CHAPTER 5
CONCLUSIONS AND RECOMMENDATIONS:
TOWARDS FULL RESPECT FOR THE RIGHTS OF
CHILDREN DEPRIVED OF THEIR LIBERTY

5.1 INTRODUCTION

This study aims to provide an analysis of the implications of International Human Rights Law and Standards for children (potentially) deprived of their liberty, without the ambition of being exhaustive. It includes an example of domestic legislation specifically meant for detained or imprisoned children, the Dutch Youth Custodial Institutions Act (YCIA). As pointed out in Chapter 1, the initial objective of the study was to assess this piece of recent legislation (September 2001) in light of the international human rights framework. However, the assessment of the YCIA in theory and practice, the general conclusions of which will be addressed below, illustrates that the Act could serve as an example for the implementation of the international legal standards for children deprived of their liberty.

The study has been concentrated around two central (sets of) questions:

I. What are the implications of International Human Rights Law and Standards regarding deprivation of liberty of children, in particular for the legal status of children deprived of their liberty?

II. To what extent is the Dutch Youth Custodial Institutions Act (and its practical implications) in accordance with International Human Rights Law and Standards? What lessons can be learned from the YCIA and its implementation? To what extent can the YCIA serve as an example for other domestic jurisdictions?

Many detailed conclusions have been drawn earlier in the three substantive chapters. These will not be repeated here. This concluding chapter presents the general findings of this study in a way that can provide guidance regarding the implementation of the rights of children (potentially) deprived of their liberty at the domestic level. The following paragraphs successively pay attention to the instrumental framework of the International Human Rights Law and Standards, primarily governed by the CRC, and to the value and significance of the legal framework for children deprived of their liberty (para. 5.2). Subsequently, the main points of departure and key concepts of International Human Rights Law will be addressed, affecting the decision-making process leading to deprivation of liberty of children (para. 5.3) and the legal status and the quality of treatment of children who are deprived of their liberty (para. 5.4). Each of these paragraphs will be
concluded with a summary of the legal actions recommended in Chapter 3 regarding the implementation of International Human Rights Law and Standards at the domestic level. The main conclusions regarding the Dutch legal system will be presented in paragraph 5.5, accompanied by detailed recommendations for the Dutch legislator, competent authorities (i.e. generally the Ministry of Justice and the National Agency for Correctional Institutions) and youth institutions. This chapter closes with a few concluding remarks in paragraph 5.6.

Although this study mainly focuses on deprivation of liberty of children in the context of juvenile justice, many of the general principles (and their implications) apply equally to the other forms of deprivation of liberty (see also para. 5.2.2 regarding the scope of art. 37 CRC). This is particularly true for most of the components of the legal status of the children regarding basic rights and special protection rights (see para. 5.4.3), and the general requirement that deprivation of liberty must be lawful (see para. 5.3.1). Despite differences in objectives requiring different approaches, all children deprived of liberty generally share being placed in a setting from which they cannot leave at will, being deprived of their family environment and being subject to one of the most far-reaching forms of State intervention.

5.2 THE CRC FRAMEWORK AS THE GUIDING LEGAL FRAMEWORK

5.2.1 Recognition of the Child Deprived of His Liberty by the CRC

The position of the child deprived of his liberty has gained particular attention in the relatively young International Human Rights Framework. After World War II the development of International Human Rights Law really came off the ground. In the beginning it focused on the protection of human rights of individuals against violations of the State through general, legally binding, human rights treaties. In the final quarter of the 20th Century there was growing attention to specific groups of human beings, including children and individuals deprived of their liberty. In 1989, the CRC was adopted which resulted in the first recognition of the child deprived of liberty in an international treaty (art. 37 CRC). In general, the CRC led to the recognition of the child as independent rights holder under International Human Rights Law. This UN convention – almost universally ratified – recognizes the child as a human being entitled to civil, political, social, cultural and economic rights. In addition, it acknowledges that a child is a human being in the process of development (art. 6 CRC) and, therefore, should be entitled to special provisions and special measures of protection. Before the adoption of the CRC, the child’s special position was already acknowledged in the general human rights treaties, the ICCPR and ICESCR, and previously in the 1959 Declaration of the Rights of the Child and the 1924 Declaration of Geneva. However, the CRC no longer approaches the child merely as an object of his family ‘entitled’ to special
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protection. On the contrary, it attributes to the child independent rights and their full enjoyment, free from discrimination (art. 2 CRC). In addition, it explicitly provides for the child’s right to participate, in accordance with his age and maturity (art. 12 CRC).

The recognition of the child as a rights holder has an impact on the child’s relationship with his family. The family is explicitly recognized as the environment in which a child should preferably develop. In addition, parents have the primary responsibility for their child’s upbringing and development, and the State has the positive obligation (‘to ensure’) to appropriately assist parents in their performance in this regard (art. 18 CRC). A child should, in principle, not be separated from his parents (art. 9 (1) CRC). If a child happens to be deprived of his liberty, he is entitled to maintain contact with his family (art. 37 (c) CRC; cf. art. 9 (3) CRC) and there is a mutual right to information about each other’s whereabouts (art. 9 (4) CRC). The reciprocal relationship between child and family should be interpreted in light of the child’s growing independence and assumed increasing maturity. The CRC reflects this reality by introducing the dynamic concept of the child’s ‘evolving capacities’ (art. 5 CRC), which can be considered something of a significant novelty in International Human Rights Law.

Another salient point is the concept of the child’s best interests, which must be a primary consideration in all decisions affecting children (art. 3 (1) CRC). This has implications for, for example, the above mentioned rights not to be separated from parents or to maintain contact with family during deprivation of liberty.

Thus, the CRC has led to the full recognition of the child as a rights holder under International Human Rights Law, without losing sight of his special characteristics and special needs. To this end, it contains both civil and political rights, as well as economic, social and cultural rights, embodied in substantive provisions that can be divided into three categories, referred to as the three ‘P’s’: protection, provisions and participation. These provisions apply to each child without distinction or discrimination (art. 2 CRC). As a consequence the CRC is also fully applicable to children deprived of liberty. This alone would already make the CRC the most relevant human rights instrument for children deprived of their liberty, since no other international or regional treaty contains a similar child rights approach. This leaves, however, unaffected the fact that other human rights treaties may contain particular provisions that are more conducive to the realization of the rights of the child, which makes them relevant as well (art. 41 CRC). It is argued that the 1990 ACRWC has greater potential than the CRC for the African region (e.g. given the presence of an individual communications procedure), but its value in practice still needs to be determined, and this conclusion is certainly not justified regarding the specific protection of children deprived of their liberty.
5.2.2 Article 37 CRC: Core Provision of International Human Rights Law regarding Children Deprived of Their Liberty

The CRC contains a specific provision on children deprived of their liberty which, although founded on the ICCPR in particular, has neither a predecessor nor a successor. Article 37 CRC, more in particular paragraph (b) – (d), can be regarded as the core provision of International Human Rights Law for children deprived of their liberty. It successively provides for: legal requirements of deprivation of liberty (para. (b)), the quality of treatment of children deprived of their liberty (para. (c)) and procedural safeguards (para. (d)).

Article 37 CRC represents a broad approach, which means that it applies to all forms of deprivation of liberty and consequently protects all children deprived of their liberty regardless of the context (i.e. juvenile justice, child protection/alternative care, detention of refugee or asylum seeking children, etc.). Although the CRC has not defined deprivation of liberty it certainly is defendable to use the definition embodied in rule 11 (b) JDLs, that is: ‘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’. According to this definition, which is much clearer than, for example, the rather implicit and hardly child-oriented approach of the ECtHR, it is not the location as such that determines whether a child is deprived of his liberty, nor its degree of closure (on the contrary the JDLs favours (and regulates) open institutions). Instead, it is the instruction (i.e. the order) that a child must stay in the location and is not permitted to leave at will, which determines whether a child is deprived of his liberty. This relatively broad definition can bring many different forms within the scope of the JDLs and article 37 CRC. One could think of the typical (juvenile) justice facilities: police stations, detention centres or prisons, but also of (closed or (semi-)open) residential facilities for children in need of care, borstals or psychiatric hospitals. Home confinement is not excluded either.

This broad definition has two consequences. The first one is that States Parties are under the obligation to comply with the legal requirements set by article 37 (b) CRC regarding lawfulness and non-arbitrariness (see para. 5.3), and guarantee the procedural safeguards embodied in article 37 (d) CRC (e.g. the right to legal and other appropriate assistance and to challenge the legality of the deprivation of liberty), regardless of the context of the child’s deprivation of liberty. The second consequence is that States Parties are under the obligation to guarantee each child his right to the quality of treatment stipulated by article 37 (c) CRC (i.e. treatment

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1 Art. 37 (a) CRC contains the prohibition of torture and other forms of ill-treatment, which is of particular, but not of exclusive significance for children deprived of liberty. In addition, it prohibits capital punishment and life imprisonment without parole.
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with humanity, respect for his inherent dignity and in a manner that takes into account his needs as a child; see para. 5.4).

Although, article 37 CRC is generally applicable to all forms of deprivation of liberty, the scope of the second sentence of article 37 (b), containing the requirements of last resort and shortest appropriate period of time – is deliberately limited to arrest, detention and imprisonment (i.e. deprivation of liberty in the context of juvenile justice). It is argued that this limitation in scope is on strained terms with the object and purpose of the CRC and does not correspond with the broad approach of both the other provisions of article 37 CRC and the JDLs. There certainly are substantive arguments to claim the applicability of the requirements of last resort and the shortest appropriate period of time for all forms of deprivation of liberty. Children (potentially) deprived of liberty under other (legal) systems than the juvenile justice system, should be entitled to the same protection against unlawful and arbitrary deprivation of liberty. In addition, deprivation of liberty outside the context of juvenile justice should also be used with great restraint and only after careful (individual and periodic) consideration regarding both the need for and duration of this limitation of children’s right to personal liberty. Nevertheless, the deliberate drafting intentions should not be set aside too easily. An unconditional broad interpretation of article 37 (b) CRC, second sentence, is at least legally challengeable.

The CRC Committee seems to be in favour of a broad interpretation, but since it has not yet provided explicit and unambiguous guidance in this regard, it is advisable that it clarifies its position, for example in a General Comment exclusively on deprivation of liberty of children (see recommendation XXI).

Despite the ambiguity regarding the scope of the article 37 (b) CRC, second sentence, it is clear that it is applicable to deprivation of liberty in the context of juvenile justice. Arrest, police custody, pre-trial detention and imprisonment may only be imposed as a measure of last resort and for the shortest appropriate period of time. Although the last resort principle has to some extent been recognized under the other human rights conventions (see, e.g. art. 9 (3) ICCPR and the case law of the ECtHR under art. 5 ECHR), the requirement of the shortest appropriate period of time has no equivalent at all and offers a more specific form of protection for children (potentially) deprived of their liberty, that is: it forces tailoring of the decision to deprive a child of his liberty and adjust the duration and form to the special circumstances of the case, including the best interests of the child. In this regard, it is fair to say that the CRC offers a higher level of protection for children than the other provisions of International Human Rights Law.

Note that art. 37 (b) CRC refers to the ‘shortest appropriate period of time’ and not to the ‘shortest possible period of time’; a persistent misunderstanding.
Finally, the CRC contains another core provision of International Human Rights Law that is particularly relevant for deprivation of liberty in the context of juvenile justice, namely article 40 CRC. This article, founded upon article 14 ICCPR and significantly influenced by the 1985 Beijing Rules, acknowledges, besides the child’s right to fair trial, the need for specific provisions regarding the administration of juvenile justice. It therefore contains additional child-oriented implications compared to, for example article 14 ICCPR (or regional equivalents); these implications (e.g. the setting of an MACR) have (in)direct impact on deprivation of liberty within the juvenile justice system. It is argued that the ACHR to some extent is more child-oriented than the CRC (i.e. regarding the instruction to create a separate juvenile justice system and establish separate tribunals). This may be true, but the differences are not that significant concerning deprivation of liberty of children.

5.2.3 The CRC as the Head of the Children’s Rights Family

The CRC does not stand on its own. It could be seen as the ‘head’ of the family of children’s rights instruments; a family composed of Optional Protocols, minimum standards and guidelines. Regarding juvenile justice and deprivation of liberty, the 1985 Beijing Rules and 1990 JDLs are the family’s key members. Although, they are non-binding instruments (‘soft international law’) it does not mean that they have no legal or moral value at all. In particular, the JDLs are of significance for the interpretation (and implementation) of article 37 (c) CRC on the quality of treatment of children deprived of liberty. Like the HRC has referred to inter alia the Standard Minimum Rules as one of the guiding set of standards for the implementation of article 10 (1) ICCPR (art. 37 (c) CRC’s role model and equivalent), the CRC Committee has called upon States Parties to integrate the JDLs in their domestic legal system and effectively implement them (GC No. 10, para. 88). The JDLs provide for a comprehensive and detailed set of provisions regarding administrative aspects of managing an institution, minimum living conditions and the enjoyment of specific rights, such as the right to education, health care and leisure. They also provide legal safeguards and remedies, albeit in a less comprehensive way.

The JDLs regulate in detail the living conditions and other provisions regarding economic, social and cultural rights and are more modest in its instructions regarding, for example, the prevention of unlawful or arbitrary disciplinary measures or the provision of legal remedies (see further para. 5.4).

The CRC Committee also explicitly refers to the Standard Minimum Rules as one of the relevant standards applicable to children deprived of their liberty (GC No.

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3 The 1990 Riyadh Guidelines (prevention of juvenile delinquency) should be mentioned here as well, but these are of little (direct) value for deprivation of liberty of children.
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10, para. 88; see rule 9.1, but also rule 27.1). The Standard Minimum Rules, however, are not child-oriented and are ambiguous regarding their applicability to children in institutions outside the context of juvenile justice. Nevertheless, the reference of the CRC Committee is useful, although it could have been clearer in its reference and objectives in this regard. The Standard Minimum Rules can (still) be regarded as relevant to children deprived of their liberty, because they are more comprehensive at some points than the JDLs. In addition, they are particularly relevant and of added value for article 10 (2) (a) ICCPR’s requirement that unconvicted individuals deprived of liberty must be segregated from convicted individuals and must be awarded separate treatment. Article 37 CRC lacks a similar provision and although the JDLs address the specific position of the pre-trial detainee, the Standard Minimum Rules provide more detailed guidance.

5.2.4 The Significance of the CRC Framework in Relation to Other Instruments of Human Rights Law and Standards

Although the CRC provides the core provisions of International Human Rights Law regarding children deprived of their liberty, particularly in the context of juvenile justice, there are other human rights instruments that contain provisions providing more (or better) protection. The mentioned ICCPR requirement of separation of unconvicted and convicted individuals is an example in this regard, as is article 9 (5) ICCPR, containing the right to compensation if someone has been deprived of his liberty unlawfully or arbitrarily (see also art. 5 (5) ECHR). Such human rights provisions are applicable to children in States Parties to the ICCPR because they can be considered more conducive for the realization of the rights of the child (see art. 41 CRC).

The other international human rights instruments are also of additional value for another reason. One of the significant shortcomings of the CRC is the absence of an individual communication or complaints procedure. Unlike the HRC under the ICCPR’s first optional protocol or the courts under the regional human rights treaties, the CRC Committee does not have the competence to hear individual complaints. As a consequence the CRC Committee cannot issue legally binding decisions, contributing to the implementation of the CRC at the domestic level. This can be considered a serious omission, although it should be noted that all CRC States Parties are under the obligation to report to the CRC Committee on the implementation of the CRC, which places them under ‘international public scrutiny’ and enables the CRC Committee to conduct constructive and bilateral dialogue with each State Party.

The CRC Committee has proven to be rather productive in the sense that it has constructively considered many (initial and second and even third periodic) reports and organizes regional meetings for follow up of its concluding observations. This undoubtedly has a positive effect upon the implementation of the CRC at the
domestic level and it is not certain that an individual complaints procedure will contribute (more) significantly to the (overall) implementation of the CRC. The almost universal ratification certainly supports this assumption and one can question whether this success rate of ratification would have been realized if the CRC had contained an individual complaints procedure. Moreover, such a procedure is retroactive (i.e. dependent upon the filing of complaints), rather than proactive. If one looks for instance at the ECtHR, the case law specifically regarding children deprived of their liberty (under arts. 5 and 3 ECHR) is rather limited. In addition, one cannot distinguish constructive dialogue on this issue in the European region prompted by the individual complaints procedure under the ECHR. Instead, it is the CPT, a body without judicial authority, that has addressed the position of children deprived of their liberty in its CPT standards; it is to be expected that the future recommendation of the Council of Europe on the European Rules for Juvenile Offenders Subject to Sanctions or Measures will be of significant value in this regard as well.

Still, the potential of an individual complaints procedure is significant. The ECtHR for example has delivered substantial and detailed jurisprudence (e.g. under art. 8 ECHR), which significantly influenced domestic legal systems. In addition, it provides significant guidance regarding the interpretation of the human rights provisions and the ECtHR has expanded the interpretation of the ECHR provisions by formulating positive obligations. For children deprived of their liberty in the Member States of the Council of Europe, it would be a very significant breakthrough if the ECtHR adopts the relevant provisions of the CRC framework and European non-binding standards as its legal frame of reference in the interpretation of articles 5 and 3 ECHR regarding children. There are developments in this regard and similarly in the Inter-American region.

The implementation of the CRC remains to a large extent dependent on domestic initiatives. The productivity of the CRC Committee, also through its General Comments and general discussion days, can be used to inspire and encourage domestic legislators to adopt legislation in compliance with the CRC framework and act accordingly. Moreover, the CRC is a legally binding instrument, which can be used in domestic legal procedures, directly or indirectly dependent on the domestic legal system and the nature and wording of the separate provisions.

There are calls upon the international community to adopt an individual complaints procedure under the CRC. This would require another optional protocol. The drafting takes usually many years and it may not be realistic to expect that many States will ratify such a protocol. Even though the opportunities to establish an individual complaints procedure are worth exploring, too much energy should

4 Unfortunately, the CRC Committee tends to provide little (or no) information on the foundation of its recommendations. Obviously, this has a practical reason, but it is disappointing, because it decreases the value of instruments like General Comments for the interpretation and further development of CRC standards.
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not be lost in the quest for such a procedure at the cost of the other activities that are at least as important for the implementation of the CRC – one should not risk the ending of positive and constructive dialogue with States Parties, which can also have (and de facto has) considerable impact and effect on the realization of children’s rights at the domestic level.

Particularly regarding children deprived of their liberty, one could consider establishing a monitoring system of site visits comparable to the CPT (and the sub-commission of the CAT Committee) in order to contribute to the above mentioned positive and constructive dialogue. This has another benefit. Regardless of the positive aspects and significant value of the JDLs (and Beijing Rules) for the protection of the rights of children deprived of their liberty, these are static instruments. This is particularly noticeable compared to for example the CPT standards, drawn up on the basis of the CPT’s country visits, and the European Prison Rules, adopted in 1987 and revised in 2006. These instruments are more dynamic, which enables adjustment to (changed) contemporary penal approaches, insights, etc., and may prevent the instruments from being too utopian; site visits can provide realistic views of the required content of the standards. Although one should not exclude the risk that the instruments become too dynamic, which could be on strained terms with legal certainty and/or the continued quality of the legal standards, a more dynamic approach (supported by a system of regular visits) can certainly contribute to the credibility of the standards.

It would be advisable to explore the possibility of establishing a monitoring system under the CRC, specifically regarding children deprived of their liberty, on the basis of country visits and subsequent reports, which can additionally contribute to the updating of the JDLs. Given the broad scope of the JDLs and article 37 CRC, the mandate of the body competent to conduct the visits (e.g. a body established under the CRC Committee or as a special representative or rapporteur of the UN Secretary General resp. Human Rights Council) should not be limited to deprivation of liberty in the context of juvenile justice. It could furthermore be of assistance to the special representative in matters of violence against children, whose mandate has a much broader scope and is not limited to children deprived of their liberty (but at the same time is not specific enough in relation to all aspects of deprivation of liberty). The establishment of a monitoring body would moreover contribute to the visibility of the children, whose institutional stay often lacks (complete) transparency, which makes them particularly dependent and vulnerable to abusive practices; in this regard it can be seen as a fulfilment of rule 72 JDLs’ requirement of independent monitoring (cf the recommendations of the UN Violence Study 2006).

Obviously, the establishment of a monitoring body under the supervision of the CRC Committee would require an optional protocol to the CRC and subsequent ratification (cf the establishment of an individual complaints procedure), but could have the benefit that it fosters reciprocal use of information (from States Parties’
reports and country visits and vice versa). The appointment of a special representative or rapporteur on children deprived of their liberty would not require an additional protocol and can use the existing diplomatic channels of the UN, but it lacks the direct link with the CRC Committee. In addition, the effectiveness of either a monitoring body or a special rapporteur remains dependent on the cooperation of States. Therefore, one should not exclude considering the establishment of an informal monitoring system, for example under the CRC Committee, specifically focusing on children deprived of their liberty.

Regardless of the form, the establishment of an independent monitoring mechanism at the UN level, which conducts State visits and (publicly) reports its findings deserves further exploration.

**RECOMMENDATION I**

The UN should establish an independent monitoring mechanism, in close connection with the present CRC monitoring system, which conducts State visits and assesses the implementation of International Human Rights Law and Standards regarding children deprived of their liberty.

In conclusion, the CRC framework provides the core legal provisions regarding deprivation of liberty of children. Despite some lacunae and deficiencies, it represents a child rights approach for children deprived of their liberty in (and outside) the context of juvenile justice. Given the imperfections, in particular the lack of adequate guidance regarding the interpretation of the relevant provisions, it is important to use the CRC framework in conjunction with the other relevant international and regional human rights instruments, if applicable. This is furthermore prompted by the strong interdependence of the different relevant instruments of International Human Rights Law; altogether they form a strong human rights framework meant to protect the position of individuals deprived of their liberty, including children (see Chapter 2). The following two paragraphs present the general conclusions and findings regarding the substantive implications of this legal framework.

**5.3 LEGAL REQUIREMENTS: ULTIMATE RESTRICTION, TAILORED APPROACH AND LEGAL SAFEGUARDS**

5.3.1 Deprivation of Liberty: a Legitimate Limitation of the Right to Liberty of the Person

Depriving children of their liberty is not prohibited under International Human Rights Law. Although the right to liberty of person is one of the fundamental rights
of every human being, and thus of every child, it is not absolute. There may be legitimate reasons to temporarily limit a child in the enjoyment of his right to liberty by ordering his arrest, detention, imprisonment or other (closed) placement. Particularly in the context of juvenile justice such reasons are apparent. Arrest may be required to interrogate a child suspect, pre-trial detention in the interests of criminal investigation and trial, and imprisonment as a reaction to delinquent behaviour. Deprivation of liberty in the context of the justice system has been practised for ages and will be in the future.

This does, however, not imply that deprivation of liberty should be used lightly. On the contrary, it is one of the most far-reaching State interventions possible, resulting in a significant limitation of one of the child’s most fundamental rights, with potentially far-reaching consequences for the child’s relation with his family and community, his development and future prospects. It is in this light that International Human Rights Law provides legal requirements that must be taken into account before and during the deprivation of liberty.

The definition of deprivation of liberty is not very clear under the various human rights instruments (see para. 3.2). The question whether a child is deprived of his liberty is, however, significant, because it determines the applicability of International Human Rights Law and Standards. Regarding children, the definition of rule 11 (b) JDLs provides very useful guidance. It defines deprivation of liberty as ‘any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority’.

Even though it is not embodied in a ‘hard’ legally binding provision, it is (at this point) the only definition that can be found under International Human Rights Law and Standards and one that, given its broad scope, contributes to the protection of children deprived of their liberty regardless of the context. This fits the general approach of article 37 CRC (i.e. covering deprivation of liberty in all contexts). Although other international human rights instruments generally represent a broad approach as well, they do not provide clear guidance regarding the decisive elements of deprivation of liberty. Under the ICCPR and ECHR (other instruments lack any guidance) the question what constitutes deprivation of liberty is not easily answered and is strongly dependent upon the circumstances of the case. This does not contribute to legal certainty, and has led thus far, particularly under the ECHR, to a rather complex assessment of deprivation of liberty, without clarifying the most prominent parameters.

Under the JDLs’ definition, it is not required that a child is placed in a closed setting or to be subject to a certain regime that makes him particularly dependent. Instead, decisive is whether he is placed in a facility from which he is not permitted to leave if he wants to (‘at will’). In addition, the placement must be ordered by a public authority. Both key elements generally correspond to the approaches recognizable under the ICCPR and ECHR. The latter element (i.e. an order of a
public authority), however, is one of the definition’s most significant limitations, because it does not include a child placed in an institution by his parents; a serious limitation that may deprive a child from essential protection, which additionally seems hard to unite with the concept of the child’s evolving capacities (art. 5 CRC). While the ECtHR has been rather reluctant towards granting children full protection under article 5 ECHR (see the case Nielsen v. Denmark), it has not entirely excluded protection from article 5 ECHR in the situation in which the child is placed in an institution by his parents. In addition, the CRC Committee has occasionally referred to a broader approach.

In light of this and given the significance of clarity regarding the definition of deprivation of liberty it would be advisable if the CRC Committee provides explicit guidance regarding the definition, its decisive elements and implications (e.g. in a General Comment exclusively on deprivation of liberty of children; see recommendation XXI).

Even though the definition of deprivation of liberty is not unambiguous under International Human Rights Law and Standards, there is little chance that arrest, pre-trial detention and imprisonment of children in the context of juvenile justice, even through home confinement or placement in an open institution, will not be regarded as deprivation of liberty. These forms will fall under the protection of inter alia article 37 CRC. Regarding the other contexts it may be harder to determine whether a particular placement amounts to deprivation of liberty. However, International Human Rights Law and Standards clearly represent a broad approach aiming at the protection of all children in situations that imply a limitation of their fundamental right to liberty of the person. Consequently, the constitution of deprivation of liberty should not be taken lightly and should not deprive children from the substantive legal protection they are entitled to.

Article 37 (b) CRC, like article 9 ICCPR and its regional equivalents, provides that deprivation of liberty must be lawful and not arbitrary. It does not provide further guidance, unlike for example article 5 (1) ECHR which provides an exhaustive list of lawful forms of deprivation of liberty (see para. 3.4).5 It is clear, though, that these requirements affect the legal foundation of the deprivation of liberty, as well as the procedure and execution, implying instructions to both the domestic legislator and enforcing authorities. Deprivation of liberty can only take place if it is based on clear and strict legal provisions. A court order is not required, but the law must allow for a possibility to challenge the legality of the deprivation of liberty (art. 37 (d) CRC). Without a lawful order a child should not be admitted to a detention centre, prison or other (closed) institution.

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5 The lack of further specification (in the CRC) stresses once more the desirability of guidance by the CRC Committee, e.g. in a special General Comment on deprivation of liberty; see recommendation XXI.
In addition, article 37 (b) CRC embodies two requirements that have no equivalents in any of the general human rights treaties, namely: last resort\(^6\) and the shortest appropriate period of time. Only the ICCPR explicitly requires that pre-trial detention must not be ‘the general rule’. These child-specific concepts, however, go further and are elements of the requirements of lawfulness and non-arbitrariness. They represent the essence of the International Human Rights Law approach towards children. Where children are entitled to the same legal requirements as adults, when it comes to deprivation of liberty (i.e. lawfulness and non-arbitrariness), the CRC sets two additional requirements specifically regarding children (art. 37 (b) CRC). It calls for the utmost restriction regarding the use of arrest, detention or imprisonment and if the decision is made to use this far-reaching limitation of the child’s right to liberty of the person, it must be done only for the shortest appropriate period of time.

5.3.2 Arrest, Detention and Imprisonment as Measures of Last Resort and for the Shortest Appropriate Period of Time

5.3.2.1 General Remarks

The exact implications of the requirements of last resort and shortest appropriate period of time are strongly dependent on the circumstances of each case and on the phase of the juvenile justice process in which a child is deprived of his liberty (pre-trial or post-disposition). Consequently, it is not surprising that International Human Rights Law and Standards do not provide much specific guidance in this regard. In addition, little guidance can be found regarding the implementation of both requirements.

The requirements of last resort and shortest appropriate period of time imply in the first place an instruction towards the domestic legislator. As part of the requirement that each deprivation of liberty must be lawful, he must provide each form of arrest, detention or imprisonment with a (statutory) legal basis. Regarding children in particular, the legislator should foster the use of deprivation of liberty as last resort by building in (substantive) legal requirements, such as a limited list of grounds and cases for pre-trial detention. In addition, he could set (outer) time limits for the imposition of deprivation of liberty for the shortest appropriate period of time.

Second, the implementation of both requirements largely is a matter of enforcement. Police authorities and the public prosecutor often have a large discretion in arresting children and placing them in police custody or even in pre-trial detention; courts are competent to sentence children to imprisonment. This

\(^6\) As mentioned in para. 5.2, the use of deprivation of liberty as *ultimum remedium* has been recognized, e.g. under art. 5 ECHR by the ECHR and to some extent by art. 9 (3) ICCPR (see para. 3.4.2).
requires that the enforcing authorities are competent to use their discretion and are aware of their responsibilities in this regard. In addition, the legislator should design the legal framework in a way that enables the enforcing authorities, including the judicial authorities, to tailor the use of deprivation of liberty (or the use of alternatives) to the specific circumstances of the case, including the best interests of the child. Furthermore, the legal system should provide procedural safeguards; the more discretion authorities have, the more there is a need for legal safeguards (see also para. 5.3.3).

Although the legislator should provide the legal framework in which enforcing authorities can enforce the requirements of last resort and shortest appropriate period of time, essential for their implementation are alternatives to deprivation of liberty – alternatives for both pre-trial detention (including police custody) as well as deprivation of liberty as disposition (see also art. 40 (4) CRC). In this regard, it should be noted that diversion of children from the juvenile justice system could also have impact on the use of deprivation of liberty.

It is interesting to take a closer look at the implementation of both legal requirements regarding arrest, police custody and pre-trial detention on the one hand, and deprivation of liberty as a disposition on the other.

5.3.2.2 Arrest, Police Custody and Pre-trial Detention

A. Arrest and Police Custody

Arrest is a matter of the police or law enforcement authorities. It can result in police custody and subsequently in pre-trial detention. The legislator should provide the legal basis and boundaries, such as allowing arrest only if the child is suspected of having committed a crime and that keeping him at the police station (in police custody) is required for the criminal investigation (e.g. for interrogation). The substantive assessment will be made by the police officials (potentially but not necessarily under the supervision of the public prosecutor). They need a certain discretion, obviously within the boundaries set by the law. In addition, they should be provided with alternatives to arrest and police custody. The most obvious alternative in this regard is the child’s family, provided that it can be found and that the return to the family is in the child’s best interests. Other options should be available in the event the child’s family is not the appropriate alternative for police custody. One could think of foster homes, crisis centres or shelter homes, provided that these options actually are alternatives to deprivation of liberty and fully respect the rights of the child and requirements set by International Human Rights Law; the end certainly does not justify the means.

In essence, police authorities have a large discretion and ditto responsibility. The enforcement of the last resort principle also is a matter of awareness. Police officials should first of all be (made) aware of the last resort principle and its
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significance for children in particular. Second, they should be trained and supported in the use of the last resort principle (by the system as a whole and other key-actors, such as the public prosecutor). This additionally requires awareness of the available alternatives. Specialization of police officials will most certainly contribute as well.

The assessment of the police authorities (and e.g. public prosecutor) to determine whether police custody (and further detention) is necessary, could be fostered for example by a checklist or assessment tool, which forces the authorities to seriously assess the (continued) need for police custody, and which provides them with a list of relevant aspects that should be taken into account (e.g. alleged crime, personal history of the child, including criminal record, his family, etc.).

The arrest and subsequent police custody must furthermore be limited to the shortest appropriate period of time. In this stage of the justice process, this means that it must be based on strict legal provisions, *inter alia* providing time limits regarding the duration of police custody. It also is important that the child is brought ‘promptly’ (art. 9 (3) ICCPR) before a judge or other officer authorized by law to exercise judicial power, such as the public prosecutor (dependent on the domestic legal system).

Police authorities play a vital role in the ‘supply’ of arrested children. Unfortunately, these children are often subjected to police violence and other human rights violations. Consequently, the implementation of the last resort principle in this phase of the justice process may require a change of attitude, climate, methods and priorities. In addition, it calls for adequate monitoring, for example, by the public prosecutions office and independent judicial review. Although, the CRC lacks such an explicit prescription, the CRC Committee has recommended that a child arrested (and subsequently held in police custody) should be brought before a competent authority to examine the legality of the (continuation of) deprivation of liberty within 24 hours (GC No. 10, para. 83). The legality question when children are concerned also includes the question whether the arrest and police custody were measures of last resort and led to deprivation of liberty for the shortest appropriate period of time.

The large discretion of the police also points to the particular significance of legal (and other appropriate) assistance in the beginning of the juvenile justice process, not only for the preparation of the child’s defence, but also in light of his deprivation of liberty (art. 37 (d) CRC; see also para. 5.3.3).

### B. Pre-trial Detention

The requirement of last resort should also be a determining factor regarding continuation of the child’s deprivation of liberty in the form of pre-trial detention.

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7 This recommendation implies a tighter time schedule than the guidance provided under the ICCPR and ECHR. The CRC Committee has not clarified its position, but it may be related to the different perception of time of children (i.e. 24 hours for children is ‘longer’ than for adults).
Besides an assessment of the presence of legal grounds for pre-trial detention, the competent authority should assess the necessity of pre-trial detention in light of the best interests of the child and the legitimate objectives of pre-trial detention (i.e. safeguarding the child’s appearance before court, protection of witnesses or victims, prevention of recidivism, prevention of disturbance of public order). In this regard the point of departure should be that the child must be released, unless his detention is required for the safeguarding of the objectives of pre-trial detention (i.e. the assessment should not focus on the question whether there are grounds to detain a child; cf the ECtHR’s approach under art. 5 (1) ECHR; para. 3.4). The authorities are compelled to assess whether the objectives could be realized by alternatives.

Conditional suspension of pre-trial detention (or conditional release) can be regarded as a key alternative for the implementation of the requirement of last resort (and shortest appropriate period of time).\(^8\) It enables the suspension of the deprivation of liberty, while recognizing the interests of the justice process. At the same time it can be used to respond (quickly) to the child’s (alleged) criminal behaviour by offering him a programme, as special condition. Prolonged police custody and pre-trial detention will most likely not contribute to the child’s ultimate reintegration, taking into account the international consensus that the period between the offence and the final response determines the effect on the wanted pedagogical impact and on the child’s stigmatization (GC No. 10, para. 51). Conditional suspension of pre-trial detention could contribute to both the reduction of the use of unsuspended pre-trial detention as well as the realization of the objectives of juvenile justice. Obviously, the child’s right to fair trial (particularly the presumption of innocence) must be fully respected. In addition, one should avoid the last resort principle being undermined by setting conditions for suspension that are on strained terms with international law, such as another form of deprivation of liberty in which the child is worse off.

The domestic legislator could foster the use of suspended pre-trial detention by prescribing by law that the pre-trial judge or court must consider suspension before ordering the child’s detention (see para. 5.5 for an example from the Netherlands). This would also imply that the judge or court must explicitly explain why he does not suspend the pre-trial detention.

Obviously, it is vital that the judicial authority is provided with adequate information (e.g. on the basis of an initial assessment) on the potential conditions for suspension (and the appropriateness of suspension in the specific case). The child’s lawyer can play a significant role in this regard as well. Finally, the judicial authority should be capable of making an adequate assessment, which requires specialization (see art. 40 (3) CRC; cf art. 5 (5) ACHR).

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8 There may be other alternatives, such as, e.g. a night detention programme (see para. 4.3).
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For the requirement of the shortest appropriate period of time, it is important that the child’s pre-trial detention can be suspended or terminated in a later stage. In this regard (and for the principle of last resort), it is important that the pre-trial detention is subject to regular review, preferably ‘every two weeks’ (GC No. 10, para. 83). This would imply a regular review of the legality of the pre-trial detention, which includes an assessment of its necessity and duration. The child should as a minimum have the right to challenge the legality of the deprivation of liberty in this phase of the justice process (art. 37 (d) CRC). In this regard, the child should be entitled to submit an (interim) request for suspension or termination before the pre-trial judge or court.

The duration of pre-trial detention is to a large extent dependent on the duration of the police investigation, adjudication and criminal trial. It is, in order to determine the ‘appropriate time’ in the pre-trial phase, important to balance the necessary time to safeguard the objectives of police custody and pre-trial detention and the child’s best interests. It also is important that the domestic legislator sets time limits for the different phases of the juvenile justice trial (i.e. for the period between the commission of the offence and the completion of the police investigation, the decision of the public prosecutor and disposition by the court or other competent judicial body), which should be shorter than regarding adults (GC No. 10, para. 52). The CRC Committee has provided some rather firm recommendations in this regard, which should be used as points of reference:

- a child should be brought before a competent authority to examine the legality of the arrest and police custody within 24 hours (see above);
- a child should be formally charged with the alleged offences and be brought before a court not later than thirty days after his pre-trial detention took effect;
- a final decision on the charges must be taken not later than six months after they have been presented.

5.3.2.3 Deprivation of Liberty as a Disposition

Imprisonment (as a disposition) as a measure of last resort is not only prompted by article 37 (b) CRC, but also by article 40 CRC. The provision for the administration of juvenile justice places States Parties under the positive obligation to make a variety of alternatives to institutional care available as a disposition, such as care, guidance and supervision orders, counselling, probation, foster care and education and vocational training programmes, while taking into account the principle of proportionality (art. 40 (4) CRC).

9 If the child’s trial does not start within a reasonable time, the child would under article 9 (3) ICCPR be entitled to release. The CRC does not provide such a clear sanction, but this provision could apply through art. 41 CRC.
10 The setting of this term would also tackle the practice of (endless) adjournments of court hearings, and consequent prolongation of pre-trial detention.
The legislator could stimulate (or force) authorities to consider alternatives and to resort only to deprivation of liberty in serious cases (as a proportionate response) and if it would best serve the interests of the child (appropriateness in this phase is to a large extent determined by the interests of the child; special prevention). This could be realized by building in (high) thresholds for the imposition of imprisonment. In addition, one could make differentiations between age levels or require the consultation of a psychologist and/or psychiatrist.

As with regard to the suspension of pre-trial detention, the law could force the imposing judge or court to explicitly defend why it considers deprivation of liberty the appropriate resort. The law could, for example, stipulate that imprisonment may only be used if there is no adequate alternative available, given the circumstances of the case or that it is mandatory to consider suspension. This would – again – imply that the court should explicitly explain either why it has not resorted to suspension or alternatives or why it finds imprisonment the one and only (appropriate) resort. In this regard, the last resort principle does not mean that one must try all alternatives first; such (frequently heard) reasoning could undermine both the function of the juvenile justice system as well as the interests of the child. The requirement of last resort calls for an adequate estimation regarding the most appropriate reaction to the child’s delinquent behaviour. It should be adopted in a reasoned verdict, which also answers the question what is not to be expected of alternatives and why deprivation of liberty should be favoured in light of the effects to be expected. Obviously, the child should have the right to appeal this decision (art. 40 (2) (b) (v) CRC; see para. 5.3.3).

Furthermore, the judge or court should have alternatives available. This requires that the courts are adequately informed about the available dispositions and the content of the programmes; in addition, the child’s legal representative could provide the court with serious alternatives, which requires an active and outreaching attitude. The nature (and form) of the disposition should be explicitly addressed during the trial in order to enable the court to estimate what is to be expected of the programme and the child’s participation. Provided that the court is specialized and well-informed, it seems advisable to let the court decide where the child should be placed, in particular when it concerns placement of a child in a specific (and specialized) institution (see also below).

One of the options that could be mentioned specifically here, besides those in article 40 (4) CRC, is the suspended sentence. The court could avoid deprivation of liberty by sentencing the child to imprisonment suspended under certain conditions. These could include one of the alternatives mentioned in article 40 (4) CRC, provided that it is proportionate and takes into account the best interests of the child. Suspended imprisonment serves as an extra deterrent.

The last resort also implies that one should always seek the least restrictive way of deprivation of liberty. The broad definition of deprivation of liberty by implication
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The duration of pre-trial detention can affect the duration of imprisonment in legal systems that provide for subtraction of period in pre-trial detention. If the community is regarded as an unsafe or bad place for the child, this should not prevent a community-oriented approach. It basically stresses the need for a more integral approach in which the focus is also on improving (the safety in) the community (see also UN Violence Study 2006, p. 20).

Covers both closed and (semi-)open institutions. In addition, the JDLs favour open institutions and a community-oriented approach. A specific alternative that could be mentioned here is home confinement (with or without electronic monitoring) which enables the child, for example, to continue his education at his own school. In this regard one could also think of gradual transfer from closed facilities to more open to the child’s return to the community, which can affect the duration of deprivation of liberty and can also contribute to the implementation of deprivation of liberty for the shortest appropriate period of time.

The shortest appropriate period of time should be determined in each individual case separately. Where the court should assess the necessity of imprisonment as a disposition in light of the appropriateness of the available alternatives, the duration should be assessed specifically as well. Article 40 (4) CRC explicitly refers to the principle of proportionality, one of the core principles of fair trial referring to a link between the committed crime, the level of criminal intention and the circumstances of the case. This principle is applicable to children as well and should for example lead to the significant conclusion that sanctions for children should be lower than for adults, per se, given children’s lesser culpability (see para. 3.3; GC No. 10, para. 10). It should also prevent a mere ‘welfare approach’ resulting in, for example, the locking up of children (in their or society’s interests) for long periods of time for re-education or avoiding ‘bad influences’ from the community (this would also interfere negatively with one of the key principles of the JDLs calling for a community-oriented approach). At the same time the principle of proportionality is meant to prevent the tipping of the scale towards repression (see also art. 40 (1) CRC).

Thus, the principle of proportionality should be taken into account in the assessment of the appropriate sanction. This has inevitably impact on the duration and the assessment of the shortest appropriate period of time; the shortest appropriate period of time should include the principle of proportionality (i.e. ‘shortest appropriate’ is partly determined by proportionality). Obviously, this is not without complications (see below), but it should be used by the legislator to determine the outer time limits by law, which should be lower than regarding adults (i.e. the call for a separate juvenile justice system; art. 40 (3) CRC).

International Human Rights Law and Standards are not specific regarding the (maximum) duration of imprisonment. Life imprisonment is not prohibited, provided that there is the possibility of parole (art. 37 (a) CRC). The adoption of

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11 The duration of pre-trial detention can affect the duration of imprisonment in legal systems that provide for subtraction of period in pre-trial detention.

12 If the community is regarded as an unsafe or bad place for the child, this should not prevent a community-oriented approach. It basically stresses the need for a more integral approach in which the focus is also on improving (the safety in) the community (see also UN Violence Study 2006, p. 20).
this provision has considerably weakened the requirement of shortest appropriate period of time. Even with the possibility of parole, life imprisonment can hardly be regarded as a short and/or appropriate response to child offenders.\footnote{In addition, it is on strained terms with the objectives of juvenile justice that should ultimately foster the child’s reintegration (art. 40 (1) CRC).} Taking into account the requirement of the shortest appropriate period of time in article 37 CRC, one could argue that the requirement of the possibility of parole implies that even though a child can be sentenced to life imprisonment, it should be subject to regular periodic review – a regular assessment on the appropriateness of the continuation of the life sentence. The domestic legislator should build in fixed terms for these reviews (e.g. every two years after the judgment has become final).

In general, it is recommendable that the CRC Committee provides further guidance regarding the maximum duration of imprisonment under article 37 CRC and additionally addresses the relation between the requirement of the shortest appropriate period of time, the principle of proportionality and life imprisonment with the possibility of early release (see recommendation XXI).

The assessment of the duration of the imprisonment is complex, because it is delicate and paradoxical. It 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 paradoxical due to the chosen wording ‘shortest’ and ‘appropriate’. The shortest imprisonment is not necessarily the most appropriate disposition. The shortest appropriate period of time implies that one should seek the shortest disposition within the boundaries of appropriateness, which is determined by the best interests of the child (as a primary consideration; art. 3 CRC), the interests that should be protected by the justice system (which does not exclude the child’s interests given art. 40 (1) CRC) and the principle of proportionality. The last principle implies that even if the child’s interests are best served with a long penal treatment order, one should never lose sight of the fact that this primarily remains a reaction in the juvenile justice context, which calls for proportionality (and other legal safeguards).

The combination of ‘shortest’ and ‘appropriate’ places the authorities under a significant challenge. It is possible that ‘appropriate’ is filled in with mere repressive arguments. In that sense appropriate could be considered as the weakest link. This would apparently not fit the child rights approach embodied in the CRC. On the contrary, it calls for an assessment of the best interests of the child in conjunction with the other key principles of the CRC, the objectives of the juvenile justice system and the principles of fair trial – an assessment that in essence should be seen as an opportunity to opt for constructive methods to foster the child’s development and future role in society. The call for an individual assessment also rules out minimum or mandatory sentences.
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Given the complexity of the assessment it should be conducted by a specialized, competent judicial authority, which should be open to reassessment if required by the circumstances of the case. The right to challenge the legality of deprivation of liberty (art. 37 (d) CRC) should not be excluded after a court judgment (see further para. 5.3.3).

Interim review of imprisonment is also relevant, because the requirement of the shortest appropriate period of time implies that imprisonment should be shortened or changed in form (e.g. less secured or participation in a programme within the community) as soon as this is seen as sensible in light of the best interests of the child and the objectives of juvenile justice. (Conditional) release should not be excluded (rule 2 JDLs); on the contrary, it could foster the child’s reintegration by offering a gradual return to society. The special conditions could help to stimulate the child to continue and not to fall back.

Finally, this requirement could be seen as a positive obligation for States Parties to establish and maintain a system in which deprivation of liberty can be used for the shortest appropriate period of time. This calls for the creation of effective programmes that rely on a relatively short period of deprivation of liberty. Furthermore, one should start as soon as possible (appropriate) with community and/or reintegration programmes. It requires a clearly described treatment or action plan for each child deprived of liberty which is regularly evaluated to measure the (lack of) progress and to adjust it when necessary in the best interests of the child.

The positive obligation also includes that the available institutions should be appropriate. This has implications for the child’s placement (i.e. he should be placed in the appropriate institution) and for the quality of treatment in the institution (see further para. 5.4).

5.3.3 Procedural Safeguards

Under International Human Rights Law each child deprived of his liberty is entitled to a number of procedural safeguards, which are of particular significance for the implementation of the legal requirements regarding deprivation of liberty. Some were already addressed in the previous paragraph. This paragraph briefly highlights the key aspects of the relevant safeguards and pays attention to their implementation at the domestic level. For the enjoyment of most of the procedural safeguards, it is crucial that the child is fully informed. This should be seen as a general responsibility of the authorities responsible for the child’s arrest, detention or imprisonment.

Although each child prosecuted under the juvenile justice system is entitled to legal or other appropriate assistance, which can also include parental assistance (art. 40 (2) (b) (ii) and (iii) CRC), each child deprived of liberty is entitled to legal and
other appropriate assistance (promptly and regardless of the context; art. 37 (d) CRC). This right is deliberately linked to the special condition the child is in (i.e. deprivation of liberty) and the assistance he then requires. The child is entitled to legal assistance, for example to exercise his right to challenge the legality of the deprivation of liberty or to remedy unlawful treatment during deprivation of liberty (e.g. through filing a complaint). In this regard it is important that the child gets ‘prompt access’ to legal assistance, which could be fostered by providing instructions in domestic law (e.g. an instruction that the police must inform a duty lawyer immediately after a child’s arrest).

In addition, the child is entitled to any form of other appropriate assistance. One could think of medical, psychological or parental assistance during the pre-trial phase. In this regard it is important to keep in mind that it is the child who can exercise this right and thus determines which appropriate assistance he would like to receive; ‘appropriate’ indicates that there should be a relation between his special condition and the desired assistance.

Another procedural safeguard directly linked to the child’s deprivation of liberty is the right to challenge the legality of the deprivation of liberty before a court or other competent, independent or impartial authority (also known as the right to habeas corpus; art. 37 (d) CRC). This is an important legal guarantee against unlawful or arbitrary deprivation of liberty and it entitles the child to a full review under both national and international law. Particularly for children, this includes the assessment of compliance with the requirements of last resort and shortest appropriate period of time (see above). In addition, the child is entitled to a ‘prompt decision’ on his action, which is arguably sooner than ‘without delay’ as prescribed by the ICCPR and ECHR. The CRC Committee has indicated that the decision should be delivered as soon as possible, for example within two weeks (GC No. 10, para. 84).

Within the juvenile justice system the right to challenge the legality before a court is particularly relevant where the system has not provided a (regular) legal review. International Human Rights Law can be considered in favour of regular review of deprivation of liberty in the pre-trial phase. A child must be brought before a judge or other judicial officer promptly after his arrest or detention (art. 9 (3) ICCPR; the CRC Committee recommends a term of 24 hours) and the CRC Committee considers States Parties under a positive obligation (‘to ensure’) to draw up strict legislation which provides for regular review of pre-trial detention, ‘preferably every two weeks’ (GC No. 10, para. 83; see also para. 5.3.2.2).

The right to challenge the legality of imprisonment after conviction is slightly more complicated. First, the right to challenge the legality does not equal the right to appeal as provided by article 40 (2) (b) (v) CRC; the right to appeal can, however, be regarded as a right that can include the right to challenge the legality. Second, if imprisonment is ordered for a fixed term by a court (which should be the case) through a final judgment, one could argue that a child no longer has the right
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to challenge the legality of this decision (cf e.g. the position of ECtHR regarding art. 5 (4) ECHR). As mentioned before, elements of the legality of deprivation of liberty of children are the requirements of last resort (and that must be clearly assessed and explained in the disposition) and the shortest appropriate period of time. The last element is not in a final way decided in the disposition but should be subject to review and challenge by the child; the development of the child and the (personal) circumstances (e.g. the child has participated successfully in a treatment programme or his family is better capable to provide support) may undermine the legality of continuation of the deprivation of liberty (for the period it was set for). In such event the child should have the right to access the court and request early conditional release or an alternative sanction, which would be more appropriate.

The domestic legislator could facilitate periodic review of imprisonment after disposition by providing the right to submit a request for early release or conditional termination of the sentence. He could also build in fixed time limitations and require an explicit court order for prolongation upon request of the public prosecutor. Obviously, the child could use legal and other appropriate assistance in this regard. For example, his lawyer could play a proactive role by providing the authorities with suggestions and realistic proposals for early conditional release, which also stresses the importance of post-dispositional involvement of lawyers.

Furthermore, there are a few other legal safeguards that cannot be found in article 37 CRC, but which are relevant for children deprived of their liberty. Besides that each child arrested or detained must be brought promptly before a judge or other judicial official (art. 9 (3) ICCPR and see above), he must also be informed immediately (‘at the time of the arrest’; art. 9 (2) ICCPR) of the reasons for arrest and, if charged, promptly and directly of the charges (i.e. as soon as possible; art. 40 (2) (b) (ii) CRC). These instructions are of importance in light of legal certainty and imply that the information is provided in a way that the child fully understands it. In addition, it forces authorities to formulate charges as soon as possible or act otherwise, which most likely will mean that the child has to be released. Information on the reasons for arrest and charges is also important in light of the right to challenge the legality of the deprivation of liberty.

Finally, the ICCPR, supported by the ECHR, provides the right to compensation of the child who has been deprived of his liberty unlawfully or arbitrarily (art. 9 (5) ICCPR; art. 5 (5) ECHR). It grants the child the entitlement to address both the domestic and international legal forums to demand pecuniary or non-pecuniary coverage of damages.

5.3.4 Conclusion – Deprivation of Liberty as Part of Juvenile Justice

The CRC framework supported by other instruments of International Human Rights Law provides a number of legal requirements regarding deprivation of the child’s
fundamental right to liberty. Two concepts can be regarded as crucial elements for the legality of deprivation of liberty of children: the requirements of last resort and shortest appropriate period of time.

The implementation of these requirements of International Human Rights Law requires both action from the domestic legislator, who should provide the required clear legislative framework, as well as from all enforcing authorities involved, such as the police, public prosecutors, judicial authorities and institutions. It is a matter of legislation on the one hand and enforcement on the other. Awareness-raising, training and specialization are vital – so are procedural safeguards such as regular legal review and legal and other appropriate assistance. Deprivation of liberty of children should only take place in a legal system that is founded on a clear legal basis with check and balances, in which all authorities work together as part of one integral approach. No one acts independently, all authorities are interrelated; too much discretion in an isolated place could foster abuse of power.

Politicians, policy makers and the general public should also be involved in awareness-raising and education. In essence, one should contest rhetoric, merely aiming at zero-tolerance policies and locking up children, often based on a complete lack of understanding of the root causes of juvenile delinquency.

Above all it is important to bear in mind that the CRC calls, besides lawfulness and non-arbitrariness equally to adults, for the ultimate restriction towards deprivation of liberty when children are concerned. Their best interests should be given due weight in assessing the last resort character of deprivation of liberty as well as the appropriateness of its duration. In addition, it must serve the legitimate objectives of the juvenile justice system as formulated in article 40 (1) CRC and call for treatment ‘in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society’. This includes a full respect of the child’s right to a fair trial, similar to adults, and a clear child’s rights orientation witnessed by specialized authorities and institutions, the setting of an MACR of twelve years or higher (see GC No. 10, para. 32) and the child’s reintegration as the ultimate objective. Respect for the child’s dignity should be seen as the driving force behind the realization of the objectives of juvenile justice. This also has implications for the quality of treatment children are entitled to, if they, despite all restrictions, are deprived of their liberty.

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14 Preferably, States should set a specific minimum age for deprivation of liberty as well, which – as a minimum – equals the MACR and should not be lower (rule 11 (a) JDLs).
SUMMARY OF RECOMMENDED ACTIONS AT THE DOMESTIC LEVEL – PART I

Implementation of Legal Requirements and Procedural Safeguards regarding Deprivation of Liberty of Children in the Context of Juvenile Justice

I Legislation

- All forms of deprivation of liberty should have a clear (and detailed) basis in domestic (statutory) law. Without a lawful order a child should not be admitted to a detention centre, prison or other (closed) institution.
- Domestic law should set legal requirements, more specifically the requirements of last resort and shortest appropriate period of time, as standards regarding deprivation of liberty of children.
- Domestic law should force the enforcing authorities to implement the legal requirements by:
  - building in thresholds and time limits that are more conducive for their implementation than regarding adults;
  - providing that authorities must consider suspension of pre-trial detention;
  - providing that the authorities must consider the use of deprivation of liberty as a measure of last resort and to explicitly explain why (conditional) release or other alternatives are not considered an option (NB. last resort does not imply that one must have tried all alternatives first).
- Life imprisonment of children without parole, mandatory or minimum sentences should be prohibited or abolished.
- Domestic law should entitle each child to legal and other appropriate assistance as soon as he is deprived of his liberty (pre-trial and post-disposition).
- Domestic law should provide for a regular periodic review of pre-trial detention (preferable every two weeks) and, regarding deprivation of liberty as a disposition longer than two years, preferably every two years.
- Domestic law should set time limits (shorter than for adults) regarding the essential procedural safeguards as recommended by the CRC Committee, that is:
  - a child should be brought before a competent authority to examine the legality of the arrest and police custody within 24 hours;
  - a child should be formally charged with the alleged offences and be brought before a court not later than thirty days after his pre-trial detention took effect;
  - a final decision on the charges must be taken not later than six months after they have been presented.
- Domestic law should entitle each child subjected to unlawful or arbitrary deprivation of liberty to compensation.

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II Enforcement

II a Alternatives

• There should be sufficient appropriate alternatives for deprivation of liberty of children, while taking into account the fact that the rights of children should be fully protected. More specifically one could think of:
  - return to family custody immediately after arrest;
  - diversion from the juvenile justice system;
  - (conditional) suspension of detention or imprisonment;
  - early conditional release;
  - youth care programmes;
  - less infringing forms of deprivation of liberty, such as night detention or home confinement (with electronic monitoring, intensive probation, etc.).

II b Awareness-raising and Training

• Each professional working within the juvenile justice system with children (potentially) deprived of their liberty should be made aware of the existence and relevance of the requirements of lawfulness and non-arbitrariness, more specifically of the requirements of last resort and the shortest appropriate period of time. This requires awareness-raising, inter alia through education and training of:
  - (specialized) police officials on their vital role regarding the entrance of children into the juvenile justice system, potentially resulting in police custody and pre-trial detention;
  - (specialized) public prosecutors and (specialized) judicial authorities regarding (the use of) alternatives to both pre-trial detention and deprivation of liberty as a disposition;
  - (specialized) lawyers to follow carefully the use of deprivation of liberty in accordance with International Human Rights Law and to assist the child in the exercise of his legal remedies, e.g. to request early termination. In addition, lawyers should assist their client by providing the (judicial) authorities with appropriate and realistic alternatives for detention or imprisonment; this presumes legal assistance during the post-disposition phase as well;
  - administrations of detention centres, prisons and other (closed) institutions, where children can be deprived of their liberty, to deny access to each child without a lawful order for detention or imprisonment.

(…)
5.4 LEGAL STATUS OF CHILDREN DEPRIVED OF THEIR LIBERTY; CONCEPT AND COMPONENTS

5.4.1 Introduction – CRC Approach to Children Deprived of Their Liberty

The quality of treatment to which children deprived of their liberty are entitled is primarily governed by article 37 (c) CRC. This children’s rights provision forms the basis of the legal status of children deprived of liberty (i.e. regardless of the context) and stipulates that they must be treated with humanity and respect for the inherent dignity of the human person, and in a manner that takes into account the needs of persons of his age. Regardless of the detailed implications of this provision (see below), in general, it provides that children are entitled to the same ‘rights-based treatment’ as adults (c.f. art. 10 (1) ICCPR). The CRC, however, adds a child-oriented dimension and provides that the child is entitled to a ‘child-specific rights based treatment’. In particular, article 37 (c) CRC provides two key aspects that give content to this child-oriented approach. The first aspect is separation of children from adults. A child must be separated from adults, unless it is in the child’s best interests not to do so (i.e. no room for exceptions from this principle...
for, e.g. organizational reasons). This provision has not been introduced by the CRC. It is also embodied in article 10 ICCPR, but this provision leaves no room for deviation, which has led to many reservations.

The second child-specific aspect provided by the CRC has no explicit equivalent in other instruments of International Human Rights Law. It concerns the child’s right to maintain contact with his family through correspondence and visits, save in exceptional circumstances, which also should be limited to the best interests of the child principle (see also art. 9 (3) ICCPR).

States Parties are under the positive obligation to guarantee each child the quality of treatment as provided by article 37 (c) CRC, which has been further elaborated in the JDLs. The JDLs are founded on four principles: integration of the institution in the community (a community-oriented approach), respect for the child’s dignity, family contact and the right to fair treatment, and should according to the CRC Committee be implemented (‘incorporated’) in domestic (statutory) law, in conjunction with the Standard Minimum Rules (GC No. 10, para. 88; see also para. 5.2).

5.4.2 Concept of the Legal Status of Children Deprived of Their Liberty

Article 37 (c) CRC in conjunction with the general CRC principles (arts. 2, 3, 6 and 12 CRC) implies that each child deprived of his liberty is entitled to a legal status that in the first place acknowledges that he remains entitled to all rights under the CRC. This is primarily prompted by the fact that as a principle no distinction between children in liberty and children deprived of liberty is allowed. Second, the requirement of treatment with humanity and respect for the child’s inherent dignity points out that a child deprived of liberty is entitled to the same rights as any other human being. In addition, one must acknowledge the specific characteristics of children, which requires a child-specific approach. Consequently, each child deprived of his liberty must be acknowledged as a human being in development, independently entitled to all rights under the CRC (and other provisions of Human Rights Law; cf. art. 41 CRC and rule 13 JDLs). This includes civil, political, economic, social and cultural rights, such as the right to privacy, to an adequate standard of living, to education and to protection of physical and mental integrity (e.g. through the prohibition of torture and other forms of ill-treatment).

However, the execution of the child’s deprivation of liberty may require that the child is limited in the enjoyment of his rights and freedoms; one reason for limitation may be, for example, the maintenance of order and safety in the institution – another the enforcement of a child’s individual treatment plan. Limitations may only be imposed if required by the special condition of the child (i.e. deprivation of liberty) and under the full implementation of the principle of the best interests of the child (art. 3 (1) CRC). This can be considered the doctrine of minimal limitations (i.e. no limitations, unless strictly necessary) with a clear child
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rights orientation: each limitation must be necessary, proportionate and assessed in light of the child’s best interests.

In other words, the legal status of the child deprived of liberty under International Human Rights Law means that:

1. each child deprived of his liberty must be recognized as a rights holder entitled to all rights under International Human Rights Law, in particular the CRC;
2. the enjoyment of these rights may only be limited if required by the special condition the child is in (i.e. deprivation of liberty), and
3. only under the full implementation of the principle that the best interests of the child must be a primary consideration (art. 3 (1) CRC).

The recognition of the legal status of the child deprived of his liberty under International Human Rights Law has a number of implications. First, it rules out the doctrine of inherent limitations, proclaiming that each individual deprived of liberty is automatically limited in the enjoyment of his human rights and fundamental freedoms. It also rules out the use of limitations as a general rule. Limitations are only allowed if they are imposed individually and based on clearly defined grounds set by law and – as a minimum – after a transparent decision-making process resulting in a reasoned individual decision. In addition, the child must be consulted (immediately or later), while taking into account his age and maturity (art. 12 CRC). The legal status of the child deprived of his liberty also implies that he should have the right to remedy decisions resulting in limitations of his rights and freedoms; an important legal safeguard against unlawful or arbitrary treatment (see para. 5.4.3.2).

5.4.3 Components of the Legal Status of Children Deprived of Their Liberty

It goes beyond the scope of this concluding chapter to (re)address all substantive elements of the legal status of children deprived of liberty under of International Human Rights Law and Standards in detail (see para. 3.5ff). Instead, the key elements will be highlighted in this paragraph.

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15 This does, however, not rule out the fact that institutions draw up internal rules regulating various aspects of daily institutional life, such as sleeping, visiting or school hours, although these internal rules should have a legal basis as well. In addition, the child should be informed about these rules.
While recognizing the inherent limitations of a division like this and without disregarding the strong interdependence of the different elements, the legal status of children deprived of liberty can be divided into the following three (substantive) components:

1. Basic rights;
2. Special protection rights;
3. Realization of the objectives.

5.4.3.1 Basic Rights

A. Enjoyment of Civil, Political, Economic, Social and Cultural Rights
The first component of the child’s legal status during deprivation of liberty consists of his basic entitlements. States Parties are under the obligation to provide minimum living standards that enable the child to enjoy his economic, social and cultural rights under International Human Rights Law – in particular the right to an adequate standard of living (art. 27 CRC), to health care (art. 24 CRC) and to education (art. 28 CRC).

The implementation of the basic rights of children affects housing and accommodation in the institution (including minimum floor space, hygiene and sanitary facilities), food & nutrition, personal care and clothing (if the child has no clothes or insufficient clothing). It also places the authorities under the obligation to provide health care, including medical checks upon admission, dental care, prescription of medicines, specialized medical assistance for the children’s individual treatment (if relevant), and for a daily programme with education for children of compulsory school age (including vocational training), sports, leisure and recreational activities (literature, arts, crafts, etc.). The daily programme serves as an important safeguard in avoiding that a child is locked up in his cell for 24 hours a day. Instead, it could foster the child to participate in social processes, group structures and joint activities, provided that this is in the child’s best interests. In addition, the daily programme is important for the child’s reintegration into society (see para. 5.4.3.3).

Besides that the design of institutions and quality of living conditions should foster the enjoyment of economic, social and cultural rights, they should not unlawfully infringe the child’s civil and political rights, such as the right to privacy and physical integrity. On the contrary, they should foster their enjoyment. Harsh conditions of deprivation of liberty can even lead to cruel, inhuman or degrading treatment or punishment (art. 37 (a) CRC).16

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16 Although a clear distinction between violation of art. 37 (a) and (c) CRC in this regard is not easily made; cf e.g. the HRC jurisprudence under art. 7 and 10 (1) ICCPR, which does not draw a clear line between violations of both human rights provisions either.
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A concrete aspect brought forward by the JDLs is that the child should be entitled to possess personal belongings as part of his right to privacy. This includes, for example, the right to wear personal clothing (i.e. not an institutional uniform), which also is of significance for treatment with respect for the child’s dignity. Since personal belongings, including personal clothing forms part of the child’s privacy, limitations should be based upon clearly described legal provisions and should be used only if required for the child’s best interests or order or safety in the institution (i.e. not as a general rule). This does not exclude that general regulations provide rules regarding prohibited goods, such as contraband.

The medical check upon admission is another example of a provision relevant to the enjoyment of civil and political rights (see also GC No. 10, para. 89). A medical check after the child’s arrival in the institution is not only relevant to the provision of health care, but also for the determination of the child’s medical needs as part of his individual treatment programme (and thus for the realization of the objectives of deprivation of liberty). In addition, it serves as an initial assessment of the child’s physical and mental health condition, which is relevant for the examination of alleged violations of the child’s human rights during his institutional stay. If the child has (allegedly) been tortured or has been treated or punished in a cruel, inhuman or degrading manner, a medical check could serve as an valuable source of information and evidence, which then should be compared to the records of the child’s initial medical check (e.g. did he already have the scars that are found on his body or was he already in the bad mental state he was found?). In other words, the medical check upon admission has several objectives, one of which is the legal protection of the child’s mental and physical integrity.

Furthermore, the health care offered during the child’s deprivation of liberty should respect the child’s physical integrity in the sense that he cannot be medically treated without his consent. Dependent on the child’s evolving capacities, the position of the child’s parents should be taken into account as well. This can imply that a young child cannot be medically treated without informed consent by his parents (or without consent of both the child and his parent). An older child could consent independently (while his parents are merely informed). International Human Rights Law does not provide specific guidance in this regard. The domestic legislator could provide regulations regarding the question when a child can consent independently (see, e.g. the Dutch law in this regard; para. 5.5), but this could also be made dependent on the child’s evolving capacities after an assessment in each case regarding each individual child. The domestic legislator should provide a specific regulation in case the opinion of child and parent(s) are conflicting.

The child’s freedom of religion, thought or conscience must be fully respected during his deprivation of liberty. This may have implications for the daily programme in the institution, which should leave room, for example, for prayers. It can also affect substantive living conditions, such as food. In addition, the
institution should facilitate the child to exercise his religion by offering the services of spiritual leaders.

B. Right to Maintain Contact with the Family
The child should be enabled to maintain contact with his family through correspondence and visits. This specific child rights element embodied in article 37 (c) CRC forms part of the child’s right to family life (art. 16 CRC) and not to be separated from his parents (art. 9 CRC). In addition, it is a significant safeguard for children deprived of their liberty, because it can contribute to the visibility of children and the transparency of their institutional stay – it can contribute to the prevention of violence, abuse, neglect or any (other) form of ill-treatment of children (and i.e. be a special protection right).

The right of the child to maintain contact is not absolute. Exceptional circumstances may give reason to limit contact, which should be prompted by the child’s best interests (cf art. 9 (3) CRC). Limitations should be clearly described in the law and not left to the discretion of the institution’s administration (GC No. 10, para. 87; cf art. 16 CRC and, e.g. art. 8 (2) ECHR), although some discretion is unavoidable (e.g. the setting of visiting hours), which stresses the need for legal remedies. In addition, the enjoyment of the right to maintain contact with the family means that the child’s placement outside the region of his family residence should be an exception explicitly justified by a placement decision (see also below para. 5.4.3.3). The possibility of parents to visit their child should not be made dependent on the child’s placement in their vicinity. If a child is placed (far) away from his parental home, his parents should if necessary be (financially) supported in order to enable them to visit their child. In this regard, it is important to note that article 37 (c) CRC entitles the child to maintain contact through correspondence and visits.

Besides contact with the family, contact with the wider community as a whole has been recognized in International Human Rights Standards as a vital element in the realization of the child’s return to that community. It is particularly recognizable in one of the main JDLs principles, integration of institutions in the community. It goes without saying that – again – the child’s placement within his community is of significance in this regard. Specific tools that could be attributed to the child are correspondence (letters, telephone calls and maybe e-mail) and visitation, but also leave arrangements. As with regard to the child’s family, one should embody the limitations of these forms of contact with the outside world (i.e. denying contact or methods of screening) in clearly described legal provisions, which force the authorities to explicitly justify the (grounds for) limitation, based on the best interests of the child or the maintenance of order and safety in the institution.17

Furthermore, it is important to reiterate that the child is entitled to legal and other appropriate assistance (art. 37 (d) CRC) and should be enabled, when he is in

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17 The latter ground should not be used for limitation of the child’s contact with his parents or family.
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pre-trial detention, to prepare his defence and to this extent have private and confidential contact with his lawyer (see art. 40 (2) (b) (ii) CRC). 18

5.4.3.2 Special Protection Rights

A. Introduction
The second component of the legal status of children deprived of liberty consists of provisions meant to ensure that the child receives the special protection he is entitled to. This includes in the first place the right to be protected against torture and other forms of cruel, inhuman or degrading treatment or punishment. Second, it enshrines provisions regarding the separation of children from adults and of pre-trial detainees from convicted children. It also includes provisions regarding limitations of rights related to the maintenance of order and safety in institutions, such as the use of force or restraint and disciplinary measures. Special protection rights furthermore include the right to remedy unlawful or arbitrary treatment, particularly through filing complaints. In this regard, it is important that each child has a personal file in which all relevant aspects of the child’s deprivation of liberty should be recorded. In addition, the second component of the legal status consists of provisions meant to improve transparency of institutional life and the administration of institutions through independent supervision and inspection. Above all, it is vital that the child (and his family) is well informed about his rights.19

B. Information for the Child and His Family
It needs hardly any clarification that for the exercise of the rights of the child, it is of eminent significance that the child is aware of his rights and that he knows how to exercise them. This calls for adequate information for the child on all aspects of his legal status; it forms part of the general duty of care of the institution. It should inform the child, upon admission, of his rights; he should for example receive a copy of the internal rules (i.e. an up-to-date representation of the applicable law and regulations; see rule 24 JDLs). Since an institution cannot be regarded as the most objective source in this regard, the right of the child to have contact with, for example, his lawyer (as part of his right to legal and other appropriate assistance, which can also include legal assistance from a child legal aid centre) or an independent inspector is of eminent importance.

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18 International Human Rights Standards do not pay much attention to the possibility that the closed character of the institution may require rules regarding the screening of visitors, letters and phone calls. In addition, the best interests of the child may require this. It is advisable to provide exhaustively for such possibilities in domestic (statutory) law. These limitations may neither deprive the child from his right to maintain contact with the outside world, above all with his family and parents, nor may it lead to unlawful infringement of his right to privacy.

19 The rights of a child should also be fully respected during transportation.
Furthermore, it is vital for the child to fully comprehend the information. In the first place, this means that the information must be provided in a language that the child understands and can read, which may require translation of written information, such as the internal rules. If no translation is available (reasonably or not), the institution must provide the assistance of an interpreter when informing the child (this should also be done if the legislation and/or international rules have changed). If the child is not capable of reading or speaking due to illiteracy, the child must receive the information orally in a way he can understand it. This also implies an obligation for the institution to perform to the best of its ability. Furthermore, children may speak the language but do not understand the content of the information. This has more than one dimension. First, information should be child-friendly; institutions have a general duty to provide information that is fit for children. In addition, children differ from each other, requiring different approaches regarding the provision of information. The age and maturity of children must be taken into account as well as their level of intelligence and specific characteristics (e.g. state of mental health), which may influence their capability to understand the provided information. Each child must be granted ‘full comprehension’ of information relevant for his legal status (see rule 25 JDLs).

The child is not the only one who must receive information. The child’s parents, guardians or closest relative should receive information as well, particularly regarding the placement (or transfer) of their child. In addition, the child and his family should be mutually informed about their whereabouts, such as the state of health or death (art. 9 (4) CRC). The institution has an outreaching responsibility in case the child has died or is severely ill (i.e. requiring transfer or long-term clinical treatment). If a child has died the institution must facilitate an independent inquiry into the causes of death, which is significant in light of the prohibition of torture and ill-treatment and the child’s right to life (cf. art. 9 (4) CRC and art. 6 CRC).

C. Prohibition of Torture and Other Forms of Ill-treatment
Each child has the right to be protected against torture and other forms of cruel, inhuman or degrading treatment or punishment, prohibited under article 37 (a) CRC. Although, this applies to all children, it is particularly relevant to children deprived of their liberty. They are generally placed in institutions that lack transparency, which makes them dependent and particularly vulnerable; de facto, they often are subject to gross human rights violations, such as cruel, inhuman or degrading treatment (see, e.g. UN Violence Study 2006).

The absolute and non-derogable prohibition of torture and other forms of ill-treatment under International Human Rights Law (and International Customary Law) places States under specific (positive) obligations. These include obligations
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regarding various aspects of the child’s legal status (as discussed in this paragraph) including the general conditions of deprivation of liberty (i.e. harsh conditions can amount to ill-treatment). In addition, they include instructions to domestic legislators to incorporate legislation which prohibits corporal punishment, solitary confinement and detention incommunicado (cf. art. 37 (c) jo. 9 (3) and (4) CRC). Furthermore, each child should have effective remedies to challenge violations of the prohibition of torture and ill-treatment; the child’s file and (medical) records are vital in this regard (see under G.). The State should also provide redress for victims, prosecution of perpetrators and training for all those involved in and around institutions where children are deprived of their liberty (see also arts. 19 and 39 CRC). In this regard, it is important to realize that the impact of torture and ill-treatment arguably is different for children than for adults.

Regarding the question what constitutes torture of children, the definition of article 1 of the CAT provides guidance. It defines torture as ‘any act by which severe pain of 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.’

Due to the specific status of the child, as a human being in development, the threshold for the constitution of torture, particularly regarding the aspect of ‘severe pain or suffering’, arguably is lower for children than for adults. This also has implications for the constitution of the other forms of cruel, inhuman or degrading treatment or punishment, which have not been clearly defined, but are assumed to form a chain of aggravated forms of ill-treatment, starting with ‘mere’ degrading treatment up to inhuman and cruel treatment (and torture).21

In addition, the scope of torture (and other ill-treatment) is not limited to violations in public settings (i.e. public detention centres, prisons, etc.), but extends also to private institutions (or privatized institutions) in which children are deprived of liberty. In this regard, each official working in or around an institution where children are deprived of their liberty (staff, director or other professionals responsible for the execution of institutional tasks) should refrain from treatment or punishment as prohibited by article 37 (a) CRC. The institution has the duty to protect the child against torture and other forms of ill-treatment imposed by staff or other officials. This could be seen as an obligation to provide a safe institutional climate as part of the child’s right to special protection. This also includes

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21 Note that the other forms of ill-treatment are strongly dependent on the circumstances of the case, which should be interpreted in a child-oriented manner.
protection against violence from other inmates (i.e. the horizontal effect of the prohibition of torture and ill-treatment). One other specific element in this regard is the protection of children against hazardous influences of adults; hence the requirement of separation of children from adults (art. 37 (c) CRC), as will be highlighted below.

In conclusion, the prohibition of torture and other forms of ill-treatment is not exclusively, but particularly, relevant to children deprived of their liberty. The CRC framework provides little child-specific guidance regarding definitions, interpretation and implications of this prohibition. It is to be recommended that the CRC Committee fills this lacuna. Although (parts of) the prohibition deserve(s) special and separate attention (see, e.g. the issue of corporal punishment addressed in GC No. 8), the CRC Committee could pay attention to its implications specifically for children deprived of their liberty (see recommendation XXI).

D. Relevant Separation Issues
One of the two specific elements under article 37 (c) CRC’s quality of treatment is the separation of children from adults. This requirement can also be found in article 10 (2) and (3) ICCPR, but the CRC leaves room for deviation grounded on the best interests of the child. This issue of separation is prompted by the protection of children against negative and hazardous influences of adults and by the need for a child-specific approach. Children deprived of their liberty are entitled to an institutional approach that meets the standards set by the CRC (i.e. child-specific) and this alone already legitimizes separation from adults (i.e. no placement in an adult climate). From this point of view separation is particularly important for the realization of the objectives of deprivation of liberty (see para. 5.4.3.3). The child’s protection against hazardous influences from adults is an essential part of the second component of his legal status concerning special protection rights.

This separation issue brings forward the question whether young adults who are sentenced under the juvenile justice system can still be placed (or remain) in a facility for children. These young adults were sentenced under the juvenile justice system, since they were still children when they committed the offence (‘crime date criterion’). As a result, they remain entitled to be treated accordingly and thus are entitled to be placed or to remain in a youth institution. This leaves unaffected the fact that (younger) children have the right to be separated from adults.

Obviously, the line between children and adults has been drawn at eighteen and where one draws a line there are borderlines. The general rule should not be that children who turn eighteen are transferred immediately to an adult facility. Continuation of their stay in a child facility should be regarded as an extension of the ‘crime date criterion’ and should be fostered provided that this is not against the interests of the young adult in question (i.e. based on the legal fiction that art. 37 (c) jo. 3 (1) CRC still applies) or those of the other children in the institution. It seems advisable not to place a young adult together with a young child (of twelve or thirteen years). In general, placement of children should take into account their
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differences in age and maturity, which requires internal differentiation, also between young and older children (see also para. 5.4.3.3). The same is true regarding boys and girls. In addition, the young adult should have the right to request transfer to a facility for (young) adults (e.g. through conversion of his sentence into an adult sentence).

In this regard it is furthermore important to stress that deviation from the provision that children must be separated from adults must be prompted exclusively by the best interests of the child. This leaves no room for other purposes, such as lack of places in youth institutions or any other logistic (and potentially pragmatic) reason.

Another issue of separation aims at ‘segregation’ of unconvicted and convicted individuals deprived of liberty (art. 10 (2) (a) ICCPR). This separation issue is prompted by the presumption of innocence and implies that pre-trial detainees are entitled to be treated accordingly. The CRC has not recognized this separation issue, although the JDLs acknowledge the differences between child pre-trial detainees and convicted children. Under article 41 CRC, however, article 10 (2) (a) ICCPR can be applicable (i.e. in a State that has ratified the ICCPR). This would imply that children in pre-trial detention should be housed separately from adults. This does not necessarily mean that they cannot stay in the same institutions, provided that there are separate departments (as can be derived from the HRC case law). This approach could also be defended regarding the other issue(s) of separation (see above and below in para. 5.4.3.3). The Standard Minimum Rules furthermore provide detailed guidance (more than the JDLs) regarding the implications of separate treatment (see para. 3.7).

E. Limitations to Maintain Order and Safety in Institutions

The institution’s administration should have legitimate means to maintain or restore the order and safety in the institution and to protect children and staff, such as the use of force or disciplinary measures. By implication these measures can limit children’s enjoyment of human rights – in particular, their right to privacy, freedom of movement or liberty and physical integrity. International Human Rights Law and Standards do not prohibit such limitations, but call for a restrictive and lawful (e.g. not violating the prohibition of ill-treatment) use only.

The use of force or restraint is, in principle, not permitted, unless used in exceptional cases (prevention of self-injury, injuries to others or serious destruction of property), as a measure of last resort and only if grounded in specified legislation. In addition, these far-reaching limitations should be used for the shortest possible period of time only and by order of the director (rule 63 and 64 JDLs).

Disciplinary measures should be used only if required for the interests of safety and order in the institution (and arguably outside the institution if the child participates
in community life under the responsibility of the institution) and should serve the objectives of the institutional stay (i.e. ‘instilling a sense of justice, self-respect and respect for the basic rights of every person’; rule 66 JDLs). It may never be imposed merely for retributive reasons; it should have an educational aim instead. Disciplinary measures should be clearly described in domestic legislation that stipulates which conduct can constitute a disciplinary offence, the type and duration of disciplinary sanctions, the competence (or competent authority) to impose disciplinary sanctions and the authority competent to hear appeals (rule 68 JDLs). Unlike regarding the use of force or restraint, the JDLs do not refer to the director as the exclusively competent authority to impose disciplinary measures. Still, a certain distance and degree of objectivity seems inevitable in this regard (see also para. 5.5 for Dutch experiences on this particular point).

Domestic legislation should furthermore be child-specific, which implies that it should take into account the specific characteristics, needs and rights of the child. This can, for example, have implications for the maximum duration of disciplinary measures (i.e. shorter than regarding adults) and excludes limitation of contact with the family as a disciplinary measure (see below). Another specific aspect that should be mentioned here is that the child should be heard in accordance with his age and maturity (art. 12 CRC). Above all, the best interests of the child should be a primary consideration regarding each disciplinary decision.

International Human Rights Standards do not provide guidance on the forms of disciplinary measures (nor on the forms of restraint or force; only weapons are explicitly prohibited under rule 65 JDLs and sanctions executed by other inmates under rule 71 JDLs). It does however exclude (in rather firm wording) all measures that constitute cruel, inhuman or degrading treatment or punishment, including corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical or mental health of child. Furthermore, reduction of diet, the restriction or denial of contact with family members should be prohibited for any purpose, or labour as disciplinary measure should also be prohibited. Finally, the ne bis in idem rule should apply (i.e. a child may not be sanctioned more than once for the same conduct) and collective sanctions should be prohibited. This final point touches an important aspect of limitation of children’s human rights for disciplinary purposes, namely that they should always be based on decisions, taken in each individual case (which does not exclude the fact that more than one child is punished), which, in addition, are later subject to checks. The same is true regarding the use of force or restraint, which is prohibited as a general rule.

22 This leaves unaffected the fact that there may be reason to limit or deny contact with the family, if against the child’s best interests (art. 37 (c) CRC).

23 This applies in general to limitations of children’s human rights; see above para. 5.4.2.
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Given the impact of disciplinary measures their imposition should be surrounded by a number of specific legal safeguards (see rule 69ff JDLs). A report of the child’s misconduct must be presented ‘promptly’ to the authority that is competent to impose a disciplinary measure (e.g. the director of the institution) and it should decide on it ‘without undue delay’, after a thorough examination. Before imposing a measure the child should be properly informed about the alleged conduct that may justify a disciplinary reaction. In addition, the child should be enabled to present his defence. In other words, the child should be heard and should receive information regarding the director’s findings and decision. This should all be duly recorded. The information in this regard must be fully understood by the child, which calls for ‘child-friendly’ information and for interpretation if required (see also above regarding the provisions of information in general). Furthermore, the child should have the right to remedy the decision before a competent impartial authority. Obviously, the child should be informed about this right to remedy the decision (e.g. by providing the decision in writing – a document which could be registered in the child’s file as part of the obligation to duly record the imposition of a disciplinary measure).

Other legal safeguards that can be found in the JDLs regarding the use of force or restraint is that the director should immediately consult medical or other relevant staff and report the use of force or restraint to a higher administrative authority (rule 64 JDLs; see further below).

F. Effective Remedies and Transparency – Independent Supervision
An essential component of the child’s legal status is the presence of effective legal remedies to challenge unlawful or arbitrary treatment during deprivation of liberty. The use of legal remedies can illuminate human rights violations and therefore serve to protect the child deprived of his liberty. Legal remedies can also contribute to more transparency and screening of the institutional administration and they can also be relevant for decisions concerning medical treatment or placement and transfer. In addition, they can contribute to the settlement of conflict – a form of dispute resolution. In essence, legal remedies, like the right to complain, revolve around the right of the child to challenge decisions that affect him, before an independent authority, in order to determine whether that specific decision is in conformity with the (domestic and international) law.

International Human Rights Standards provide that detained children should have the opportunity to formally communicate with the director of the institution and to submit requests or file complaints to authorities outside the institution (such as the central prison administration, judicial authority or any other ‘proper’ authority (rule 76 JDLs). These requests or complaints should be free from

24 In this regard it is important that legal remedies should never rule out the use of informal ways of settling a dispute. The child’s right to freedom of expression could imply that there should be a form of participation in the decision-making process in an institution, e.g. through a youth council, which also could avoid grievances.
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censorship (and should not lead to repercussions, according to rule 70.4 EPR) and
the child should be informed about the response without delay. However, by using
rather broad wording (the EPR, e.g. contain clearer instructions) some questions
remain unanswered (e.g. can the delivered decisions be regarded as legally
binding?) and leave room for minimal interpretations.

Only with regard to disciplinary measures the JDLs explicitly provide that the child
should have the right to appeal before a competent impartial authority. Arguably,
the requirement of impartiality applies in general to the authority competent to hear
complaints. Rule 77 JDLs does call for the establishment of an independent office
(an ombudsman) that is competent to receive and investigate complaints of children
denied liberty and which should assist in finding settlements (which represents
a form of dispute resolution). Still, the JDLs could have provided more clarity
regarding the demands regarding the organ(s) competent to hear complaints and its
competences in terms of delivering binding decisions. In this regard it is advisable
to distinguish between attempts to settle disputes and investigation of allegations of
human rights violations. In particular regarding the latter, the right to complain
forms an essential part of the child’s legal status. Denying the authority competence
to hear complaints with impartiality and independence on the one hand and the
competence to deliver legally binding decisions on the other, would negate the right
to complain and make the legal remedies potentially ineffective. The CRC
Committee should provide further and more detailed guidance in this regard (cf GC
No. 10, para. 89; see recommendation XXI). In addition, it is of great significance
that domestic legislators adopt domestic legislation in which detailed legal
remedies, including procedural requirements are laid down.

Regarding the child’s legal capacity, it is important to note that each child deprived
of liberty is assumed legally capable of exercising his rights in this regard (or at
least the JDLs do not provide instructions to assume otherwise). The child’s age
and maturity may, however, give reason to provide for additional (legal) assistance.
For example, the child’s parents could act in their child’s place or the child should
be granted a special (legal) representative. In general, each child is entitled to legal
and other appropriate assistance (art. 37 (d) CRC), which is particularly relevant to
the use of legal remedies. Furthermore, despite potential assistance, the procedure
and procedural demands (e.g. the form and reasoning of the notice of complaint)
should not be too high. In addition, one should take into account that a child may
not be able to speak or understand the language, which should entitle him to
interpretation, or that he is illiterate, which should not exclude filing a complaint
orally (with adequate registration). Again the JDLs are not superfluous in this
regard.

Another important element for the special protection of children deprived of their
liberty is that institutional life be independently supervised or inspected.
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International Human Rights Standards provide rules regarding the establishment of an independent inspection mechanism, which should be entitled to visit the institutions regularly and unannounced, in order to conduct inspections. Inspectors should have unrestricted access to children, staff and records. Children should be allowed to talk to the inspectors in confidence. There is little specific further guidance, but inspectors and the inspection body must be qualified and duly constituted. Above all they should not belong to the institution’s administration. Furthermore, States have much discretion regarding the organization of such an independent inspection mechanism. What is clear, however, is that domestic law should provide for such an independent mechanism, which can be regarded as crucial in respect of the transparency of institutions, the protection of the rights of children, but also for the constant screening of the quality of the living conditions and treatment of children deprived of their liberty. As mentioned before both international independent supervisory mechanisms and the child’s family are of significance in this regard as well (see paras. 5.2 and 5.4.3.1).

G. Files and Records
A final aspect of the child’s procedural legal status is the existence of a personal file and record. Each child should have an individual file that is confidential and to which he, or his family have access in conformity with the child’s evolving capacities (i.e. a child may reach an age or level of maturity that justifies that he can deny access to his file by his parents; domestic law could set age limits in this regard). The file should inter alia include records regarding admission, transfer and other information on the child’s whereabouts during his deprivation of liberty. It should also include information on his personal, legal and medical records and details regarding the child’s participation in treatment programmes. Furthermore, the child’s file must be kept up to date which implies also a periodic review of the content. The child’s file is an important legal safeguard, because it should enshrine records on decisions of the institution regarding the child, such as decisions regarding disciplinary measures. In this regard it serves as an important source of information during complaints procedures concerning alleged violations of the child’s rights. Domestic legislation should provide legislation regarding access to or consultation of files by a third party, such as a complaints committee or inspection body (see rule 19 JDLs).

Although the child’s file serves as an important legal safeguard, its value should not be overestimated. The reliability of the content of the file is dependent on who maintains the file (i.e. the institution’s administration or staff members). In the event of serious human rights violations and serious denying of rights by the institution it is not unlikely that the related actions will not be duly recorded in the child’s file. This stresses the significance of the child’s right to contest the content of the file; the child should be entitled to request rectification of his file.
5.4.3.3 Realization of Objectives

A. Respect for the Child’s Dignity as the Driving Force

The third component of the legal status of children deprived of their liberty focuses on the realization of the objectives of deprivation of liberty. In the context of juvenile justice any response to (alleged) delinquent behaviour or form of treatment of the (accused) child should be aimed at ‘the promotion of the child’s sense of dignity and worth’ and the ‘reinforcement the child’s respect for the human rights and fundamental freedoms of others’. It should furthermore take into account the child’s age and the desirability of promoting his reintegration and his assuming a constructive role in society (art. 40 (1) CRC). Similarly, this applies to deprivation of liberty as well.

Despite the fact that the realization of objectives should be taken into account while determining whether deprivation of liberty is appropriate (art. 37 (b) CRC; see para. 5.3), it also has implications for the treatment during deprivation of liberty. Obviously, there are different implications for pre-trial detention and for imprisonment as a disposition but, in essence, the child deprived of liberty under the juvenile justice system is entitled to be treated in a manner that fosters his (eventual) reintegration.

This component of the child’s legal status is closely related to elements of the other two components. For example, the daily programme should contribute to the child’s reintegration through offering, for example, education or vocational training. The child’s right to have contact with his family is also of significance for his return to the community. Moreover, the objectives of juvenile justice are certainly not well served if the child is not treated with respect for his dignity, the driving force behind the realization of the objectives of juvenile justice. The CRC Committee rightfully raised the following question (GC No. 10, para. 13): ‘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 freedoms of others?’ It is clear that the administration and staff of institutions should be considered such key actors as well.

B. Finding the Appropriate Place

Another important aspect for the realization of the objectives of deprivation of liberty is the child’s placement. On the basis of a lawful (court) order, the placement of a child primarily is a matter of the enforcing authorities. It may, however, affect the appropriateness of the deprivation of liberty in light of the legal requirement of the shortest appropriate period of time. Different aspects are relevant to the determination of the right placement. International Human Rights Law and Standards do not specifically address the question where a child should be placed.
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Based on the other elements of the child’s legal status the following aspects can be regarded as relevant in this regard.

The place where a child is deprived of his liberty largely determines his possibility to maintain contact with his family, particularly through visits (see also para 5.4.3.1). This implies that a child should preferably be placed within the vicinity of his parents’ or family’s residence (i.e. regional placement). The community-oriented approach of institutions, as proclaimed by the JDLs, provides another reason to place the child within the region of his community. This also is important for the child’s participation in reintegration programmes (see below), which should preferably take place in the community where the child eventually returns.

However, there may be reasons to place the child outside his community region. One is that the institution where the child (e.g. under a penal treatment order) can receive the (most) appropriate individual treatment is situated in another region. Another is that there is no institution available in the child’s vicinity or that there are no places available in the closest facility.

The weighing up of these different factors and finding the appropriate place is not an easy task. In addition, there may be conflicting interests. An important issue in this regard affects the question of how much discretion the enforcing authorities should have, taking into account the assessment the court or judge ought to make when determining the appropriate disposition.\(^{25}\) If a court has ruled that the child should be placed in a specific institution, there is little to no room for the enforcing authorities to divert from that instruction. It may be assumed that such instruction is directly linked to the requirements of the shortest appropriate period of time and diversion would make the deprivation of liberty unlawful, particularly if the appropriateness of the deprivation of liberty is undermined. If the court has not provided any specific instructions, the enforcing authorities have a certain discretion.

In general, the objectives of the deprivation of liberty in the context of juvenile justice (e.g. preventing the child from re-offending) should not be jeopardized by inappropriate placements. This implies in the first place that one should be willing to accept that a child is temporarily placed in the inappropriate institution if the appropriate place is not available (see also the jurisprudence of the ECHR, e.g. *Bouamar v. Belgium and Brand v. the Netherlands*; para. 5.5), since (conditional) release most likely is not an option. The authorities must, however, find the appropriate place as soon as possible. Regional placement seems, given the child’s particular interests and rights under the CRC, to be favoured (cf e.g. rule 17.1 EPR). However, one should not exclude (and arguably favour) placement outside

\(^{25}\) This particularly affects deprivation of liberty as a disposition, although the authorities should always find the child the most appropriate place, also in the pre-trial phase.
the child’s region if that will serve the child’s interest the most.\footnote{As mentioned in para. 5.4.3.1 this places the authorities under the obligation to facilitate the child’s family to make visits, which may require financial support.} With a view to the child’s reintegration such placement outside the region should preferably be followed later by a transfer to a facility in the child’s region, where he ultimately returns.

Although the State has the responsibility to use institutional capacity efficiently, this does not refrain the State from the positive obligation to place each child in the most appropriate place as soon as possible (e.g. within three months; the domestic legislator should set a time limit by law). This also places the State under the obligation to provide sufficient and appropriate facilities (i.e. not necessarily more or larger facilities, but smaller and better divided throughout the country or state; see also rule 30 JDLs).\footnote{The quality of institutions in terms of the realization of the ‘objectives of social reintegration’ should also be subject to \textit{inter alia} regular inspection by a competent authority, not belonging to the institution (rule 14 JDLs).} If the most appropriate place cannot be found within a reasonable time, the child should either be placed in the second best facility and receive additional support from outside the institution or be released; after a certain amount of time the deprivation of liberty becomes unlawful under article 37 (b) CRC.

Given the potential complexity of the child’s placement and given the fact that the appropriateness of a certain placement may be subject to change, it should be evaluated regularly. In this regard it also is important that the child can submit a request for transfer (including the right to appeal the decision upon his request) and that the institution, capable of judging the (assumed) progress made, can also instigate transfer to another, more appropriate, facility. This can also be used to foster the child’s gradual transfer from a closed to a (semi-) open institution.\footnote{Note that a child should not be transferred from one facility to another arbitrarily (rule 26 JDLs). If transfer takes place the child’s family should be informed (\textit{inter alia} to avoid arbitrary transfer or disappearance).}

\section*{C. Admission, Individual Approach and Internal Differentiation}

Upon admission the institution’s administration should determine the appropriate placement for the child (i.e. where in the facility), which requires an initial assessment, including a medical check (see above), on the basis of information of earlier reports (including those on which the court’s decision has been based, if any). This assessment is particularly important for the realization of the objectives of the child’s stay in the institution, ultimately aiming at the child’s reintegration. This requires, besides an appropriate internal climate in which the child’s basic and special protection rights are fully respected, an individual approach, based on a plan, which is subject to periodic review (see rule 27 JDLs; art. 25 CRC). This is particularly true if the disposition includes a court order for the child’s individual
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treatment. A plan-based approach can certainly contribute to the enforcement of deprivation of liberty for the shortest appropriate period of time, by (regularly) reviewing the need for closed placement in an institution. This also implies that one should draw up such a plan as soon as possible. The potentially short or unpredictable duration of pre-trial detention does not exempt an institution from this obligation; one should constructively ‘work’ with children from day one. In this regard the connection between institution and community is of significance as well and reiterates the earlier remarks regarding the institution as part of an integral approach to address juvenile delinquency – an approach which should also aim at improving the quality and safety of child’s community (see also para. 5.3), in essence a continuum of care.

The determination of the appropriate placement inside the institution implies that there is internal differentiation, which represents the recognition of differences between children according to age and maturity (also in light of the protection of younger children against older children and maybe even against young adults who still reside in a youth facility (see under para. 5.4.3.2) or to gender (girls are entitled to equal treatment, but require specific attention and protection against hazardous influences (including the dominant behaviour of boys).

In addition, there is one other issue that deserves attention: the issue of mixing of children deprived of liberty in different legal contexts. The most prominent form is placement of children under the juvenile justice system together with children under the child protection system. The CRC Committee has criticized this practice, for example regarding the Netherlands (see also para. 5.5). There are reasons to favour separation, which are primarily given from the perspective of the child deprived of liberty under the child protection system; that is: these children should not be placed with juvenile justice children, since a penitentiary climate would not meet their need for alternative care (see also the ECtHR jurisprudence under art. 5 (1) (d) ECHR), there would be risk of criminal contamination (see commentary to rule 13 Beijing Rules) and it would not be justifiable towards both children and parents (see Dutch research in this regard; para. 4.6). One could also proclaim that both legal systems are different by nature and that one should not set aside too easily the fact that one group has been convicted and the other group has not (note, e.g. the proclaimed segregation of unconvicted and convicted prisoners under the ICCPR).

However, in connection with finding the most appropriate place for each child, while taking into account each child’s specific needs (rule 28 JDLs) and the broad approach of article 37 (c) CRC and the JDLs as a whole, one could defend that these groups should not necessarily be separated.

The solution to this issue is not easily given. It is particularly dependent from the system’s point of departure. If a system is used to separate both groups, this should not be changed. If a system mixes both groups, like for example the Dutch system used to do, there is no need to change this system. The assumed experiences
of unfairness and essential difference between both legal systems could be answered by providing for separate groups. Above all, the domestic legal system much acknowledge that each child deprived of his liberty is entitled to the same legal status, which should automatically leave room for a tailored approach in accordance with the child’s individual needs. This recognition is particularly relevant to the children under the juvenile justice system, because these (‘super predators’, ‘outlaws’ or ‘criminals’) are often denied their inalienable human rights and fundamental freedoms.29

D. Reintegration Programmes and Aftercare
Finally, International Human Rights Standards call for the creation of specific reintegration programmes and aftercare programmes (after the child has returned to society). Both are of significance and confirm that institutions, although their use should be avoided as much as possible, form part of an integral system and that they certainly do not form the endpoint. The preparations for reintegration need to start in the institution (arguably from day one), but should be continued and fulfilled after a child’s release. In this regard a gradual return should be fostered, either through gradual placement towards open institutions, leave arrangements and reintegration programmes in which a child participates in educational or training programmes or internships, while he stays at home. After the child’s (conditional) release, aftercare should be offered for example through probation. In light of the objectives of juvenile justice (art. 40 (1) CRC) and imprisonment for the shortest appropriate period of time (art. 37 (b) CRC) it certainly is defendable that each child deprived of liberty is entitled to be guided and assisted in the period after that.30 The domestic legislator and enforcing authorities should provide the legal foundation and implementation, respectively.

5.4.4 Conclusion – Safeguarding a Strong Legal Status for Children Deprived of Liberty

Under International Human Rights Law and Standards each child deprived of his liberty is entitled to a legal status that consists of the elements and components highlighted above. In order to strengthen the legal status it is important that it is concretely elaborated in domestic (statutory) law. It should be based on the doctrine of minimal limitations with a child-oriented approach, that is: that the child remains entitled to all rights under the CRC, unless limitation of the enjoyment of his rights is required for (the execution of and realization of the objectives of) the deprivation of liberty. In addition, the best interests of the child should always be a primary consideration. Regarding the question what should be incorporated into the child’s

29 See further para. 5.5 and para. 4.7 for more information on the Dutch debate in this regard.
30 Although the enforcement may be problematic due to lack of means to force the child to cooperate; conditional release may be an outcome in this regard.
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legal status, three components could be distinguished under International Human Rights Law and Standards: basic rights, special protection rights and provisions for the realization of the objectives of deprivation of liberty. Each component implies different obligations for both the legislator and enforcing authorities in terms of the setting of minimum standards and their implementation. In this regard, knowledge about the legal requirements of the legal status of children is vital, as is awareness of their significance. In addition, skills to effectively implement are important, also in light of the realization of the objectives, aiming at the child’s ultimate reintegration into society (see for more details the recommended actions at the domestic level – part II). Above all, domestic legislation is rather worthless without sufficient will to implement it.

As announced earlier, paragraph 5.5 will address the main conclusions and findings regarding a study on deprivation of liberty of children in the Netherlands. This can be used as an example of what the details of domestic legislation can look like. In addition, it provides information regarding the challenges domestic legislators and enforcing authorities may be confronted with. It may finally serve as an inspiring example for the adoption of substantive domestic legal provisions to strengthen the legal status of children deprived of their liberty.

At this point, it is furthermore important to stress that the demands regarding the implementation of the provisions of International Human Rights Law and Standards should take into account the domestic level of development and local realities. Too high demands may be unrealistic. In addition, one should avoid unbridgeable differences between a well provided and supported life inside and the (very) poor life (in terms of, e.g. health care and education) outside the institution. This may have undesired effects, such as an increase of inmates. In particular, the requirements regarding the basic rights of children should be placed in perspective. The general approach of the CRC is that economic, social and cultural rights should be implemented to the maximum extent of the available resources (see art. 4 CRC). This does, however, not imply that one should not strive for the highest attainable standard of living inside institutions (see art. 27 CRC). In particular, the actual living conditions (i.e. accommodation (floor space and air; separate bed), sanitation, non-degrading and non-humiliating clothing and nutritional food) should meet the standards set by International Human Rights Law and Standards, regardless of the local developmental level. In addition, the right to education should be recognized with a view to achieving it progressively (art. 28 CRC). Finally, the domestic level of development and local context is less relevant regarding the protection of the child’s civil and political rights and his special protection rights in this regard.

It is important to reiterate that the JDLs, as the main source of international law providing the detailed rules regarding the implementation of the legal status of children deprived of their liberty, regulate in detail the living conditions and other provisions regarding economic, social and cultural rights; it is more modest in its instructions regarding, for example, the prevention of unlawful or arbitrary
disciplinary measures or the provision of legal remedies (see also para. 5.2). In light of the (potentially difficult) relation between the implementation of economic, social and cultural rights for children deprived of their liberty and the local context, this approach is quite remarkable. It would have been more obvious to comprehensively regulate the protection of civil and political rights rather than to prescribe a certain (i.e. high) standard of minimum conditions of deprivation of liberty.

Finally, the JDLs could be improved by addressing more in detail the requirements regarding the special protection rights of children deprived of their liberty, in particular regarding the use of force and restraint, imposition of disciplinary measures and legal remedies (including independent inspection and supervision). This could contribute to a higher level of special protection of children deprived of their liberty. The CRC Committee should take the initiative in this regard (see recommendation XXI).
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**SUMMARY OF RECOMMENDED ACTIONS AT THE DOMESTIC LEVEL – PART II**

*Implementation of the Legal Status of Children Deprived of Their Liberty in Accordance with International Human Rights Law and Standards*

I Legislation

- The domestic legislator should elaborate the legal status of the child deprived of his liberty concretely in domestic (statutory) law. It should be founded on the recognition that each child is entitled to all rights under International Human Rights Law. Limitation of the enjoyment of his rights must be required by the execution of the deprivation of liberty, with a view to the realization of the objectives, and can only take place after an explicit, individual decision based on an assessment that has primarily considered the child’s best interests.
- Regarding the child’s basic rights the legislator should set minimum standards regarding inter alia:
  - housing and accommodation;
  - personal care, including the possession of personal affects and clothing;
  - health care, including, e.g. a medical check upon admission and rules regarding consent for medical treatment;
  - educational facilities (including facilities for vocational training);
  - leisure and recreational facilities;
  - facilities to avow religion;
  - contact with the wider community, in particular the child’s family;
  - limitation of the enjoyment of basic rights, including rules regarding grounds and division of competences, while taking into account the principles of International Human Rights Law (e.g. limitation of contact with parents should be required by the child’s best interests);
  - internal rules meant to provide the general rules in institutions (including the rights of children) and which should be based on the applicable legal framework; the rule should be kept up to date and be drawn up in a child-friendly manner.
- Regarding the child’s special protection rights the legislator should provide clear and unambiguous guidance and instructions regarding inter alia:
  - the duty to inform the child (and his family) appropriately and adequately;
  - special protection of specific categories of children including separation of children from adults, separation of unconvicted children from convicted children and internal differentiation based on differences in age and maturity, and gender;

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Chapter 5

I Legislation (sequel)

- the use of force or restraint or disciplinary measures. In particular the law should:
  - exhaustively regulate the use of these measures;
  - provide under which circumstances, on what grounds and by whom these measures can be imposed;
  - prohibit collective sanctions and the execution of sanctions by other inmates;
  - prohibit corporal punishment and other forms of ill-treatment (e.g. solitary confinement);
  - prohibit torture (for reasons of clarity and awareness-raising, since it is prohibited under International Customary Law);
  - consider torture and other forms of ill-treatment criminal offences under domestic penal law and enable prosecution of perpetrators;
  - provide child victims of ill-treatment with remedies to claim redress, recovery and social reintegration.

- legal safeguards, including:
  - legal and other appropriate assistance (including interpretational assistance);
  - compulsory hearing of the child (in accordance with his age and maturity, implying that young/immature children should be entitled to special assistance);
  - service of decisions in writing, including instructions regarding legal remedies, in a child-friendly manner and taking into account that children may not be able to read or understand the decision (and instructions regarding legal remedies), which requires special assistance;
  - registration of relevant decisions regarding the child, particularly the use of force or restraint or disciplinary measures (also in the child’s file);

- effective legal remedies, such as the right to file complaints before a competent impartial (and independent) authority, which should be competent to issue legally binding decisions; these decisions should be published;

- division of competences, fostering objectivity in particular when it comes to (severe) limitations of a child’s human rights and fundamental freedoms;

- independent inspection and supervision competent to visit institutions at any time and talk with children in full confidentiality;

- personal (and confidential) files and records, including rules regarding access and the right to contest the content;

- potential differences (in general) between children in gender, age and maturity, requiring particular attention and/or special assistance (by, e.g. building in different levels of protection according to age).

(...)
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Towards Full Respect for the Rights of Children Deprived of Their Liberty

(...)

• Regarding the realization of the objectives of deprivation of liberty the legislator should, besides the instructions regarding the first two components, provide clear and unambiguous guidance and instructions regarding inter alia:
  - procedures concerning placement of the child, including the instruction to place a child within the region of his family (particularly parents) and community, rules regarding transfer, legal remedies for the child to challenge placement decisions and requests for transfer, and time limits for the situation in which the most appropriate placement is not available at once (e.g. placement within three months, after which term the child should either be placed in the second best institution and be awarded additional assistance from outside the facility or be released);
  - an assessment upon admission regarding the appropriate internal placement, while taking into account the child’s particular needs, gender, age and maturity;
  - the obligation to draw up a plan as soon as possible (preferably within certain time limits) in which the individual objectives of the child’s deprivation of liberty are formulated in conjunction with means to realize them and guidance regarding a time frame.
  - compulsory periodic review of the treatment plan;
  - leave arrangements and reintegration programmes fostering the gradual return into the community;
  - aftercare programmes, e.g. after early conditional termination of the deprivation of liberty (aftercare with a deterrent).

II Enforcement

In order to effectively implement legislation regarding the legal status of children, the competent authorities should:

• raise awareness (inside institutions as well as in society as a whole) regarding the child deprived of liberty as a rights holder entitled to rights according to the principles of International Human Rights Law and Standards; children deprived of their liberty under the juvenile justice system should not be portrayed as outlaws, perpetrators, ‘super-predators’ or disqualified in any other way, resulting in the denial of their entitlement to humane treatment and treatment with respect for their human dignity;

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II Enforcement (sequel)

- foster (and increase if necessary) the visibility of children and transparency of institutions, *inter alia* through family contact and the establishment of (local or national/state) inspection and supervisory bodies, which publish their findings in public reports. In addition, institutions should be compelled (and stimulated) to publish annual reports, their internal rules and relevant (disaggregated) data in the application of relevant legislation (e.g. regarding the use of force or restraint and disciplinary measures); this information should be made widely known;
- provide for education and (constant) training for all professionals involved in and around places where children are deprived of their liberty regarding applicable national and international law and standards and their implications; special attention should be given to the transition of the legal provisions in daily practice;
- provide children deprived of their liberty with adequate information regarding their legal status; as a minimum each child should be fully informed about his rights during his deprivation of liberty and should receive child-friendly written materials enabling a better understanding of his legal status. This information should be adequate and up to date (i.e. it should be reviewed regularly, particularly regarding the ‘translation’ of information from the relevant laws and regulations). In addition, information for the child’s family is important;
- provide redress for victims of torture and other forms of ill-treatment and prosecution of perpetrators;
- training for all those involved in and around child institutions in how to use force and restraint in a lawful and responsible way, which includes training in how to avoid the use of these means;
- provide sufficient (financial) resources to effectively implement reintegration programmes;
- acknowledge the institution as part of the community in which it participates together with the authorities relevant for the juvenile justice system (i.e. police, public prosecutor, courts, probation, youth care agencies, etc.) and for the child’s life in the community (i.e. child’s family, school and other actors in the child’s neighbourhood);
- not focus only on the deprivation of liberty as part of the response to the child’s delinquent behaviour; the (safety of the) child’s community should also be given attention, as part of an integral approach regarding children in conflict with the law.
5.5 Deprivation of Liberty of Children in the Netherlands: Key Findings and Challenges

5.5.1 Introduction

The second question of this study concentrates on deprivation of liberty of children in the Netherlands, in particular: children in youth institutions and their legal status as provided by the 2001 YCIA. In addition, special attention has been paid to the legal requirements regarding deprivation of liberty of children in the context of juvenile justice.

It would go beyond the scope of this concluding chapter to address all the relevant findings in detail (see Chapter 4). Instead, the most prominent general conclusions and findings will be presented below, followed by the most significant lessons learned and recommendations for improvement of the legal framework as well as its implementation and enforcement. Some of these recommendations reiterate those from the YCIA Evaluation 2004, but leaves those that are not reiterated here unaffected.31

This paragraph will make some general remarks regarding recent (and future) developments, which, although not part of this study, are worth mentioning in light of the findings and conclusions of this study (see also para. 4.1).

5.5.2 Respect for the Rights of Children Deprived of Their Liberty

Although the role model of the Netherlands in penal policy is no longer self-evident (see, e.g. by the large increase of individuals, including children, deprived of their liberty in the past two decades), the overall conclusion is that the Netherlands in general respects the rights of individuals treated under the criminal justice system and those deprived of liberty in that context – children included. This is particularly visible in the legislation drawn up in this regard: the Code of Criminal Procedure (CCP), the Criminal Code (CrimCo) and the penitentiary principles Acts, one of which has been particularly designed for children.

The Dutch juvenile justice system has been developing since the first decade of the 20th Century. Since 1905 the position of the child in the criminal justice system has been recognized in both the CCP and CrimCo. The last large review of juvenile justice legislation dates from 1995. It was primarily prompted by the recognition of the child as a rights holder entitled to procedural legal safeguards (i.e. right to a fair trial) in the same manner as adults. In addition, children were regarded as individuals who could be treated as more mature than previously, and for whom such new status justified (at least according to the Dutch legislator) the adoption of severer penalties (i.e. a doubling of the maximum duration). Simultaneously, the child still had to be recognized as a human being in development, part of a family

and deserving of special attention and protection (i.e. resulting in the preservation of essential procedural safeguards: trial in camera before a juvenile judge or court, a special position of the child’s parents, legal assistance by a court-appointed lawyer and a special role for Child Care and Protection Board). Since 1995 the forms of deprivation of liberty in the context of juvenile justice in the Netherlands are: arrest, remand in police custody, pre-trial detention, youth imprisonment (‘jeugddetentie’) and the measure of placement in a youth institution, a treatment order under penal law (‘PIJ-maatregel’).\(^{32}\)

Particularly regarding children deprived of their liberty in youth institutions, 2001 marked the year of the adoption of the Youth Custodial Institutions Act (YCIA). This statutory Act was specifically adopted for children in youth institutions and represents the ultimate recognition of the rights of children deprived of their liberty in the Netherlands. At the same time, its applicability to youth institutions only is its most significant limitation (or shortcoming); the applicability of the YCIA is determined by the location where children are detained or imprisoned (i.e. a youth institution). As a consequence it is not applicable to children held at police stations (which can be regarded as an even more serious flaw given art. 16a YCIA, allowing continuation of a child’s stay at the police station, while awaiting transportation or availability in a youth institution; see below) or in any other facility, not being one of the youth institutions, but depriving children of their liberty (such as, e.g. the Glen Mills School, a borstal). Children at police stations lack a clear legal status and children in other institutions (including the new established institutions for closed youth care; see para. 5.5.6) lack a legal status that provides the same level of legal protection as the YCIA. Consequently, it is highly advisable to change the approach. Instead of letting the location (and/or context) determine which level of legal protection a child should be entitled to (and which regulation is applicable), the fact that a child is deprived of his liberty should be decisive. This basically applies to all three components of legal status, although one should not lose sight of the fact that differences in context have (and require) different substantive implications; this may, however, not imply that the minimum standard of legal protection is lowered for certain specific groups of children (see recommendation II).

Despite this limitation, the YCIA covers a significant part of children deprived of liberty in the context of juvenile justice,\(^{33}\) since pre-trial detention, youth imprisonment and the treatment order are in principle executed in youth institutions.

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\(^{32}\) On 1 February 2008, an additional penal measure was introduced, specifically meant to influence (and change) the child’s behaviour through specialized (residential) programmes, without resorting to deprivation of liberty; an interesting development which may effect the use of deprivation of liberty and which deserves future attention.

\(^{33}\) In this regard it is important to note that children can be also placed in youth institutions in the context of child protection (see para. 4.2). This currently is subject to change (period 2008-2010); see para. 5.5.6.
Conclusions and Recommendations: Towards Full Respect for the Rights of Children Deprived of Their Liberty

5.5.3 Legal Requirements concerning Deprivation of Liberty of Children

The principle that no one may be deprived of his liberty unlawfully has been explicitly acknowledged in the Dutch Constitution (art. 15 (1)) and all forms of deprivation of liberty in the context of the (juvenile) justice system – arrest, remand in police custody, pre-trial detention, youth imprisonment and treatment order – have a specific legal foundation in statutory law. Dutch law does, however, not make any explicit reference to the prohibition of arbitrary deprivation of liberty.

5.5.3.1 Legal Requirements in the Pre-trial Phase

Under the CCP, arrest primarily is a matter for the police, under the responsibility of the Public Prosecutions Office; remand in police custody can be ordered by the public prosecutor. Given the discretion of these authorities, checks and balances and other legal safeguards are needed. In this regard the CCP provides that each arrested suspect should be brought before a competent authority immediately (i.e. the (deputy) public prosecutor), who should decide on his remand in police custody, on the basis of legal criteria laid down in the CCP. It has furthermore built in a compulsory judicial check (by an examining (juvenile) judge; ‘rechtercommissaris’) within three days and 15 hours after the arrest.

Dutch law provides that pre-trial detention must be ordered by a judge or court. The examining judge can order the suspect’s pre-trial detention for fourteen days, on the demand of the public prosecutor and provided that the legal criteria have been met. Continuation of pre-trial detention must be decided by a special chamber of the district court (‘raadkamer’), again upon the demand of the public prosecutor. This special chamber can order pre-trial detention for ninety days; before the end of
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this period the trial before a court or single juvenile judge should have started (i.e. the suspect is brought before the court which examines the case).³⁴

Although the Dutch legislator has built in (periodic) checks and balances, in the event someone is detained during the pre-trial phase, the CCP can hardly be regarded as child-specific in this regard. For example, there are no specific (i.e. shorter) time limits for children and the time limits that do apply are not in conformity with the recommendations of the CRC Committee. These recommendations are not legally binding, but deserve adherence (pre-trial hearing within 24 hours by an authority competent to review the legality of the deprivation of liberty and a periodic check of pre-trial detention provided by law, preferably every two weeks).

Although article 493 CCP does provide that if a child has not been heard by the district court, it can order the continuation of pre-trial detention for thirty days maximum. Still, if the child has been heard, his pre-trial detention can be ordered for ninety days, without any obligation for regular review of its legitimacy (and necessity) during this period. In this regard, it is advisable to build in periodic reviews of pre-trial detention (e.g. every 14 days as recommended by the CRC Committee), regardless of whether the child has been heard or not; the current legal system would merely encourage the child not to appear before the court, because if he does, the court can impose a pre-trial detention of ninety days. Such legislative change implies a continuation of a periodic review after completion of the first fourteen days of the term of remand in custody and would therefore fit rather well the current legal structure.

RECOMMENDATION III

The CCP should be amended in order to make mandatory a periodic review of a child’s pre-trial detention every 14 days, regardless of whether the child has been heard or not.

A (more) regular review of pre-trial detention would also be appropriate given the possibility of suspension of pre-trial detention. A child-specific element of the CCP (art. 493 (1) CCP) is that the examining judge or court has the legal obligation to examine the possibility of suspending the pre-trial detention. Although the CCP does not make one single reference to the use of pre-trial detention (or arrest or police custody) as a measure of last resort or for the shortest appropriate period of time, this provision (art. 493 CCP) represents in essence the last resort principle.

³⁴ Which de facto can imply that the court session starts pro forma, resulting (repeatedly) in adjournments for three months – a practice particularly criticized by the CRC Committee (GC No. 10, para. 83).
Given this legal obligation, one may expect that the judge or court explains why it has or has not suspended the child’s pre-trial detention, but the assumption is that this is hardly ever done in practice. In addition, the special conditions that can be attached to the suspension can be used for a quick response to the child’s delinquent behaviour, provided that the child’s right to a fair trial is not violated (in particular the presumption of innocence).³⁵

In light of pre-trial detention for the shortest appropriate period of time, it is furthermore important that the child (like any adult) can submit a request for suspension or termination of pre-trial detention. This entitlement is even more important given the lack of child-specific provisions regarding periodic review of pre-trial detention (as mentioned above).

Legal and/or other appropriate assistance to the child is of great significance, in particular to provide the judge or court with suggestions for suspension or to assist him in his request for suspension or termination of pre-trial detention. The CCP provides that the child is entitled to a lawyer and that if he is remanded in police custody, the Child Care and Protection Board must be informed, with a view to providing early assistance (“vroeghulp”), often resulting in a report on the child’s background and personal circumstances. The public prosecutions office is under the obligation to take this report into account when considering demanding pre-trial detention.

Regarding the right of the child to legal assistance (and free access of the lawyer to his client; art. 50 CCP) it is important to stress that although the law acknowledges the right of the child to have a lawyer, which includes the hearing prior to his remand in custody (pre-trial detention), this does not imply that the child has the right to have its lawyer (or any other assistant, like, e.g. his parents) present during the police interrogations. Although International Human Rights Law does not contain an explicit right to legal assistance during (initial) police interrogations, legal assistance is rather important in this stage of the criminal justice process; police interrogations tend to be vital for collecting evidence and the child may be forced to make important strategic decisions, requiring legal advice. Moreover, the child could use assistance to safeguard humane and child-specific treatment and to prevent police intimidation or violation of the nemo tenetur principle (i.e. the child being forced to confess or testify in a way that incriminates him). The need for legal (and/or other appropriate) assistance arguably is even more prominent due to the fact that children are concerned. Although there are currently experiments with the presence of lawyers during police interrogations (i.e. limited to cases of alleged homicide), the child’s entitlement to legal assistance during all police interrogations could be defended in light of article 40 (2) (b) (ii) CRC.

³⁵ The law review of 1 February 2008 increased the number of potential special conditions; it may even include the child’s participation in a programme to (positively) influence the child’s behaviour.
(stretching out to all phases of the justice process, including police interrogations, as proclaimed by the CRC Committee; GC No. 10, para. 53) and article 37 (d) CRC. It is advisable that the Dutch legislator provides for child-specific legislative guidance in this regard.36

**RECOMMENDATION IV**

The Dutch legislator should explicitly provide the right of each child to have legal and other appropriate assistance after arrest and during police custody, including the right to have his lawyer present during all police interrogations.

The Dutch competent authority should foster lawyers’ participation during police interrogations, for example by advancing the moment of involvement of duty lawyers.

Another CCP provision which deserves special attention is article 493 (3) CCP. According to this article, the judicial authorities or public prosecutor can decide to execute a remand in police custody or pre-trial detention order at any place.37 This competence is hardly used in practice, but has great potential in light of the implementation of the requirements of last resort and shortest appropriate period of time. It can be used to divert a child from placement in a police station or youth institution. Although, this does not necessarily imply that the child is not deprived of his liberty, it allows the use of home confinement (e.g. with electronic monitoring) or further forms of night detention.

Furthermore, the time necessary for processing the case (processing time; ‘doorlooptijd’) is of direct relevance to the duration of pre-trial detention (and thus for the requirement of the shortest appropriate period of time). The Netherlands could (and should) make further progress in this regard. With the ‘Kalsbeek norms’ as the point of departure, which generally correspond with the recommendations of the CRC Committee (GC No. 10, para. 83), the legislator could foster the speedy processing of juvenile justice cases by setting fixed time limits in the law.

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36 See also the recommendations of the CAT Committee in this regard; CAT Committee, ‘Conclusions and recommendations: The Netherlands’, CAT/C/NET/CO/4 of 3 August 2007, para. 6.

37 Although one could raise the question whether this competence is of added value, compared to the competence to conditionally suspend pre-trial detention.
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RECOMMENDATION V

The law should set fixed time limits for processing juvenile cases during the pre-trial and disposition period. The recommendations of the CRC Committee should be used for guidance, that is: the commencement of the trial within 30 days after the child’s pre-trial detention has been ordered and a final decision at first instance within 6 months.

Finally, particular attention should be given to article 16a YCIA. This legal provision entitles the selection official (a civil servant of the Ministry of Justice, exclusively competent to place children in youth institutions) to order the continuation of a child’s stay at the police station during his pre-trial detention, while he actually should be placed in a youth institution (or elsewhere, but not in a police cell; art. 493 (3) CCP). Children of twelve years or older can be held at the police station for another three days only if there is no transportation to bring them to a youth institution; children of sixteen years or older can be held at the police station for another ten days if there is no place available in a youth institution. Data regarding 2007 reveals that de facto one third of the children remanded in police custody and subsequently held in pre-trial detention are held at the police station for another four to five days (on average).

This provision (and practice) is remarkable and worrying since it undermines the legal system of judicial checks and balances, which could result in arbitrary deprivation of liberty. It also undermines the requirement of the child’s placement in an appropriate setting; a police station can hardly be regarded as appropriate for children. In addition, it potentially violates the child’s right to be separated from adults (art. 37 (c) CRC); article 16a YCIA is not prompted by arguments related to the best interests of the child, but merely by practical and logistical arguments instead. Furthermore, article 16a YCIA significantly weakens the child’s legal status, because the YCIA is not applicable to police stations and the regulations regarding detention at police stations are unclear and certainly not child-specific (see also recommendation XVI).

38 Art. 16a YCIA is not limited to children in pre-trial detention; it can also apply to situations in which a child is arrested by the police, e.g. after an escape.
39 See also the findings of the CPT based on its visit to the Netherlands in June 2007; CPT/Inf (2008) 2, para. 9.
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RECOMMENDATION VI

The Dutch legislator should abolish the provision of article 16a YCIA.

In the interim, the selection official of the Ministry of Justice should not use the competence of article 16a YCIA and transfer children to the most appropriate youth institution promptly.

In conclusion, although there are some child-specific elements regarding pre-trial detention that have potential in light of the legal requirements set by International Human Rights Law (one that has not been mentioned explicitly is that the examining judge should be a juvenile judge), Dutch criminal (procedural) law as a whole insufficiently recognizes the specific position of the child. It therefore is highly desirable to review the law on its child-specificity in this regard and adjust it accordingly; some specific recommendations have been made above.

5.5.3.2 Legal Requirements in the Post-disposition Phase

The Dutch juvenile justice system includes a separate set of sanctions for children embodied in the CrimCo. There are two sanctions resulting in deprivation of liberty: youth imprisonment and treatment order. Youth imprisonment is a retributive sentence, which can only be imposed while taking into account the best interests of the child offender and in full respect of the principle of proportionality. Compared to adult sentences it has been significantly limited in time to either twelve or 24 months maximum, dependent on the child’s age (i.e. 12 or older, or 16 and over, respectively) when the offence was committed.

The treatment order is surrounded by legal requirements and procedural safeguards, which reveals the legislator’s intention to use the treatment order only as a measure of last resort (i.e. limited to serious offences).\(^{40}\) In addition, the compulsory involvement of behavioural experts contributes to the imposition of the treatment order as an appropriate measure; the treatment order may only be imposed if the child forms a danger to himself or to society (‘danger criterion’) and when treatment is in his best interests (‘assistance criterion’). The duration is furthermore limited in time by specific time limitations and requirements for prolongation which are: up to four years only for sex or violence offences; up to the maximum of six years only for children who suffered from a limited development or mental disorder when committing the offence. Since it is a treatment order and not a (punitive) penalty, the principle of proportionality is relevant to a lesser

\(^{40}\) It has been questioned whether the treatment order is de facto used as a measure of last resort. In addition, the threshold for ‘serious offences’, one of the criteria for the treatment order, has been lowered, because more offences are categorized as serious. Recent figures show, however, that use of the treatment has been rather stable during the years 2004-2006 (see para 4.1).
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extent. However, the treatment order is not exclusively meant for children who cannot be held responsible for their offences, due to limited development or mental disorder. Consequently, the principle of proportionality should not be set aside entirely in favour of long-term treatment (see also para. 5.3 for the conflict of interests between the shortest appropriate period of time and the principle of proportionality); in this regard the maximum duration of six years is relevant, although it is currently subject to debate.

De facto, children under a treatment order often have to wait for long periods of time in a remand home before they are transferred to an appropriate treatment centre. This practice, caused by structural waiting lists, seriously hampers the use of the treatment order for the shortest appropriate period of time, in particular when it eventually leads to prolongation, which could have been avoided if the child’s treatment had started sooner. The Appeals Committee with reference to jurisprudence concerning adults and jurisprudence of the ECtHR under article 5 (1) ECHR, has ruled that a child should be placed in the appropriate treatment centre within six months. Otherwise the deprivation of liberty becomes unlawful; a violation which entitles the child to financial compensation. This has been the guiding jurisprudence since September 2005. Based on the legal system of the YCIA (revolving around art. 11 YCIA) and article 37 (b) CRC, it is, however, defendable to demand that each child is placed in the appropriate treatment centre within three months. Thus far, the Appeals Committee has incidentally used a lower threshold of three months.

If the most appropriate placement cannot be realized within three months, one should place the child in the next best centre with the provision of additional services and treatment programmes needed in the individual situation. If this cannot be offered to the child, he must be released from the remand home; continuation of the child’s deprivation of liberty would be unlawful under article 37 (b) CRC (see above in para. 5.4.3.3). Obviously, a certain period of interim detention should be accepted and inappropriate release should be avoided, but the law should no longer tolerate the government’s lack of will or inability to solve the waiting lists issue (and to stop the violation of the rights of children under art. 37 (b) CRC). The financial compensation granted by the Appeals Committee will most likely not provide the required incentive to move the Ministry of Justice in the direction of solving this issue.
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RECOMMENDATION VII A-B

A) A time limit should be set for temporary placements in remand homes of a maximum of three months for children waiting for a placement in a treatment centre (i.e. an adjustment of art. 11 YCIA); within three months one must find an appropriate place, which preferably is the most appropriate place, but may be the next best option, provided that the child’s individual treatment is supported with additional services and programmes from outside the institution; if the three months’ time period expires, the child must be released from the remand home.

B) The Dutch competent authority should systematically address the issue of waiting lists for treatment centres, primarily by implementing the use of deprivation of liberty (under both the juvenile justice and child protection system) really as a measure of last resort and for the shortest appropriate period of time, requiring careful assessments on the need for closed placement (including periodic review) and the availability of sufficient appropriate (non-custodial) alternatives.

The possibility to suspend either youth imprisonment or a treatment order under special conditions is an important instrument in avoiding deprivation of liberty on the one hand and offering a child a constructive programme on the other. This is to be applauded in light of the objectives of the juvenile justice system and the use of deprivation of liberty as a measure of last resort. Conditional suspension of a sentence should, however, not result in a lower level of protection of the rights of the child in question. There are examples of cases in which the adequacy of the level of legal protection can be questioned (e.g. placement in a borstal (i.e. Glen Mills School) as a special condition to a suspended youth imprisonment or treatment order).41 In this regard, it is important to reiterate the need for a broader (legislative) approach regarding equal protection for each child deprived of his liberty regardless of the location or context (see recommendation II).

Furthermore, it is important to point out the legal possibility to request early (conditional) release or early termination of the treatment order. These options, although little used, can be of particular significance in light of the use of deprivation for the shortest appropriate period of time. It could, for example, provide interim evaluation of the progress made and continued appropriateness of the deprivation of liberty. In addition, it can be used to reward the child’s progress and therefore serve as a positive stimulant. Obviously, the child could use legal assistance in this regard, which reiterates the particular significance of involvement

41 The same prudence is appropriate with regard to children’s diversion to the child protection system, which may result in placement in an institution for closed youth care. The law review of 1 February 2008 widened the possibilities to provide special conditions.
of lawyers in the post-disposition phase (see also para. 5.3). It is recommended that the government actively fosters the involvement of lawyers in this regard and to inform children about the legal possibility to request early (conditional) termination of their deprivation of liberty.

**Recommendation VIII**

The Dutch competent authority should actively foster the involvement of lawyers in the post-disposition phase and inform children about the legal possibility to request early termination of the deprivation of liberty. Institutions should also be made aware of this possibility.

Dutch law regarding deprivation of liberty in the post-disposition phase is much more child-specific than regarding the pre-trial phase. Still, there are some significant challenges, in particular regarding the enforcement of the treatment order. One aspect that has not been mentioned in this concluding chapter is the significant increase in the number of children in Dutch youth institutions in the past two decades (see para. 4.1). Although this increase, particularly since the beginning of the 21st Century is largely caused by the number of children placed in remand homes under child protection law, it raises questions regarding the use of deprivation of liberty as a measure of last resort in the Netherlands.42

In general, the child-specificity of the CCP and CrimCo regarding deprivation of liberty could be strengthened if the legislator would explicitly adopt the requirements of last resort and shortest appropriate period of time. For example, one could provide that youth detention can only be imposed if other non-custodial sanctions (e.g. community service) would be inappropriate in light of the principle of proportionality. Regarding the treatment order, one could for example provide that it may only be imposed if less far-reaching, non-residential treatment alternatives have failed or would be inappropriate in light of the danger criterion and/or assistance criterion. This would, as a minimum, place courts under the obligation to explicitly explain why they felt compelled to choose a sentence that deprives the child of his liberty.43

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42 See also Detrick et al. 2008.
43 cf e.g. art. 1:254 (1) Civil Code, which contains the grounds for family supervision and states that family supervision can only be ordered if other means to avert an assumed threat to the child’s development ‘have failed or are likely to fail’.
5.5.4 Legal Status of Children Deprived of Liberty in Youth Institutions

5.5.4.1 Doctrine of Minimal Limitations and the Youth Custodial Institutions Act

In the Netherlands, children remain entitled to all human rights, if deprived of their liberty; limitations of the enjoyment of their rights should be reduced to the minimum and grounded on the objectives of the deprivation of liberty. This point of departure, the doctrine of minimal limitations, has been acknowledged in the Dutch Constitution, the CCP, regarding children remanded in police custody and the YCIA, regarding children in youth institutions.

The 2001 YCIA has been a particular object of this study. The YCIA’s most important objective was to strengthen the legal status of children deprived of their liberty by adopting one national law applicable to all children in youth institutions, regardless of the reasons for their placement. The law has been modelled on two similar (and previous) laws for adults and incorporates a variety rules that were not regulated before or that used to be laid down in different Acts and regulations. By adopting one central statutory Act the legislator (also) aimed at providing more legal equality and, additionally, more clarity regarding the objectives of children’s deprivation of liberty and the powers of staff and an institution’s director, in particular regarding limitations of children’s human rights. In this regard, the doctrine of minimal limitations serves as a point of departure and limitations of the child’s human rights are only allowed if required in light of the objectives of the deprivation of liberty (i.e. security, upbringing, reintegration and if relevant individual treatment; art. 2 (4) YCIA).

The YCIA is a framework Act recognizing the three components of the legal status of children deprived of their liberty (see para. 5.4). First, it provides minimum rules regarding various substantive aspects of deprivation of liberty, relevant to the enjoyment of basic rights, such as living conditions, health and personal care, daily programme (including compulsory education) and contact with the wider community including the family. Second, it contains detailed rules regarding special protection rights, such as rules regarding the use of force or restraint and the imposition of disciplinary sanctions. Since these measures imply serious and – potentially – far-reaching limitations of human rights and fundamental freedoms of...
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children, the legislator found it necessary to regulate these extensively (and exhaustively with regard to use of restraint, force and disciplinary sanctions) in statutory law. In addition, the YCIA provides a comprehensive system of legal safeguards, such as compulsory hearings, division of competences (between director and staff), inspection and supervisory bodies, and legal remedies, including the right to file complaints (and subsequently to appeal) and to submit formal requests and lodge objections (e.g. against the child’s placement).

The last two rights also affect the third component of a child’s legal status, since his placement is of significance for the realization of the objectives of the deprivation of liberty, ultimately aiming at reintegration into society. As part of the realization of the objectives, the YCIA proclaims a plan-based approach (i.e. a residential or treatment plan for each individual child) and provides, in addition to the enjoyment of basic rights, further specific guidance by providing rules regarding leave and reintegration programmes (i.e. school and training programmes; STPs).

Finally, the YCIA regulates many administrative aspects of youth institutions, such as institutions’ designated use, placement and transfer, and management, including the relation with the Ministry of Justice.

Based on the evaluation of YCIA, conducted in 2003 and 2004, the conclusion can be drawn that the YCIA has indeed improved the legal status of children deprived of liberty in youth institutions. Despite some considerable issues regarding its implementation and operation, the YCIA is working reasonably well and is regarded as (rather) clear. Its adoption has certainly contributed to an increased awareness of the child’s legal status among institution’s staff members and administration, and although it is argued (by some) that the focus on the rights of children may be somewhat overdone, there is a general consensus on the significance of a good (and strong) legal status for children deprived of liberty.

Another important conclusion is that, although it goes too far to conclude that the YCIA has been adopted with the objective to implement International Human Rights Law or Standards, the content of the YCIA is largely in compliance with the provisions provided therein. Consequently, this piece of statutory legislation could serve as an example of good practice and, given its assumed unique value as a precedent creating document and the gathered information on its implementation based on the YCIA evaluation, as guiding examples regarding the implementation of International Human Rights Law and Standards at the domestic level.

5.5.4.2 Particular Significance of the YCIA

The YCIA is particularly interesting because, as just mentioned, it provides a detailed and comprehensive application of the child’s procedural legal status (i.e. special protection rights), including legal safeguards (including a clear division of competences which *inter alia* makes the institution’s director exclusively competent
to make decisions regarding the most far-reaching limitations of human rights) and legal remedies (including legal means to influence placement and transfer). As mentioned in paragraph 5.4, most of the International Human Rights Standards merely call for such provisions, without elaborating on the details.

In essence, the YCIA requires an individual approach based on tailored decisions (also regarding the scheduling of the daily routine), some of which are exclusively reserved for the director. All individual decisions can be challenged before an independent authority (i.e. the complaints committee of a supervisory committee) that delivers legally binding judgments, which can be appealed against before an independent national appeals committee. In addition, the YCIA provides explicitly (and to a large extent exhaustively) the legitimate competences to limit the child in the enjoyment of his rights and freedoms, including the maximum duration, competence to impose disciplinary sanctions and procedural safeguards, such as the hearing of the child and the service of decisions in writing. These limitations top up the general, less far-reaching, competence of staff members to work and communicate with children according to their own pedagogical views.

Another significant point of the YCIA is that it fosters transparency in the sense that it provides detailed rules regarding inspections and supervisory mechanisms, stipulating for example that each institution must have one independent supervisory committee and including rules regarding composition and duties. It also provides rules regarding records and personal files and different decision-making processes, including those affecting placement and transfer, individual residential and treatment plans, contact with the wider community, leave arrangements and reintegration programmes. As mentioned in paragraph 5.4, clarity and transparency can be seen as an eminent part of a child’s legal status, particularly his right to be treated with respect for his inherent dignity; the YCIA provides a significant contribution in this regard.

The many detailed substantive rules regarding the enjoyment of basic rights (i.e. minimum living conditions, including accommodation, health care, compulsory education and recreational activities, and contact with the wider community) and reintegration programmes are also worth mentioning, although the high demand regarding living standards should be placed in perspective (i.e. the perspective of a first world country). In particular, the YCIA’s introduction of the STP is an interesting example of a framework of reintegration programmes, although its implementation leaves a lot to be desired; it actually serves as an example of lack of sufficient financial support and incapability of organizing the involvement of all required authorities in and around youth institutions.

5.5.4.3 An Overactive Legislator and Executive Power?

The YCIA is a large, comprehensive and detailed piece of legislation, which at the same time is one of the most significant points of critique. Where the YCIA
provides the legal framework with minimum rules and main principles (hence the Dutch name ‘Beginselenwet’ – Principles Act), it has been elaborated in detail in the YCIR and many Ministerial Regulations (i.e. lower decrees). Moreover, there are a number of circulars and other guidelines for the enforcement of the YCIA, although the exact number is unknown. The legislator, but more importantly the executive power has exercised ultimate control regarding the application of the letter of the law, through lower regulations, which has some risks and objections.

First, there is the risk of undermining. Lower non-statutory regulations could undermine the statutory basis of the YCIA provisions as well as its content and quality. The more there are delegated or secondary regulations, the more there is the risk that it (eventually) will not or no longer correspond with the principles set by the YCIA. This is particularly true regarding regulations (including institutions’ internal rules) that explicitly provide substantive guidance on the implications of the YCIA. Even though the YCIA should always prevail in case of conflict, since people tend to work with delegated regulations, rather than with the more independent higher regulations, it is vital that the former are subject to constant review. In general, it should also be reason to draw up lower regulations restrictively.

Second, the different and detailed regulations have made the legal framework rather complex. When the YCIA entered into force, people working in and around youth institutions all of a sudden had to become part-time lawyers. This has significantly increased the burden of their work and workload – at least it is experienced by the staff as such – let alone it has become much harder for children (and their families) to understand the law and its implications. The complexity has, in other words, impact on the transparency of the legal framework, which may put the legal protection of the rights of children and the quality of treatment in institutions at risk. Lack of clarity regarding the legal provisions and regarding one’s particular competences can hamper a proper implementation and enforcement. It can cause feelings of insecurity regarding one’s specific competences, feelings of lack of trust or intrigue, perception or not.

Finally, a large number of (lower) regulations can have a suffocating effect (i.e. (the perception of) a lack of room to operate) and to increased bureaucracy (see below). The YCIA evaluation revealed that there seems to be a conflict of interests regarding the desire for clear rules and clarity on the one hand and sufficient room for appropriate pedagogical work and treatment on the other. Coping with this potential conflict requires certain skills that can vary from one staff member to another. This conflict should receive special and constant attention. The above mentioned skills could be developed or improved through training and courses for (new) staff. There is no reason to lower the standards for children deprived of liberty, but the legislator and executive power could take another critical look at the amount of regulations, in particular those regarding the enforcement of the YCIA and YCIR.
5.5.4.4 Division of Competent Authorities

The above mentioned conflict of interests is also related to the distancing of competent decision makers both inside the institution and the national system (between Ministry of Justice and institutions). Inside the institutions some of the most important decisions affecting children are laid down higher in the institution organization (i.e. at the director’s level). This has met with critique in particular regarding the desired pedagogical room for group leaders working with children on a daily basis; group leaders felt limited in their competences. Partly this is true, but it certainly is not true that the law does not leave room for pedagogical work at all. In fact, the YCIA aims at regulating (serious) limitations of children’s rights and freedoms and does leave room for ‘normal’ pedagogical work and communication (see also the referral authority of art. 4 (3) YCIA; ‘aanwijzingsbevoegdheid’). It arguably requires more time and training to get used to the legal framework (which is not an easy task given its complexity). Nevertheless, the legislator could provide for additional room for staff members, particularly group leaders, for example by adopting the de facto widely used ‘time-out measure’ – a short-term pedagogical measure to restore order and safety or protect the child and others by placing the child temporarily in his room (for a maximum of 4 hours with a 30-60 minute periodic check given its nature as a measure to restore order, that is: it should not endure longer than strictly required for the restoration of order or the protection of the child).

RECOMMENDATION X A-B

A) The Dutch competent authority should reduce the amount of delegated legislation such as regulations, circulars and guidelines, review those that are essential for their appropriateness for children and provide for constant quality and accuracy checks according to substance and conformity with (inter)national law.

B) The Dutch competent authority and the (management of the) institutions should provide professionals working in youth institutions constantly and proactively with education and training on the content and operation of the entire legal framework, and on changes in this regard. In addition, institutions should have executive staff with legal expertise.
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**RECOMMENDATION XI**
The Dutch legislator should provide a legal basis for the measure of ‘time-out’ – a measure to restore order falling under article 24 YCIA, implying the child’s placement in his room for the maximum duration of 4 hours, with a compulsory regular check every 30 or 60 minutes and adequate registration, which can be imposed by staff members (including group leaders).

**RECOMMENDATION XII**
The Dutch legislator should review the division of competent authorities regarding leave and reintegration arrangements, such as STPs. Institutions should be made exclusively competent to make decisions regarding a child’s participation in this regard.

5.5.4.5 Rigidity and Formal Approach of the YCIA

Besides the number of regulations and rules, with its potential risk of suffocation, and the division of competent authorities causing a certain lack of room to actually work constructively with children, another point of critique of the YCIA legal framework is its rigidity and formal approach, resulting *inter alia* in an increased
workload and bureaucracy. For example, the principle that children must stay in groups or participate in group activities for a fixed duration per day is regarded as a strict norm, depriving institutions from room to divert for reasons of safety and the implementation of other laws (e.g. time employment rules). In addition, the YCIA has formalized any practical limitation in this regard, including if a child is temporarily ill or cannot participate in a group due to his psychiatric or behavioural problems (i.e. requiring an individual approach). Despite the fact that the YCIA evaluation pointed out that institutions managed to meet the standards (i.e. the child’s stay in a group during at least 12 hours a day – 8.5 hours during weekends), with a few exceptions primarily caused by staffing problems, recent inspection reports revealed that the norms in this regard have become increasingly problematic. In addition, the group size and desirability of this historically developed principle is currently subject to debate. Still, the question remains whether one should adjust the norm in this regard. The rule that a child in principle stays in a group during the day prevents him from being locked up in his cell for 23 hours a day. In addition, it forces the institution to make an explicit decision (which can be remedied) if it regards a more individual approach required in the interests of the child. In other words, it serves as an important legal safeguard (i.e. a special protection right) and should, therefore, not be set aside lightly. For the realization of the objectives of deprivation of liberty of children in youth institutions, it is recommended to conduct further research regarding this principle as the cornerstone of a child’s stay in a youth institution.

**RECOMMENDATION XIII**

The principle that a child stays in a group for at least 12 (or 8.5) hours a day should be subject to further research, which should aim at answering *inter alia* the following questions:

- To what extent is this principle (still) relevant for the realization of the objectives of deprivation of liberty?
- Provided that this principle is relevant, how can the child’s right to special protection against (unlimited) isolation be safeguarded?
- Provided that this principle is relevant, which adjustments should be made (regarding the legal embedment in the YCIA and/or its enforcement) to enable institutions to guarantee each child the special protection of this specific right, without hampering each child’s right to an individual tailored approach and/or treatment?

Another example of a rather formal approach of the YCIA is the mediation procedure. Contrary to the objectives of its introduction in the YCIA, it can hardly be regarded as an informal form of dispute resolution with speedy outcomes. The procedure as such is far too formalistic and its connection with the regular
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complaints procedure is far from clear and rather complicated instead. In addition, the procedure has resulted in a significant increase in workload for the (voluntary) members of supervisory committees, who are exclusively competent to mediate. *De facto*, it means that the mediation procedure is not always regarded as a right of the child, but often as a first (compulsory) attempt to solve an issue. Although, this is not necessarily a wrong approach, it was not the legislator’s objective and may blur the distinction between the filing of a formal complaint and the request for mediation. It is important to keep in mind that the *right* to complain or to request mediation should be part of the child’s sole discretion; if not, a substantial part of his legal status may be at stake.

5.5.4.6 Essential Procedural Safeguards

Finally, some of the YCIA’s significant procedural safeguards, such as compulsory hearings and service of decisions in writing (including information on the complaints procedure) are regarded as formal and demanding. This critique should however be set aside, because it affects two crucial elements of the legal protection of children. Moreover, it stresses that a child has the right to express his views and participate in procedures that affect him directly (*cf* art. 12 CRC). In essence, it points out that staff members, an institution’s administration or others competent to exercise legal power over the child have the obligation to keep communicating with the child, as an essential part of the child’s right to participate. The procedural safeguards should be understood in this context; adequate information and training may foster their acceptance.

In this regard it is important to note that the YCIA does not refer to differences in children’s capacity to participate (nor does it in general differentiate between young and older children; the only explicit distinction between children of different age levels can be found in the regulation regarding the maximum duration of measures to restore order or disciplinary sanctions). This is quite remarkable since children younger than the age of twelve may end up in a youth institution as well. Given the absence of a minimum age for deprivation of liberty, it is to be recommended that particularly the younger children should be provided with appropriate assistance (legal and other appropriate (e.g. parental) assistance; art. 37

**RECOMMENDATION XIV A-B**

a. The mediation procedure and the potential complaints procedures following mediation should be clarified and simplified via amendment of the YCIA. In addition, the supervisory committees should be granted assistance during the mediation procedure.

b. Further research should be conducted regarding the activities of supervisory committees, in particular regarding their working methods and (quality of) jurisprudence.
(d) CRC). However, legal and other appropriate assistance should be granted to each child in a youth institution. In addition, assistance should not be limited to the situation in which a child wishes to exercise his right to complain (i.e. the only explicit entitlement to legal assistance in the YCIA).

Furthermore, the institution should assist each child in the exercise of his rights, but should particularly provide additional assistance if there is reason to do so, while taking into account that child’s age and maturity. The Dutch legislator could provide more guidance in this regard, although article 37 (d) CRC arguably is directly applicable.

RECOMMENDATION XV

All children deprived of liberty should receive legal and other appropriate assistance, particularly children under the age of twelve (although these young children should preferably not be placed in institutions for young offenders; see recommendation XVI). The right to legal and other appropriate assistance should not be limited to assistance during the complaints procedure.

5.5.5 Some Critical Remarks regarding Differentiation and Separation

Having addressed the general findings regarding the legal requirements concerning deprivation of liberty (para. 5.5.3) and the legal status of children deprived of their liberty in youth institutions as embodied in the YCIA (para. 5.5.4), below are some other critical remarks that have not yet been made and which are related to internal differentiation and separation of different groups of children.44

The first remark affects the MACR and the setting of a minimum age for deprivation of liberty. The Netherlands has set the MACR at the age of twelve; children below that cannot be held accountable (and consequently prosecuted) for offences committed before the age of twelve. This sets the minimum age for deprivation of liberty in the context of juvenile justice (i.e. remand in police custody, pre-trial detention, youth imprisonment or a treatment order). Still, these children can be arrested and taken to the police station for interrogation for a maximum of six hours.

The Netherlands has no specific minimum age for deprivation of liberty as recommended by rule 11 (a) JDLs. The absence of such a minimum age is particularly visible regarding children deprived of their liberty under child protection law; these children can end up in a youth institution (or since 1 January

44 See para. 5.5.6 for more on the issue of (non-)separation of children under the child protection and juvenile justice system.
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Note that since 1 February 2008 children can no longer be sentenced to life imprisonment under art. 77b CrimCo. Although this certainly is a positive development, it leaves unaffected that a child of 16 or 17 years of age can be sentenced to thirty years of imprisonment and to a potentially lifelong treatment order.

2008 in an institution for closed youth care) even under the age of twelve. The legal barrier to placement in a youth institution was abolished in 2001. Deprivation of liberty of such young children is undesirable, particularly in institutions for children in conflict with the law. If it is nevertheless in their interests to be placed in closed alternative care, they should be awarded special attention, that is: placement in a facility specifically designed for young children (‘under twelves’) with adequate legal and other appropriate assistance and sufficient means to maintain contact with their family and parents, provided that this is in their best interests. In this regard it is advisable to differentiate between children according to their age and maturity.

A second remark affects the upper age limit. The CrimCo contains the possibility to sentence children, who were sixteen or seventeen when they committed the offence, under adult penal law, which can result in imprisonment in an adult facility. Due to the reservation of the Dutch government to article 37 (c) CRC in this regard, the Netherlands strictly is not violating International Human Rights Law. Nevertheless, it is a highly undesirable legal practice. Not only because it may lead to non-separation of these children from adults, but also because it undermines the child rights approach these children are entitled to (like any other child within the justice system) – an approach which includes placement in a youth institution designed to provide children with education and other means fostering their reintegration into society, in order to let them play their assumed constructive role.

The CRC Committee has urged the Netherlands twice to withdraw the reservation and has explicitly called for the abolition of the transfer of children (of sixteen or seventeen years of age) into the adult penal system (GC No. 10, para. 38). It is advisable to abolish this legal option from the CrimCo, moreover because recent research showed that its application does not result in higher sentences than possible under the juvenile justice system, and the juvenile justice system offers enough severe (particularly since 1995) and appropriate options (particularly since the law review of 1 February 2008) to respond to children in conflict with the law appropriately. In addition, it is to be recommended that the Dutch government withdraws its reservation in this regard.45

It is important to stress that the above reservation is limited to the situation of non-separation as the result of the application of article 77b CrimCo. This implies that besides this situation, the Dutch government has the obligation to separate children from adults, unless it is not considered in the best interests of the child to do so. In this regard, it is worrying that Dutch law permits placement of children (outside the application of art. 77b CrimCo) in adult prisons or detention centres for other reasons than their best interests (e.g. capacity shortage). This is in violation of article 37 (c) CRC and it is advisable to build in legal barriers regarding the

45 Note that since 1 February 2008 children can no longer be sentenced to life imprisonment under art. 77b CrimCo. Although this certainly is a positive development, it leaves unaffected that a child of 16 or 17 years of age can be sentenced to thirty years of imprisonment and to a potentially lifelong treatment order.
placement of children in adult facilities for other reasons than those prompted by their best interests.\textsuperscript{46} In addition, children detained at police stations are entitled to the protection of article 37 (c) CRC, but de facto a police station cannot be regarded as child-specific accommodation where children are separated from adults (see also para. 5.5.2).

Finally, the separation of children from adults also affects transportation; recent reports of the National Ombudsman showed that this deserves particular attention and improvement, because the current instruction and practice is in violation of article 37 (c) CRC.

In connection with the above, the Netherlands has made reservations regarding article 10 (2) and (3) ICCPR. This implies inter alia that it is not legally bound to separate children in pre-trial detention from children sentenced to youth imprisonment or a treatment order. De facto, both groups of children are placed in remand homes (cf the separation of adults in detention centers, prisons and treatment centres); their accommodation in different groups is dependent on the policy of the separate institution and is not prescribed by law. Despite the reservation, the Dutch government is still bound to respect the presumption of innocence (art. 40 (2) (b) (i) CRC; art. 14 (2) ICCPR; art. 6 (2) ECHR), which as a minimum implies that children in pre-trial detention should be awarded treatment in accordance with this principle. This makes the reservation untenable and it deserves the recommendation to withdraw it. A similar conclusion should be drawn with regard to the reservation regarding article 10 ICCPR’s absolute requirement of separation of children from adults; this is untenable in light of the limited scope of the reservation regarding article 37 (c) CRC.\textsuperscript{47}

\textsuperscript{46} All the more so because the special departments for young adults in adult facilities were abolished recently.

\textsuperscript{47} Note that the reservation regarding art. 37 (c) CRC as applicable to the Dutch Antilles and Aruba has a different scope and implications.
ReCOMMENDATION XVI A–F

A) The Dutch legislator should set a minimum age for deprivation of liberty as recommended by rule 11 (a) JDLs for all forms of deprivation of liberty. Given the MACR of twelve years, one should consider the (re-)introduction of the age of twelve as minimum age for deprivation of liberty (also applicable to children not in conflict with the law).

B) The Dutch legislator should consider building in an instruction in the YCIA to differentiate between children according to age and maturity, particularly regarding the composition of groups and accommodation. Children under the age of twelve should not be placed in youth institutions for youth delinquents; the YCIA should be amended and set a minimum age for deprivation of liberty of twelve years.

C) The Dutch government should reconsider its reservations (and consider their withdrawal) regarding article 37 (c) CRC and article 10 ICCPR. In addition, article 77b CrimCo should be deleted.

D) Children should not be deprived of their liberty in adult facilities, unless it is in their best interests. The legislator should amend the Penitentiary Principles Act and Hospital Orders (Framework) Act accordingly. In police stations children should be separated from adults and be treated in a manner that takes into account their rights and specific needs.

E) Children should be separated from adults during transportation and the transportation instruction should be amended accordingly.

F) The Dutch competent authority and institutions should ensure that each child in pre-trial detention is treated in full accordance with his right to be presumed innocent until proven guilty by a court of law. Dutch law (in particular the YCIA and the CCP) should be amended and include the instruction to separate children in police custody and pre-trial detention from those sentenced to youth imprisonment or a treatment order.
5.5.6 Conclusion – Specific Recommendations and Some Final Remarks in Light of Recent Developments

In conclusion, the YCIA is an interesting and rather unique example of legislation which has been specifically designed to strengthen the legal status of children in youth institutions with significant results. Moreover, the YCIA is to a large extent in conformity with International Human Rights Law and Standards. Besides the previous recommendations, there are some specific recommendations that should be made regarding various aspects of the YCIA and its implications (cf Chapter 4 for more details and clarification). These recommendations are addressed to the Dutch legislator, competent authority (i.e. the Ministry of Justice and National Agency for Correctional Institutions) and youth institutions, respectively.

**RECOMMENDATION XVII A-I**

The Dutch legislator should:

A) adopt an explicit prohibition of torture or other forms of cruel, inhuman or degrading treatment or punishment in the YCIA (although preferably in the Dutch Constitution), which, although strictly not necessary given the direct applicability of article 37 (a) CRC, article 7 ICCPR and article 3 ECHR, serves as a clear instruction to all those working with children in youth institutions to refrain from all forms of prohibited treatment, including corporal punishment or mental/physical abuse or neglect.

B) adopt a compulsory medical check up (either separately, or as part of the admission programme) in order to establish the child’s medical state of health, but also to serve as a first check which could be used when examining allegations of ill-treatment in the institution.

C) abolish the limitation of family visits as a disciplinary sanction.

D) abolish solitary confinement as a disciplinary sanction.

E) abolish the hardly used powers to use force or restraint, in particular the power to use mechanical means.

F) amend article 59 (1) YCIA and no longer permit limitation of contact of privileged persons (or organizations), including the child’s lawyer, during confinement as a disciplinary sanction.

(...)
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RECOMMENDATION XVIII A-E

The Dutch competent authority should:

A) pay particular attention to the quality of education in youth institutions and enable diversion from the general educational level if required in the interests of the child. In addition, the issues regarding the enforcement of educational programmes in practice, should have high priority.

B) increase efforts to fully implement school and training programmes (STPs), including financial support, stimulating programmes and fostering cooperation between the institution and its key partners in this regard (child care and protection board, (youth) probation and youth care agency).

C) improve publication and public accessibility of disaggregated data relevant to the quality of conditions of children in youth institutions and police stations, including – as a minimum – disaggregated figures on the use of force or restraint, disciplinary measures and all complaints procedures, including mediation.

D) prohibit the presence (and use) of weapons in institutions and amend the Ministerial Regulation regarding Instructions on the Use of Force accordingly.

E) foster adequate education and training for directors and staff of youth institutions.

(...)

g) review the recognition of the position of parents in the YCIA regarding the provision of information regarding a disciplinary sanction of their child, including confinement elsewhere (implying transfer to another institution). One could consider including the duty to inform the child’s parents under articles 59 (2) and 25 (6) YCIA and the recognition that the child must provide his permission (while taking into account his age and maturity). Furthermore, the YCIA must acknowledge that children may turn eighteen during his stay in the institution, which has implications for the participation of the parents.

h) amend the YCIA and provide that a (preliminary) residential or treatment plan must be drawn up regarding each child immediately (e.g. within one week) after admission.

i) amend article 42 (1) YCIA and acknowledge the Sanctions Inspectorate as a privileged authority.
Although these specific issues and the general issues of implementation mentioned earlier, may jeopardize the quality of the legal status of children in youth institutions, in general the implementation of the YCIA and the subsequent protection of children’s rights have not been at risk. Nevertheless, it is worrying that the legislator and executive power regard their task as being limited to merely drawing up legal frameworks like these, rather than to provide adequate education and training as well. The coming introduction of the YCIA has hardly been adequately anticipated, by preparing all those affected by the law. As a consequence, the implementation requires time (and arguably more time than necessary), which certainly does not contribute to the effective safeguarding of the rights of children.

In light of this, it also is remarkable that the YCIA has already been set aside for children within the child protection system, at least those (potentially) placed in

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**RECOMMENDATION XIX A-D**

The Dutch youth institutions should:

A) fully inform children (upon admission and as part of a constant duty of care) about their legal status (in conformity with article 60 YCIA) and to foster independent information gathering, for example, by allowing access to child legal aid centres.

B) refrain from using force or restraint systematically, as part of a general rule or policy (e.g. systematic use of body searches before and after each visit, regardless of the visitor or systematic use of handcuffs during transportation to the confinement unit).

C) provide continuous education and training of staff and other professionals working in and around institutions. Education and training should primarily focus on the use of the YCIA as a legal framework setting minimum rules and guarantees, without letting it limit the desired room to ‘work’ with children in a pedagogical way. More specifically, education and training programmes should focus inter alia on: the division of competences, the differences between measures of order and disciplinary sanctions and their use as measures of last resort, and the solving of disputes and addressing of claims of unlawful or arbitrary treatment, while fully recognizing the right of children to file a complaint or request for mediation.

D) foster transparency through contact with inspection mechanisms, monitoring bodies and the community, including the child’s family, and through the provision of information for the outside world, including families (with full respect for the privacy of the children and their families) regarding working methods, internal rules, data and results (through annual reports, websites, etc.).
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Institutions for closed youth care. One could argue that the YCIA largely is prompted by the desire to facilitate a climate to control children and secure them in closed facilities, a view supported by the extensive set of rules and regulations, particularly those regarding the use of force or restraint and disciplinary sanctions (i.e. a regulative approach). The 2008 Closed Youth Care Act represents a limited regulative approach, which on the one hand limits the potential limitations of the child’s rights and freedoms, but on the other gives institutions much more (almost unlimited) discretion to use them. Under the new Act institutions are exclusively competent to determine the division of powers and to draw up a plan of assistance (or treatment plan; ‘hulpverleningsplan’) which largely determines in which cases a child can be limited in the enjoyment of his rights, by whom and for how long. Particularly regarding individual treatment, including forced medical treatment, there is almost unlimited power. The primary criterion is ‘responsible care and assistance’ (‘verantwoorde zorg’), as embodied in art. 24 Youth Care Act. It goes beyond the scope of this study to dwell on this, but in general the conclusion is justified that the new Closed Youth Care Act has reduced the level of legal protection for children in order to provide the institutions of closed youth care with more room to design their pedagogical climate and individual treatment programmes according to their own views and the child’s individual needs. In particular in light of the large discretion and competence to determine the division of powers and given the absence of an unambiguous system of legal remedies and lack of supervision (the supervisory committees are abolished), the legal status of children has worsened.

This recent shift of the legislator can be justified neither on the argument that the YCIA would be unworkable in practice (the evaluation showed otherwise), nor by the (sole) argument that the YCIA is a law with a penitentiary connotation, because this would ignore the conclusion that the YCIA gives rise to the government’s positive obligation to provide all children deprived of their liberty, regardless of context, with a strong, substantive and procedural legal status. There is sufficient reason to conclude that the recent developments are not without worries. Consequently, it is recommended that these developments be carefully followed in conjunction with future research.

**Recommendation XX**

Future research should be conducted regarding the legal status of children deprived of their liberty under the Dutch child protection system. Particularly, attention should be paid to the differences between and connections with the YCIA framework and the laws and regulations regarding youth health care and youth psychology (*cf* also recommendation II).
One final recent development that should be mentioned here is the increased attention to youth institutions based on two rather critical reports on the safety and security inside institutions and their effectiveness. Both reports were published after the conclusion of this study (see para. 4.1 for more details). However, together with the establishment of institutions for closed youth care, this development gives reason to put the protection of rights of children deprived of liberty in the Netherlands (and the conclusions of this study) in perspective. Neither the legal framework, nor its implementation is free from pressure. Still, most of the issues regarding the actual protection of the rights of children deprived of their liberty do not detract from the essential value of the YCIA. Instead, they seem related to issues of implementation, in particular of preparation, will to effectively implement (including financial support), knowledge and skills strongly dependent on education and training, and other issues of enforcement (including shortage of general staffing and specialized staff, such as youth psychiatrists). These issues need constant attention and should be lessons for future implementation of large pieces of legislation like this. History teaches that one should not be too optimistic about the government’s ability to learn from earlier approaches or eradicate mistakes; clear is however that the Dutch government should feel compelled to do so in light of its international duty to fully respect the rights of children deprived of their liberty.

5.6 Towards Full Respect for the Rights of Children Deprived of Their Liberty

5.6.1 International Human Rights Law and Standards: Work in Progress

Although it is not exactly clear whether it is prompted by the International Community’s well-meaning concern or by its powerlessness to respond constructively to the global issue of children deprived of liberty, the fact is that International Human Rights Law and Standards provide a comprehensive set of applicable norms. One of the main objectives of this study was to bring to light the different provisions and their implications (Central Question I). As pointed out earlier, the international community should not refrain from continuously stimulating States (Parties) to implement norms of International Human Rights Law and Standards and effectively provide the legal protection of the rights for children set therein. To this end it should provide further guidance and full support. In addition, it should continue to work on the development of the international legal framework; a number of omissions, inconsistencies and questions came across in the study and one particular recommendation was made in this regard in paragraph 5.2 (see recommendation I). In addition, it would be advisable that the CRC Committee draws up a General Comment exclusively on deprivation of liberty. It could provide further guidance where required and invite the international community to review and/or further develop the relevant instruments.
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RECOMMENDATION XXI

The CRC Committee should draw up a General Comment exclusively on deprivation of liberty of children under the CRC framework.

It should inter alia address:

- the definition of deprivation of liberty and provide guidance regarding its key elements and implications. The CRC committee should also address the main differences, common characteristics and interdependence of the different forms of deprivation of liberty of children related to different contexts. In this regard it also is important that the CRC Committee pays attention to the various related or underlying (social) issues, such as poverty, social exclusion and discrimination;
- the lawfulness and non-arbitrariness of deprivation of liberty and provision of guidance regarding the permitted forms of deprivation of liberty of children and their implications (cf art. 5 (1) ECHR);
- the scope and the applicability of article 37 (b) CRC, second sentence for forms of deprivation of liberty outside the context of juvenile justice;
- the concept of the requirement of shortest appropriate of period of time with a view to deprivation of liberty as a disposition, including guidance regarding the maximum duration of imprisonment and the relation between the requirement of the shortest appropriate period of time, the principle of proportionality and life imprisonment with the possibility of early release;
- the prohibition of torture and other forms of ill-treatment and its particular relevance to children deprived of their liberty, including guidance regarding definitions and child-specific implications related to the different forms of ill-treatment. In addition, guidance should be provided regarding the implications of this prohibition when taking into account differences between children according to age, maturity and gender;
- legal remedies, in particular the right to file complaints, and provide guidance regarding the independence and competences of the bodies authorized to hear the complaints of children, including guidance regarding the scope of the right to file complaints and the status of the decisions of the competent body (preferably the status of legally binding decision). Similar guidance is needed regarding (the competences of) inspection and supervisory mechanisms. In addition, the CRC Committee should address the legal capacity of children in general, the participation of their parents or guardians, and the specific position of illiterate children and children without the capacity to file complaints.
5.6.2 Bringing the Standards Closer

Implementation of International Human Rights Law and Standards primarily is a domestic matter, particularly through legislation and awareness-raising. Based on the assessment conducted in light of the second (set of) central question(s), it has become particularly apparent that domestic legislation plays a vital role in the protection of rights of children deprived of liberty. At the same time, legislation should be part of a domestic (national or state wide) approach, which furthermore includes (national, state or local) policies, awareness-raising, education, training and information.

Regardless of the direct applicability of provisions of International Human Rights Law, which is inter alia dependent on the domestic legal system, domestic legislation plays an important role in the realization and safeguarding of rights of children (potentially) deprived of their liberty. By incorporating International Human Rights Law and Standards, it provides a binding domestic legal instrument that can significantly contribute to the (strengthening of the) legal status of children under the threat of or presently being deprived of their liberty. In particular, the legally binding status of domestic legislation is of significance, since the detailed international standards generally lack such status. In other words, domestic (statutory) legislation could ‘legally harden’ the Human Rights Standards and provide the child with a legal instrument that can be invoked before domestic courts.

There are a number of other benefits of incorporating International Law and Standards into domestic (statutory) legislation. First, it enables the domestic legislator to interpret the sometimes rather broadly formulated and/or open international norms and adjust them, if necessary, to local realities; one could for example think of adjustments of minimum conditions of deprivation of liberty to the local climate (as explicitly recommended now and then) or of the tailoring of complaints procedures in accordance with local custom. International Human Rights Law and Standards provide for the internationally accepted minimum; States could divert in a positive way without lowering the standards.

Another significant benefit of domestic legislation is that it brings the norms and standards closer. Where the international framework could be regarded as ‘a distant and irrelevant show of force’, domestic legislation stands much closer, which certainly contributes to its acceptance.

Domestic legislation can furthermore contribute to the implementation of equal rights for all children nationwide (or state wide), which prevents unlawful or arbitrary variations in legal protection of rights of children deprived of their liberty. At the same time, however, one should avoid legislation leaving no room for local or regional initiatives and diversity in the interests of the child and society. In other words: domestic, national law should provide the minimum legal framework, fostering equal protection and equality of treatment of children deprived of their
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liberty, without excluding diversity and tailored approaches. This also requires a domestic (national or state) policy that is based on trust in local initiatives and in those who are actually working in and around children deprived of their liberty or in the juvenile justice system as a whole. The executive power should refrain from providing detailed instructions and rules, embodied in lower regulations, regarding the enforcement of the (inter)national legal framework. The Dutch example presented in this study shows that an overactive executive, regulative approach may very well suffocate local initiatives and those working in and around children deprived of their liberty (regardless of whether this is based on perception or not).48

In light of this, the legislator and executive power should additionally avoid undermining the statutory legal framework by diverting from it through ‘lower’ regulations, such as decrees or regulations that lack a statutory basis. Besides its legal value, the embodiment of the legal framework in statutory law contributes to the continuity of the legal protection of children deprived of their liberty and prevents it from being subject to (lightly motivated) changes in policy; lower regulations can be changed more easily and do not guarantee such (more) permanent protection.

Finally, domestic legislation can (and should) serve better (i.e. closer) as a frame of reference for policy makers and for education and training of those who are involved in and around children deprived of liberty (e.g. staff members of institutions, law enforcement or judicial authorities). In addition, such a domestic legal framework can serve as a tool for advocacy for non-governmental organizations, since it represents another but local confirmation of the general principles and norms that should be upheld regarding children deprived of their liberty.

Thus, in order to strengthen the legal status of children deprived of their liberty it is important that it is concretely elaborated in domestic (statutory) law, while balancing the need for minimum standards and procedural safeguards and room for those who need to enforce the law. What should be incorporated into domestic law has been addressed in paragraphs 5.3 and 5.4; paragraph 5.5 has served as an example of how to implement it and has also revealed a number of issues relevant to the implementation in this regard, one of which was the significance of education and training of the professionals involved.

The actual implementation is largely dependent on the enforcing authorities, particularly each official or staff member individually. Incorporation of

48 This leaves unaffected that one may want to opt for a regulative approach regarding certain aspects, particularly regarding the regulation of far-reaching limitations of children’s civil and political rights (including division of competences safeguarding a certain objectivity). To this end one should realistically assess in advance what one needs to maintain order and safety in an institution, within the boundaries provided by international law. Furthermore, one should provide adequate legal and procedural safeguards.
International Human Rights Law and Standards in domestic law is of limited value without awareness-raising, education and training, and information. In general, the protection of the right of children (potentially) deprived of their liberty requires a comprehensive, integral approach, in which all departments (including the community) should be involved. The national or state government should provide perspective, which should be based on the International Human Rights Framework, primarily governed by the CRC (at least for 193 countries in the world).

Respect for the rights of children demands transparency and constant review of working methods. Everyone working with children (potentially) deprived of their liberty should be fully aware of their tremendous (and tremendously difficult) task, special duties and potential power. This requires clear and flexible rules on the one hand and specific skills of those working in and around children deprived of liberty on the other – specific skills that should be fostered by constant training and awareness of the heavy tasks and responsibilities towards these children.

Last but certainly not least, the children should be involved and enabled to fully participate and independently exercise their rights. As a minimum, this requires recognition of the significance of the provision of adequate information and assistance for all children before and during their deprivation of liberty.

5.6.3 Legitimacy through Respect for the Rights of Children

This study has tried to make a contribution to the interpretation and implementation of International Human Rights Law and Standards for children deprived of their liberty – clearly a global issue. It certainly is not meant as a plea in favour of deprivation of children’s liberty. Arrest, detention and imprisonment of children must be avoided as much as possible. It exposes children to the most far-reaching form of State control and intervention; it removes them from the community and family environment; moreover, they are withdrawn from visibility and placed in a particular dependent situation. *De facto*, children in detention centres, prisons or other (closed) institutions are often exposed to violence and gross human rights violations. Deprivation of liberty often is far more than just a limitation of children’s right to liberty of the person.

At the same time, deprivation of liberty is not prohibited and has been a (legitimate) form of State intervention for centuries and despite some expressed desires, it is an illusion that arrest, detention or imprisonment will ever be banned outright.

This study certainly is a plea for the use of deprivation of liberty only in full accordance with the legal requirements set by International Human Rights Law, that is: a lawful approach, based on a large amount of caution and customized, transparent decisions. In addition, it is a clear plea for treatment of children deprived of liberty in accordance with the assumption (recognized under International Human Rights Law) that they are human beings in development,
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independently entitled to treatment with humanity and respect of their inherent human dignity, in a child-specific manner. To this end each child deprived of his liberty is entitled to a strong legal status that as a principle entitles him to all rights under International Human Rights Law – a legal status that should preferably be elaborated in domestic statutory law and be implemented accordingly.

This study is closed by expressing the hope that it will contribute to the acceptance of the assumption that deprivation of liberty can only be regarded as a legitimate State intervention, serving the interests of society as a whole, if it fully respects the rights of the children involved.

A teacher of a youth detention centre in Chicago, Illinois (US) once told his pupils:

‘Every one of you is deserving of respect, (...) I may feel that some of the things you have done or will do are not deserving of respect, but that does not mean that you as a person are not deserving of respect. We should all treat each other with respect. Remember that.’
