s right to do so, should he so wish.

Above all, information regarding the procedural elements of the legal status of the arrest, detained or imprisoned child is of eminent importance. What is the point of having a legal status, if you are not aware of it or if you do not know how to benefit from it, how to use it and how to remedy violations of it? What is the point of having a legal status, if you are not (legally) capable of benefiting from it, using it and combating its violation? These questions should always be taken into account when considering the procedural legal status of the child. It requires information, guidance and assistance. Only then can one truly constitute, implement and safeguard the child’s legal status required by international human rights - in particular article 37 CRC, in light of the general CRC principles.

The paradox is that the institutions have the primary responsibility in this regard. They should unconditionally inform the child upon admission of his legal rights. At the same time it may not be in the institution’s interest to do so and some myths may play a role: for example, too much attention to the child’s legal status would merely ‘invite’ the child to file complaints. A myth like that can and should be tackled through stressing that information should be accompanied by education on how to benefit from the legal status in a constructive and responsible way. The adults running the institution should provide a good example in this regard, a good example which also contributes to the realization of the objectives of deprivation of liberty (art. 40 (1) CRC).

3.12 Realization of Objectives of Deprivation of Liberty

3.12.1 Introduction

Until now, this chapter has addressed the legal requirements concerning the preferably restrained use of deprivation of liberty (in the context of juvenile justice), followed by the quality of treatment that children deprived of their liberty are entitled to. In paragraph 3.3 the main principles and objectives of the administration of juvenile justice were highlighted. Deprivation of liberty as part of this system should serve these objectives. The realization of the objectives of deprivation of liberty as provided by article 40 (1) CRC forms the final key element of the legal status of children who are arrested, detained or imprisoned for (alleged) violation of criminal law.

This paragraph addresses a number of elements that are relevant to the realization of the objectives of deprivation of liberty. In the first place this sets certain requirements on the institutional climate, treatment and protection of children and daily programme (para. 3.12.2). Second, International Human Rights Standards provide certain means or instruments that foster reintegration, which could be
3.12.2 Fostering the Realization of the Objectives of Deprivation of Liberty

As pointed out in paragraph 3.3 the objectives of juvenile justice as stipulated by article 40 (1) CRC are the reinforcement of the child’s respect for human rights and fundamental freedoms of others and the child’s reintegration into society, where he can play his assumed constructive role. This calls for a pedagogical climate which takes into account the child’s needs as an independent human being in development. The right of the child to be treated with respect for his dignity and worth is apparently the driving force behind the realization of these objectives. As the CRC Committee pointed out in its General Comment on Juvenile Justice the preservation of public safety, as the legitimate aim of juvenile justice, is ‘best served by a full respect for and implementation of the leading and overarching principles of juvenile justice as enshrined in the CRC’ (GC No. 10, para. 14).

It is fair to say that this must be regarded as a direct instruction to the central institution’s administration of each State, to each particular juvenile justice institution, and to each director and staff member separately. The realization of the objectives of deprivation of liberty is strongly related to the quality of treatment inside the institution, with all its elements as addressed in paragraph 3.5ff. In particular the child’s right to maintain contact with his family (art. 37 (c) CRC; and with the wider community) is of significance in this regard.

It is also linked to the content of the programmes run in institutions, including educational programmes, which must inter alia ‘be directed to the development of respect for human rights and freedom’ (GC No. 10, para. 13; cf art. 29 (1)(b) CRC) and, if applicable, individual treatment programmes.

705 Cf GC No. 10, para. 13.
706 The HRC has mentioned a number of measures that should be taken in order to achieve the rehabilitative aim of the penitentiary system (art. 10 (3) ICCPR), such as education, vocational guidance and training programmes inside the institution and outside (HRC GC No. 21, para. 11). The HRC has also stressed that the way the prisoner has been treated is of significance for the realization of this objective; how are convicted persons dealt with individually and how are they categorized? Other relevant aspects are the use of a disciplinary system, solitary confinement and high-security detention. Finally, the conditions under which contact is ensured with the outside world (family, lawyer, social and medical services, and non-governmental organizations) are important (HRC GC no. 21, para. 12). This strives to reach the rehabilitative aim as prescribed in art. 10 (3) ICCPR and many aspects are important. Programmes after the deprivation of liberty helping prisoners to find work, a place to live, etc. are critical, but at least as important is the acknowledgement that social reintegration starts during the deprivation of liberty and is significantly influenced by the way individuals are treated by the institution’s administration. For instance, solitary confinement of a month’s duration does not contribute to the social attitude of a prisoner; neither does life imprisonment or excessively long sentences. In other words ‘the
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

principles of humane treatment and respect for human dignity set forth in art. 10(1) are indispensable prerequisites to the social rehabilitation of offenders’; Nowak 2005, p. 254.

The JDLs are also designed to serve the eventual reintegration of the child into society. As mentioned before one of its key principles is integration of the institution in the community; a community-based approach. See also rule 65ff SM R. The treatment of sentenced prisoners during their imprisonment should have the prisoners’ reintegration as its purpose. So far as the length of the sentence permits, the treatment must try to establish in him the will to lead a law-abiding and self-supporting life and enable him to do so. This includes the realistic view that if the stay is too short, this may not be reached. In addition the treatment must encourage the prisoner’s self-respect and develop his sense of responsibility; rule 66 SMR. This provides nothing new compared to the general principles as described earlier before. Rule 66 SMR, however, lists a number of possible means to achieve the purpose in concreto, like religious care, education, vocational guidance and training, social casework, employment, counselling, physical development and strengthening of moral character. These means can be used ‘in accordance with the individuals needs of each prisoner, taking into account his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence, and his prospects after release’; rule 66 (1) SMR. In sum, every prisoner should have his own individual approach that takes into account his requirements and his personal characteristics. Cf rule 102.1 EPR which provides that a prison regime must be designed to enable prisoners ‘to lead a responsible and crime-free life’. In addition to the rules regarding the prison regime, the EPR provide for specific guidance on the regime for sentenced prisoners in light of the just mentioned basic principle.

Neither the CRC, nor any of the other instruments of International Human Rights Law or Standards provide specific guidance regarding the content of these programmes to reach these objectives. States Parties have broad discretion in this regard, given the fact that they must, in order to be able to live up to this requirement, ‘adhere to the standards postulated in generally accepted theories of

More particularly, (institutional) programmes should be aligned as much as possible, with each child’s specific characteristics/background and address the child’s needs, which requires a careful assessment and preferably an individualized plan-based approach.

One should take into account that not all deprivations of liberty have a duration that allows such a careful assessment and plan-based approach. This may be highly problematic regarding, for example police custody or short periods of pre-trial detention. In particular regarding these forms of deprivation of liberty, one should foster the continuation of community contact through community-based programmes, means of suspension or night detention, which enable the child, for example, to continue school. Obviously, when imposing such programmes in the pre-trial phase, the accused child’s rights must be fully respected (e.g. presumption of innocence).

Furthermore, issues obstructing the enforcement of deprivation of liberty, such as waiting lists, should be reduced to the greatest extent possible, since they arguably have a direct negative impact on the effectiveness of institutional programmes.

708 See art. 29 CRC and GC No. 1 (para. 3.9.4); see also art. 40 (1) CRC.

707 The JDLs are also designed to serve the eventual reintegration of the child into society. As mentioned before one of its key principles is integration of the institution in the community; a community-based approach. See also rule 65ff SM R. The treatment of sentenced prisoners during their imprisonment should have the prisoners’ reintegration as its purpose. So far as the length of the sentence permits, the treatment must try to establish in him the will to lead a law-abiding and self-supporting life and enable him to do so. This includes the realistic view that if the stay is too short, this may not be reached. In addition the treatment must encourage the prisoner’s self-respect and develop his sense of responsibility; rule 65 SMR. This provides nothing new compared to the general principles as described earlier before. Rule 66 SMR, however, lists a number of possible means to achieve the purpose in concreto, like religious care, education, vocational guidance and training, social casework, employment, counselling, physical development and strengthening of moral character. These means can be used ‘in accordance with the individuals needs of each prisoner, taking into account his social and criminal history, his physical and mental capacities and aptitudes, his personal temperament, the length of his sentence, and his prospects after release’; rule 66 (1) SMR. In sum, every prisoner should have his own individual approach that takes into account his requirements and his personal characteristics. Cf rule 102.1 EPR which provides that a prison regime must be designed to enable prisoners ‘to lead a responsible and crime-free life’. In addition to the rules regarding the prison regime, the EPR provide for specific guidance on the regime for sentenced prisoners in light of the just mentioned basic principle.

339
Chapter 3

criminal sociology’, a ‘field of research that is (...) undergoing rapid development’. The CRC Committee urges States to independently and regularly evaluate juvenile justice practices in terms of effectiveness and in light of the principles set forth in the CRC, and to stimulate independent academic research regarding development in juvenile delinquency (GC No. 10, para. 99). This arguably includes the development of effective (institutional and community-based) programmes for children deprived of their liberty.

3.12.3 Specific Measures to Foster the Child’s Reintegration into Society

Besides the last described holistic concept of treatment of children during deprivation of liberty as being vital to fostering the objectives of juvenile justice, International Human Rights Standards provide certain measures and instruments that should foster the child’s reintegration into society. In general, these standards could be divided into those regarding reintegration programmes during the child’s deprivation of liberty and those affecting care after the child’s release, i.e. aftercare.

The JDLs provide a number of rules that are particularly designed for the child’s return to society. Cooperation between the institution and other authorities, such as probation, is crucial. Rule 79 JDLs provides that ‘[a]ll juveniles should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release’. To this end ‘[p]rocedures, including early release, and special courses should be devised’. This must be seen as a positive obligation on the institution, although they are dependent on other authorities. Rule 80 JDLs addresses these authorities by stating that ‘[c]ompetent authorities should provide or ensure services to assist juveniles in re-establishing themselves in society and to lessen prejudice against such juveniles’. The latter is interesting because this places the authorities under the obligation to focus also on the members of the community, who should be encouraged to adopt and accept the child again. The objectives of these services are addressed in rule 80 JDLs as well. To the maximum extent they should establish that ‘the juvenile is provided with suitable residence, employment, clothing, and sufficient means to maintain himself or herself upon release in order to facilitate successful reintegration’. It is interesting that rule 80 JDLs provides that ‘representatives of agencies providing such services710 should be consulted and should have access to juveniles while detained, with a view to assisting them in their return to the community’. The significance of the latter part of this rule is that the re-integration should already start when the child still is deprived of his liberty. As mentioned above, it therefore is a responsibility of the institution together with community services to start working together before the end of the detention comes

710 One can think of, e.g. youth probation services. Many children may in the meantime have become adults, so that the probation service for adults also has a task here.
into sight.\textsuperscript{711} This can be achieved by inviting the community services into the institution or by reaching out to the community, which fits the first underlying principle of the JDLs, integration into the community.

The SMR provide for a similar approach.\textsuperscript{712} Rule 80 SMR stresses that it is of importance that consideration be given to the prisoner’s future from the moment his sentence begins. He must be encouraged and assisted to maintain (or establish) social relations with persons or agencies outside the prison, ‘as may promote the best interests of his family and his own social rehabilitation’ (rule 80 SMR).

Concerning aftercare, rule 81 SMR provides a number of rules. Released prisoners must ‘be provided with appropriate documents and identification papers, have suitable homes and work to go to, be suitably and adequately clothed having regard to the climate and season, and have sufficient means to reach their destination and maintain themselves in the period immediately following their release’. There should be services and agencies, governmental or otherwise, that ‘assist released prisoners to reestablish themselves’ (rule 81 (1) SMR). The representatives of these agencies must have access to prisoners when they are still in prison. Their role should be incorporated into the considerations regarding the future of the prisoner from the beginning of his sentence. In other words from day one, the aftercare agencies should be involved. Coordination and centralization of the aftercare activities is considered to be of the utmost importance and should be established ‘in order to secure the best use of [the agencies] efforts’ (rule 81 (3) SMR).

The CPT Standards do not explicitly provide measures or instruments in this regard concerning children deprived of their liberty. The EPR do however provide a comprehensive rule regarding the release of sentenced prisoners, including the call for assistance ‘in good time prior to release’ in order to facilitate the transition from ‘life in prison to a law-abiding life in the community’ (rule 107.1), gradual transition (rule 107.2), pre-release programmes (rule 107.3) and cooperation with services and agencies supervising and assisting released prisoners (rules 107.4 and 107.5).\textsuperscript{713}

\textsuperscript{711} Obviously, this may be difficult when the child is (or may be) staying for a short term in the institution. However, in this case the need for reintegration should merely aim at avoiding stigmatization as much as possible. Arguably, the longer the stay the more should be invested in re-integration.

\textsuperscript{712} Although it refers to the ‘rehabilitation’ of prisoners.

\textsuperscript{713} Cf Committee of Ministers (Council of Europe), Recommendation Rec (2003) 20, para. 19 providing: ‘Preparation for the release of juveniles deprived of their liberty should begin on the first day of their sentence. A full needs and risk assessment should be the first step towards a reintegration plan which fully prepares offenders for release by addressing, in a coordinated manner, their needs relating to education, employment, income, health, housing, supervision, family and social environment.’ In addition, ‘[a] phased approach to reintegration should be adopted, using periods of leave, open institutions, early release on licence and resettlement units. Resources should be invested in rehabilitation measures after release and this should, in all cases,
3.12.4 Conclusion

The objectives of deprivation of liberty of children under juvenile justice are embodied in article 40 (1) CRC and involve teaching the child how to respect human rights and fundamental freedoms of others. At the same time the deprivation of liberty should from the beginning aim at the child’s reintegration. This calls for treatment of the child in a manner that is consistent with his sense of dignity and worth and should include education and vocational training designed to prepare the child for his return to society and to play its constructive role, which includes that he will not re-offend. Reintegration programmes should be part of the educational programme as well. In order to improve the chances of success, it is important that the programme begins during the deprivation of liberty and continues afterwards, through measures of aftercare. As part of the reintegration programme, contact with the outside world during the deprivation of liberty is crucial; so is the participation of the professionals in and around the institution and community.

3.13 STATE’S ACTION AND RESPONSIBILITIES

3.13.1 Introduction

Most of this chapter has addressed the implications of International Human Rights Law and Standards regarding deprivation of liberty of children. The implementation of human rights standards such as these is primarily a domestic matter (see also para. 2.6). Many of the CRC provisions are aimed directly towards States Parties and call upon them to ‘ensure’ that all children within their jurisdiction are entitled to the rights embodied in these provisions. The CRC’s holistic approach implies that these rights include both civil and political rights, as well as economic, social and cultural rights. In addition, the CRC includes both negative and positive obligations for States Parties. The holistic approach represented by the CRC justifies a general approach in discussing the required States’ actions and responsibilities regarding deprivation of liberty of children.

According to article 4 CRC States Parties must ‘undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the [CRC]’. A number of these measures already are already mentioned in the previous paragraphs, such as the call for adopting legislation regarding the imposition of disciplinary measures (see para. 3.10), or national sanctions against perpetrators of torture or other forms of ill-treatment (para. 3.6). There are some State actions and responsibilities that are worth mentioning briefly

---

be planned and carried out with the close co-operation of outside agencies’ (para. 20).
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

714 See also GC No. 8 and GC No. 5.

715 Cf. e.g. art. 2 ICESCR, according to which each State Party is under the obligation ‘to take steps (…) to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the [ICESCR] by all appropriate means, including particularly the adoption of legislative measures’. The ICESCR takes into account the existing differences in levels of prosperity and development. This is also of significance because the requirements of the conditions of detention and imprisonment should always keep an eye on the

separately: legislative measures, (national) awareness-raising and training, and data collection and analysis.714

Before addressing these particular elements of implementation of International Human Rights Law and Standards another issue will be addressed briefly: the implementation of International Human Rights Law and Standards in the local context.

3.13.2 Implementation of International Human Rights Standards in the Local Context

Having addressed the wide variety of implications regarding deprivation of liberty of children, one could draw the conclusion that living up to international human rights standards, in particular those regarding the treatment of children deprived of their liberty, is like a utopian dream. Given many local conditions, circumstances and levels of development, safeguarding all rights for children deprived of liberty as stipulated by International Law may be a bridge too far. It is not realistic to demand a certain quality of conditions of deprivation of liberty that differs (too much) from the living conditions in the general community. This may eventually lead to an undesirable increase of children inside the detention centres or prisons, or to a backlash against these children. At the same time a (claimed) lack of available resources may not be (ab)used as an argument to accept deplorable conditions of deprivation of liberty or to lower the level of entitlements for individuals deprived of their liberty.

As mentioned before, the CRC Committee has urged States Parties to fully implement the JDLs, while taking into account the SMR, in order to live up to the requirements of article 37 CRC (GC No. 10, para. 88). Although States Parties should do their utmost to meet these International Human Rights Standards, a number of remarks are appropriate to illuminate the context.

The CRC itself has recognized the differences between States Parties in terms of level of development and available resources. Article 4 CRC’s point of departure is that States Parties must take all appropriate legislative, administrative and other measures for the implementation of the rights embodied in the CRC. It additionally states as follows: ‘With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international cooperation.’715

343
addition, rule 16 JDLs provides that the implementation of the JDLs must (‘shall’) take place ‘in the context of the economic, social and cultural conditions prevailing in each Member State’. This prevents in the first place too high or unrealistic expectations. Moreover, it could prevent (too) large differences between life inside the child institutions and within the community. A proposed argument for not (blindly) living up to the International Human Rights Standards is that it would improve conditions of deprivation of liberty, which could lead to an increase of the number of children inside.\footnote{This is hard to defend in light of art. 37 (b) CRC’s requirement that arrest, detention and imprisonment must be used as a measure of last resort only.}

Although one could (and should) raise the (counter-)question whether one should be willing to adapt the conditions of deprivation of liberty to the living conditions outside in the community, if the latter are not adequate,\footnote{Also in light of the principle of international cooperation recognized in art. 4 CRC as well.} one should never lose sight of the living standards of the community.\footnote{This is also important for the child’s transition from an institution into the community.}

Despite this adjustment according to available resources, article 27 (3) CRC makes reference to some particular basic needs that require specific attention even if there is a lack or shortage of resources. In order to implement the right of every child to a standard of living adequate for the child’s physical, mental, spiritual, moral and social development (art. 27 (1) CRC), those responsible for the care of a child (i.e. institutions where a child is incarcerated) should receive material assistance and support programmes, ‘particularly with regard to nutrition, clothing and housing’. The HRC has taken a similar position in the case \textit{Mukong v. Cameroon} (HRC Comm. No. 458/1991, para. 9.3), in which the HRC observed, regarding the implementation of article 7 and 10 ICCPR, that ‘certain minimum standards regarding the conditions of detention must be observed regardless of the State Party’s level of development’. According to the HRC: ‘These include, in accordance with Rules 10, 12, 17, 19 and 20 of the UN Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed, and provision of food of nutritional value adequate for health and strength. It should be noted that these are the minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult.’

Where nutrition, clothing and housing seem to have been awarded priority, also in light of the requirement that every child deprived of liberty must be treated

\textit{level of prosperity in a country. According to Van Bueren art. 10 ICESCR ‘elevates the status of children by making them deserving of ‘special measures of protection and assistance’ and ‘[a]s a result states are under a duty to apportion a greater proportion of their scarce resources to implement children’s economic, social and cultural rights’; Van Bueren 1995, p. 20.}
with humanity and with respect for his inherent dignity, it is of significance to reiterate that a few rights embodied in the CRC must be implemented ‘progressively’. An important example is every child’s right to education (art. 28 (1) CRC; see above in para 3.9).

Finally, it is important to note that the CRC allows adjustment based on the economic and developmental context of each country solely with regard to the economic, social and cultural rights of the child. Civil and political rights must be respected and implemented at all times and at all costs. The main reason for this distinction is the presumption that implementing economic, social and cultural rights will affect resources much more than implementing civil and political rights – a presumption which is not necessarily accurate.719

Despite these remarks one should not lose sight of States Parties’ obligation to implement all rights, including economic, social and cultural rights, to the maximum extent. Lack of material resources do not discharge States Parties from the duty to strive for the full implementation of all International Human Rights Standards. Moreover, it may certainly not lead to discrimination between children according to status. Children deprived of their liberty should as a minimum be awarded the same rights as all other children.

3.13.3 Legislation

The implementation of International Human Rights Standards is primarily a domestic matter and States Parties are under the obligation to adopt these standards into domestic (statutory) legislation and translate them into ‘domestic rights for individuals’.720 By doing so, it can also adapt the often generally formulated standards to the local context, while taking into account its cultural and social particularities. Another effect will be that the open norms of International Human Rights Standards can be substantiated. An example of this general obligation to implement International Human Rights Standards in domestic legislation can be found implicitly in article 37 (c) CRC, which embodies the right of every child deprived of his liberty to be treated with humanity, with respect for his inherent dignity and in a child-specific manner. This calls for certain minimum conditions of deprivation of liberty, which are best safeguarded if elaborated in domestic (statutory) legislation. Legislation can provide the necessary framework in which minimum conditions are laid down and which enable the establishment of a climate in which children are treated in conformity with article 37 (c) CRC. In this regard

---

719 According to Van Bueren this may be a misunderstanding. One of the examples she uses is ‘(t)he costs of establishing and maintaining adequate safeguards for children appearing before courts and tribunals (…) can be equally as onerous on a state’s resources as providing for a child’s right to enjoy a specific economic, social or cultural right’; Van Bueren 1995, p. 20. Cf the discussion regarding the implementation of traditionally divided negative and positive obligations (para. 2.6).

the CRC Committee urges States Parties to incorporate the JDLs and as far as relevant the SMR into their national laws and regulations and to make them available in the national or regional language to all professionals, NGOs and volunteers involved in the administration of juvenile justice (GC No. 10, para. 88).

Besides the general obligation, International Human Rights Standards occasionally provide explicitly for the elaboration of certain issues in domestic legislation. Most of the relevant standards requiring further domestic elaboration have been highlighted and *inter alia* include a call for legislation regarding the use of deprivation of liberty (art. 37 (b) CRC) and the realization of the use of arrest, detention or imprisonment as measures of last resort and for the shortest appropriate period of time (art. 37 (b) CRC). Another example is the call for specific legislation regarding the use of disciplinary measures (rule 68 JDLs).

Furthermore, International Human Rights Law places States under the obligation to adopt domestic legislation in which torture or other cruel, inhuman or degrading treatment or punishment constitutes a criminal offence and which enables the prosecution of perpetrators. The CRC Committee urged States Parties to do so for example in its General Guidelines regarding the form and content of periodic reports to be submitted by States Parties,721 to adopt domestic legislation in which torture and the other forms of ill-treatment are punishable and to punish violations of this prohibition.722

Regarding corporal punishment in particular, the CRC Committee argues that States Parties must take legislative measures, which implies in the first place that there should be domestic legislation that criminalizes assault, which has proven to be the case for all States Parties. However, many countries still have legislation that provides parents or other caretakers with a defence or justification for using violence against children, for reasons of discipline. The CRC Committee stresses that the CRC requires the removal of any provision (in statute or common - case law) which allows some degree of violence against children (e.g. “reasonable” or “moderate” chastisement or correction), in their homes/families or in any other

---

721 CRC/C/58, para. 61.
722 C f Hodgkin & Newell 2002, p. 544-545 with reference to the concluding observations regarding Costa Rica, in which the CRC Committee recommended that the government of Costa Rica ‘include a provision in its domestic legislation prohibiting children from being subjected to torture and establishing appropriate sanctions against the perpetrators of torture’; CRC/C/15/Add.117, par. 18. Schabas & Sax note with reference to the HRC’s GC No. 7, para. 1 that “[a]s a general rule, criminal law systems do not require special legislation in order to deal with torture”. In this regard that the CAT merely requires that ‘acts of torture’ must be made punishable. Most countries effect this through ‘ordinary criminal law prohibitions of assault’. For example incorporating the CAT definition would basically limit the prosecutor’s options to prosecute allegations in this regard. At the same time Schabas & Sax point at the CRC Committee’s findings regarding the Dominican Republic (CRC/C/15/Add. 150, para. 28), which incorporated a clear prohibition in domestic legislation, but regarding which violations were consistently reported; Schabas & Sax 2006, p. 15.
setting’ (GC No. 8, para. 31). The very same applies to the authorization of corporal punishment in schools or other institutions, as is the practice in some States Parties (GC No. 8, paras. 30-32). With regard to traditional attitudes that permit corporal punishment against children the CRC Committee argues that ‘[i]n addition, explicit prohibition of corporal punishment and other cruel or degrading forms of punishment, in [the] civil or criminal legislation, is required in order to make it absolutely clear that it is as unlawful to hit or “smack” or “spank” a child as to do so to an adult, and that the criminal law on assault does apply equally to such violence, regardless of whether it is termed discipline or “reasonable correction”’. Furthermore, the CRC Committee finds it ‘essential’ that related, sectoral legislation prohibits the use of corporal punishment in the relevant settings as well. For example, the prohibition of corporal punishment in school adopted in education law or in detention centres or prisons, adopted in laws regulating the placement of children there (GC No. 8, paras. 33-35 and 39).

3.13.4 Awareness-raising and Training

3.13.4.1 Awareness-raising

Domestic legislation in which the JDLs and SMR are incorporated, should be available in the national or regional language to all professionals, NGOs and volunteers involved in the administration of juvenile justice. This forms part of the States Parties’ obligation to stimulate awareness-raising and training, both significant elements for the implementation of International Human Rights Standards regarding deprivation of liberty of children in the context of juvenile justice.

The CRC Committee provides, in general regarding the administration of juvenile justice, that ‘[t]o create a positive environment for a better understanding of the root causes of juvenile delinquency and a rights based approach of this social problem, the States Parties should conduct, promote and/or support educational and other campaigns to raise awareness of the need and the obligation to deal with children alleged of violating the penal law in accordance with the spirit and the letter of the CRC’ (GC No. 10, para. 96). In addition, States Parties should seek involvement both actively as passively ‘of members of parliament, NGOs and the media’ and in addition should ‘support their efforts for improvement of the understanding of a

723 The CRC Committee acknowledges the significant role of NGOs for both prevention of juvenile delinquency and administration of juvenile justice and calls upon States Parties to strive for active involvement of NGOs in the development and implementation of a comprehensive juvenile justice policy; GC No. 10, para. 95.

724 The CRC Committee does not mention children in this regard. As stressed earlier, adequate information for child (and his family) is of eminent importance for the realization of the child’s legal status.
Chapter 3

rights based approach to children who have been or are in conflict with the penal law. The CRC Committee also stresses that the involvement of children who have experience with the juvenile justice system themselves, is crucial. This all is of equal relevance for children who are deprived of liberty in the context of juvenile justice. They should not be regarded as ‘outlaws’ without entitlements. Awareness-raising arguably also implies that the children inside (closed) institutions should be made more visible. In this transparency should be realized inter alia through the establishment of independent inspection or supervisory bodies serving as the window of society (see para. 3.11). The call for awareness-raising in this regard is prompted by the presumption that the lack of transparency makes children deprived of their liberty particularly dependent and vulnerable to abusive practices and violence (and thus human rights violations).

The CRC Committee has particularly called upon States Parties to provide information on awareness campaigns launched to prevent torture or other cruel, inhuman or degrading treatment or punishment of children and on educative and training activities developed, particularly with personnel in institutions, services and facilities working with and for children, aimed at preventing any form of ill-treatment. In its General Comment on corporal punishment the CRC Committee also stressed the importance of these elements. In addition to law reform the implementation of an absolute prohibition of corporal punishment and other forms of cruel or degrading punishment, proclaimed by the CRC Committee, requires ‘awareness-raising, guidance and training’ (GC No. 8, para. 38). In this regard, the CRC Committee urges States Parties ‘to include in their periodic reports under the [CRC] information on the measures taken to prohibit and prevent all corporal punishment and other cruel or degrading forms of punishment in the family and all other settings, including on related awareness-raising activities and promotion of positive, non-violent relationships and on the State’s evaluation of progress towards achieving full respect for children’s rights to protection against all forms of violence’ (GC No. 8, para. 53).

3.13.4.2 Training of Professionals; Requirements regarding Staff

For an adequate implementation of International Human Rights Standards regarding deprivation of liberty of children, the enforcement of both international and domestic legislation is absolutely vital. For safeguarding respect for the human rights of these children, which includes a restrained (preferably no) use of deprivation of liberty and the quality of treatment of children who are nevertheless deprived of their liberty as provided for by international standards, all individuals professionally involved in the juvenile justice system should be well-trained.

725 Cfr rule 90.1 EPR which calls upon the prison authorities to ‘continually inform the public about the purpose of the prison system and the work carried out by prison staff in order to encourage better public understanding of the role of the prison in society’.


348
professionals who moreover are capable of working with children in a professional and humane way (*cf* e.g. rule 82 JDLs). This requires certain competences, which should be trained accurately and repeatedly. The content of the training is dependent on the professional’s particular role in juvenile justice. For example, as highlighted in paragraph 3.4, police officials should be trained in how they should deal with the principles of last resort, which implementation is a significant part of law enforcement. Institutional staff should be competent to provide *inter alia* the quality of treatment that meets the individual needs of the child (i.e. adolescents in development).727 Both groups of professionals should be competent to refrain from violations of the child’s human rights, such as torture or other forms of cruel, inhuman or degrading treatment.

According to the CRC Committee, the training ‘should be organized in a systematic and ongoing matter’ and provide the professionals with information ‘on the content and meaning of the provisions of CRC in general, particularly those directly relevant to their daily practice’ (GC No. 10, para. 97). It should however ‘not be limited to information about the relevant national and international legal provisions’. Instead, ‘[i]t should include information on *inter alia* the social and other causes of juvenile delinquency, the psychological and other aspects of the development of children [with special attention to girls and children belonging to minorities or indigenous peoples], the culture and the trends in the world of young people, the dynamics of group activities, and the available measures to deal with children in conflict with the penal law, in particular measures without resorting to judicial proceedings’.728

The Beijing Rules also provide that professionalism and (constant) training are vital. According to rule 22 Beijing Rules ‘the necessary professional competence of all personnel dealing with juvenile cases’ should be established and maintained by ongoing ‘professional education, in-service training, refresher courses and other appropriate modes of instruction’. The commentary to this rule provides that the (judicial) authorities competent for disposition should have received ‘a minimum training in law, sociology, psychology, criminology and behavioural sciences’, which is considered ‘the organizational specialization and independence of the competent authority’. In general, ‘professional on-the-job instruction would be minimum qualifications’, which are considered as ‘an essential element in ensuring the impartial and effective administration of juvenile justice’.

The JDLs provide for specific guidance regarding the professional skills of institutional staff (rule 81ff JDLs). Personnel in institutions should be ‘qualified and include a sufficient number of specialists such as educators, vocational instructors, counselors, social workers, psychiatrists and psychologists’ (rule 81 JDLs). According to rule 82 JDLs staff should be carefully selected and recruited ‘of every

---

727 See e.g. Burrell 1999, p. 20.
728 Note that GC No. 10 focuses on the administration of juvenile justice in a broad sense.
grade and type of personnel’. Besides professional and personal skills they should serve the institution’s ‘integrity, humanity, ability and professional capacity to deal with juveniles’. Training of institutional staff should be designed in a way that enables staff members ‘to carry out their responsibilities effectively’. In particular, institutional staff should receive training ‘in child psychology, child welfare and international standards and norms of human rights and the rights of the child, including the [JDLs]’. Furthermore, institutional staff ‘should maintain and improve their knowledge and professional capacity by attending courses of in-service training, to be organized at suitable intervals throughout their career’ (rule 85 JDLs).

To secure a professional institutional climate that respects each child’s human rights and which really contributes to the objectives of juvenile justice, institutional staff should, besides the above mentioned competence and training, ‘be appointed as professional officers with adequate remuneration’ and they should ‘continually be encouraged to fulfill their duties and obligations in a humane, committed, professional, fair and efficient manner, to conduct themselves at all times in such a way as to deserve and gain the respect of the juveniles’, and to provide juveniles with a positive role model and perspective’ (rule 83 JDLs).

Finally, rule 87 JDLs provides explicitly that institutional staff should ‘respect and protect human dignity and fundamental human rights of all juveniles’ by refraining from inflicting, instigating or tolerating any act that amounts to torture, or another form of cruel, inhuman or degrading treatment’, by opposing and combating any act of corruption and reporting it immediately to the competent authorities, by respecting the JDLs and reporting any violation, by safeguarding each child’s mental and physical health, including protection from physical, sexual and emotional abuse and exploitation, by respecting each child’s privacy and by minimizing and difference between life inside and outside the facility ‘which tend to lessen due respect for the dignity of juveniles as human beings’.730

The duty to train appropriate personnel has also been addressed by the HRC in General Comment No. 20 in which it stated that ‘[e]nforcement personnel, medical personnel, police officers and any other persons involved in the custody or treatment of any individual subjected to any form of arrest, detention or imprisonment must receive appropriate instruction and training’ (para. 10). In addition the HRC provided that the prohibition of heinous treatment under article 7 forms ‘an integral part of the operational rules and ethical standards to be followed by such persons’. Detention centres should additionally be indemnified

---

729 Professionalism also calls for a certain organizational structure; see rule 84 JDLs. Rule 86 JDLs provides for specific qualifications of the director of a facility.
730 Cf rule 46ff SMR; cf also rule 71ff EPR for a comprehensive set of rules regarding the work of prisons (rule 71ff), selection of prison staff (rule76ff), training of prison staff (rule 81), prison management (rule 82ff) and specialist staff (rule 89).
Implications of International Human Rights Law and Standards regarding Deprivation of Liberty of Children

731 When there is no opportunity, the chance that torture will occur will be reduced. Although one should keep in mind that for torture or ill-treatment it is not necessary to have torture equipment.  

The CPT has also provided requirements regarding staff. Staff must be aware of the fact that ‘custody and care of juveniles deprived of their liberty is a particularly challenging task’ (CPT 9th General Report, para. 33). They must be committed to work with young people and should be able to guide and motivate them. Furthermore, they must be trained professionally on an ongoing basis. The CPT favours mixed gender staffing as a safeguard against ill-treatment and because ‘[i]t can have a beneficial effect in terms of both the custodial ethos and in fostering a degree of normality in a place of detention’ (CPT 9th General Report, para. 26). Furthermore, the staff should be multi-disciplinary (including teachers, trainers and psychologists), trained to work with young people and competent to respond to the individual needs of children adequately in ‘a secure educative and socio-therapeutic environment’ (CPT 9th General Report, para. 28). Finally, the management of youth institutions should consist of persons who are capable to ‘respond in an effective manner to the complex and competing demands placed upon them, both by juveniles and staff’ (CPT 9th General Report, para. 33).

3.13.4.3 Data Collection and Analysis

Finally, in the light of national awareness-raising, it is of vast importance to know enough about the juvenile justice system, and in particular about deprivation of liberty as part of it. The national government should pay attention to research on questions like: What are the particularities of youth crime and juvenile delinquency? What are the results of the programmes run in juvenile facilities? It also implies more attention to the particularities of deprivation of liberty as such. What is the number of children deprived of liberty? What is the average length of the children’s stay in detention centres? Many other significant questions can be raised in this regard.

The CRC has expressed its deep concern about the lack of collection of basic and disaggregated data ‘on inter alia the quantity and the nature of offences

---

731 Cf. e.g. para. 27 of CPT 9th General Report which addresses the practice of staff carrying batons openly. This does not contribute to fostering positive relation between staff and inmates. According to the CPT custodial staff should preferably not carry batons at all.
733 The CPT stresses that in respect for the children involved, they ‘should only be searched by staff of the same gender and that any search which requires an inmate to undress should be conducted out of the sight of custodial staff of the opposite gender’.
734 For more on the CPT’s position regarding staffing of juvenile custodial institutions see Chapter 5 of Morgan & Evans 2001.
735 See, e.g. Meuwese 2003, Cappelaere, Grandjean & Naqvi 2005 and UN Violence Study 2006 all representing studies with difficulties in providing for numbers of children deprived of liberty.
committed by children, the use and the average length of duration of pre-trial detention, the number of children dealt with by the use of measures without resorting to judicial proceedings (diversion), the number of convicted children and the nature of the sanctions imposed on them’ in States Parties’ reports (GC No. 10, para. 98). It has urged States Parties ‘to systematically collect disaggregated data relevant to the information on the practice of the administration of juvenile justice, and necessary for the development, implementation and evaluation of policies and programmes aiming at the prevention and at effective responses to juvenile delinquency in full accordance with the principles and provisions of the CRC’ (GC No. 10, para. 98).

In addition the CRC has recommended States Parties ‘to conduct regular evaluations of their practice of juvenile justice, in particular of the effectiveness of the measures taken, including measures concerning discrimination, reintegration and recidivism, and preferably carried out by independent academic institutions’.736 The CRC Committee finds it important that ‘children are involved in this evaluation and research, in particular those who have been in contact with (parts of) the juvenile justice system’.737

3.13.5 Conclusion

Without being exhaustive, this paragraph has addressed a few elements relevant to the implementation of International Human Rights Standards regarding children deprived of their liberty, which above all is a domestic matter.

Although States Parties are under the obligation to fully recognize the rights of children deprived of their liberty and implement them accordingly, one should note that the implementation of these rights must always take place within the local context with its own particularities and realities. This in particular affects a State Party’s or community’s level of development. Although the CRC represents a holistic approach, it allows mitigation regarding the implementation of economic, social and cultural rights, in light of the locally available resources. This can only be regarded as realistic and will prevent too unrealistic expectations. On the other hand nutrition, clothing and housing seem to be regarded as basic needs that should be provided as a minimum for children (or individuals in general) deprived of their liberty.

In addition, this paragraph addressed briefly and in a general way States Parties’ responsibility and required action for the implementation of International

736 GC No. 10, para. 99. The CRC Committee also stressed that ‘[r]eview, e.g. on the disparities in the administration of juvenile justice which may amount to discrimination, and developments in the field of juvenile delinquency, such as effective diversion programmes or newly emerging juvenile delinquency activities, will indicate critical points of success and concern’.

737 GC No. 10 para. 99. In addition, ‘[t]he privacy of these children and the confidentiality of their cooperation should be fully respected and protected’. The CRC Committee refers to the existing international guidelines for the involvement of children in research in this regard. Cf rule 91 EPR.
Human Rights Standards regarding deprivation of liberty. These responsibilities and actions can be divided in legislation, calling for clear (statutory) legislation in the first place, implementing and adopting the general (sometimes open) international standards into domestic law. This should serve as the point of reference for awareness-raising and setting of standards for competent professionals working in and around (closed) institutions (law enforcement, judiciary, and institution direction and staff); it is the second responsibility of States Parties. Continual training of all professionals involved is regarded as vital in all the human rights instruments and supervisory bodies. Adequate and professional staff with different relevant competences are vital for the realization of respect for and safeguarding of the rights of children within the juvenile justice system and deprived of their liberty as part of it.

Finally, States Parties are under the obligation to provide for adequate collection of disaggregated data, the analysis of which should be used as the foundation for (national) policy making and can contribute to awareness-raising and information regarding the application and implementation of legislation.

### 3.14 SOME CONCLUDING REMARKS

This chapter aimed to provide a comprehensive overview of the implications of the International Human Rights Law and Standards, relevant to deprivation of liberty of children (Central Question 1 of this study). Furthermore, it attempted to provide a modest contribution to the further exploration of these implications. Some concluding remarks will be made here.\(^{738}\)

Deprivation of liberty of children in the juvenile justice context should be approached in light of the objectives of this context as provided by article 40 (1) CRC. Every child within the juvenile justice system must be treated in a way that meets the child’s sense of dignity and worth, which is one of the core principles of International Human Rights Law (\(c\)f art. 1 UDHR and CRC’s preamble). With this principle as the point of departure, juvenile justice should aim at reinforcement of the child’s respect for human rights and freedoms of others and his reintegration into society, in order to enable him to play his assumed constructive role, which \textit{inter alia} implies that he will not re-offend. This also requires a full acknowledgment of the child as a human being in development, with specific needs and entitlements to all rights under the CRC framework, like any other child (in liberty). Deprivation of liberty of children in conflict with the law should be used in the context of these objectives, with their best interests as a primary consideration.

---

\(^{738}\) Obviously, there is much more that can be said. For more detailed conclusions and recommendations regarding the first central question of this study see Chapter 5.
International Human Rights Law and Standards clearly proclaims the ultimate restraint regarding the use of deprivation of liberty of children. This should be considered as the point of departure. A child may only be deprived of his liberty if this is a lawful and non-arbitrary measure of last resort meant to endure for the shortest appropriate period of time (art. 37 (b) CRC); this also implies that the authorities can only deprive a child of his liberty if grounded on an individual decision, tailored on the basis of the particular interests and needs of the child and the circumstances of the case. The implementation of the requirements regarding deprivation of liberty of children calls for domestic legislation, procedural safeguards (see art. 37 (d) CRC) and clear guidelines (and training) for enforcement; particular implications are dependent on the stage of the juvenile justice process.

International Human Rights Law does not prohibit the use of this (far-reaching) limitation of a child’s fundamental right to liberty of the person (see art. 9 (1) ICCPR). Provided that deprivation of liberty meets the just mentioned requirements, States Parties are placed under the obligation to provide for a high level of quality of treatment, concentrated around article 37 (c) CRC: ‘Every child deprived of liberty shall be treated with humanity and with respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.’ This implies that each child deprived of his liberty remains entitled to all rights under the CRC, a legal status that may only be limited if required by the (objectives) of deprivation of liberty and with full respect for the child’s best interests. This ‘child rights’ approach based on the doctrine of minimal limitations (i.e. no limitations, unless strictly required) must ring through each aspect of the deprivation of liberty. It includes the right to be protected against prohibited forms of ill-treatment or ill-punishment (torture or other forms of cruel, inhuman or degrading ill-treatment or punishment, including, e.g. corporal punishment and solitary confinement) or against negative influences by for example adults (art. 37 (c) CRC) or other groups of detainees. In addition, it implies that the child must be placed in a child-specific environment and that a number of administrative aspects are particularly relevant, such as placement procedures (including right to object to a certain placement or to request for transfer), information for child and family and the creation of a personal file. The child’s legal status during deprivation of liberty furthermore consists of the enjoyment of (basic) rights, including inter alia the right to an adequate standards of living (art. 27 CRC), education (art. 28 CRC) and to maintain contact with the child’s family (art. 37 (c) CRC), and protection against unlawful or arbitrary treatment through legislation regarding limitations of the child’s rights and freedoms (e.g. freedom of movement, right to privacy and physical integrity). Furthermore, each child deprived of liberty is entitled to legal remedies, which enable him to challenge violations of his legal status.

Respect for the child’s legal status as provided by International Human Rights Standards contributes to the child’s sense of dignity and worth – the driving
force behind the realization of the objectives of juvenile justice, and deprivation of liberty as part of it.

Finally, this chapter has addressed the specific means to facilitate the (gradual) return of the child to society (see JDLs and, e.g. SMR and EPR), besides the aspects of the legal status that are also meant to contribute to successful reintegration (e.g. education and vocational training). This has been followed by a general analysis of State action and responsibilities regarding the implementation of International Human Rights Law and Standards. It is clear that implementation of human rights is first of all a domestic matter, which calls _inter alia_ for domestic (statutory) legislation that takes into account local practices and realities. However, domestic legislation alone is not enough; its implementation is to a large extent dependent on those who must enforce it. Consequently, education and training of all those working in and around the juvenile justice system and the places where children are detained or imprisoned is vital for the actual protection of the rights of children deprived of their liberty.