THE UNITED NATIONS GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY

Manfred Nowak

Independent Expert leading the UN Global Study on Children Deprived of Liberty

2019

30 YEARS CONVENTION ON THE RIGHTS OF THE CHILD

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For All Invisible and Forgotten Children Deprived of Liberty

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Prefaces

Message from the United Nations Task Force on the Global Study on Children Deprived of Liberty

Five years ago, the General Assembly, following a recommendation by the Committee on the Rights of the Child in accordance with article 45 (c) of the United Nations Convention on the Rights of the Child, invited the Secretary-General to commission an in-depth Global Study on Children Deprived of Liberty. We welcome this Study by the Independent Expert, containing research findings and recommendations for future actions.

We want to thank the Independent Expert, Professor Manfred Nowak, who with the support of the United Nations system, Member States, academia, civil society and children themselves conducted and completed the Global Study.

This year marks the 30th anniversary of the Convention on the Rights of the Child, yet countless children continue to suffer severe violations of their human rights.

Legally, we have a very strong international framework. The Convention on the Rights of the Child, its Optional Protocols, and other international standards provide fundamental guidance to all aspects of deprivation of liberty and even when new issues or concerns emerge, they cannot contradict these protections and guarantees for children. Based on the fundamental principle of the best interests of the child, States are required to absolutely minimise the detention of children, and in some cases prohibit it altogether by developing and applying appropriate non-custodial solutions.

It is our strong hope that this Study will mark a turning point in ending the invisibility and overcoming the vulnerability, stigmatisation and social exclusion of children deprived of liberty. As the research confirms, these children are often neglected by policies and data in countries around the world. Indeed, some of the key findings and recommendations of the Study relate to unavailability of comprehensive data, which is vital to understand the scope of the deprivation of liberty of children globally, as well as to assess the progress made as a result of policy changes. Sadly, the saying that "the ones who are not counted do not count" reflects well the harsh reality of children deprived of liberty.

This situation is very far from the promise "to leave no one behind" in the 2030 Agenda for Sustainable Development. For this reason, we call on all of us to put these children first.

For children deprived of liberty achieving the Sustainable Development Goals are essential: Goal 1 on poverty eradication, which is a significant risk factor for deprivation of liberty; Goal 3 on health; Goal 4 on education; and very importantly, Goal 16 on access to justice, prevention and protection of children from violence and legal identity. Investing in these areas will decrease the number of children deprived of liberty while improving the conditions for those who still are.

Recognising that this issue cuts across the Sustainable Development Agenda, a UN Inter-Agency Task Force on the Global Study was established as a platform to provide UN system-wide support to the development of the study. The Task Force consisted of the Special Representative of the Secretary-General on Violence Against Children (Chair), the Special Representative of the Secretary-General for Children and Armed Conflict, the Committee on the Rights of the Child, the Office of the High Commissioner for Human Rights, the Office of the High Commissioner for Refugees, the United Nations Office on Drugs and Crime, the International Organization for Migration, the World Health Organization and the United Nations Children's Fund.

The Study provides an overview of the situation of children deprived of liberty worldwide. It includes valuable examples from States of policy options related to restorative justice, diversion, alternatives to migration detention and de-institutionalisation of children.

The deprivation of liberty of children can and should be prevented. It is not only the responsibility of Member States, but of the wider society. The United Nations supports these efforts wholeheartedly. Children of the world deserve this, and much more.

Najat Maalla M'jid
Special Representative of the UN Secretary-General on Violence against Children
on behalf of the UN Task Force

Message from the Advisory Board of the Global Study

The Global Study Advisory Board is made up of a diverse range of experts from academia and practice, from all continents and multiple fields of expertise, several of whom rolled up their sleeves and got involved in the work of the Study.

Professor Manfred Nowak held three expert meetings with the Advisory Board – and many individual discussions with individual members on their points of expertise - and it was through this process that the content and structure of the Study was shaped. The special 'something new' that the Global Study presents is that it encompasses a range of contexts where children are deprived of their liberty, beyond the usual terrain of children in the administration of justice. The inclusion of the six thematic areas was controversial in some respects, even the Advisory Board grappled with it.

Children in prison with caregivers, for example – did they belong in the Study? There are arguments in favour of them remaining with their caregiver, at least whilst that is in their best interests, but adopting sentencing policies which aim to keep caregivers out of prison, as well as their conditions of detention, are also important questions to consider.

Children in institutions was another contentious issue. While some felt that including them created confusion between alternative care and institutionalisation, those who have seen children in institutions know that they are often, both legally and factually, deprived of their liberty. It would have been a travesty to leave them out.

For States, migration detention and children detained in the context of armed conflict and national security probably seemed sensitive issues to provide information through questionnaires for the Global Study. But no State can deny that these are the new frontiers of children's detention.

The current news cauldron bubbles with stories about child migrants separated from parents, unaccompanied migrant children detained, babies of foreign fighters held in camps, children being charged in contexts of counter-terrorism.

The Study also included a number of cross-cutting chapters, focussing on child participation, disability, gender and health – some may ask why only these? What about indigenous children and children of minorities, for example, who are often overrepresented in detention? The answer is that there is much work still to be done, and this study provides a springboard.

Indeed, there are many old and new problems to be tackled, and this Global Study is much more than a litany of the suffering of children. It also sets out clear recommendations for change, and illustrates how change can be achieved through positive examples from a range of countries. From the outset, it was understood by the Advisory Board that the Global Study will not, itself, set children free. The Study provides the base-line, the 'how to', the launching pad – but it is the concerted effort of everyone: States, NGOS, academia, professional bodies, UN agencies, treaty bodies and special procedures, that will open the doors.

Professor Ann Skelton
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Chair, Global Study Advisory Board

Sir Malcolm Evans KCMG
Professor of International Law
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Chair, UN Subcommittee for Prevention of Torture
Vice-Chair, Global Study Advisory Board

Message from the NGO Panel for the Global Study

Civil society organisations working to promote and protect the rights of children have witnessed first-hand how children's lives are damaged by detention and confinement. Whether we work on administration of justice, children in the context of migration, children with disabilities, or children and armed conflict, we have seen that far too many children around the world are detained arbitrarily, illegally, and unnecessarily. This deprivation of liberty not only causes great harm to children, but also incurs enormous costs for society.

Since the Convention on the Rights of the Child was adopted in 1989, States have made significant gains in implementing the rights of the child. Progress is lagging, however, when it comes to the Convention's requirements regarding deprivation of liberty. Too often, detention is used as the first response to perceived problems, rather than the last resort and for the shortest appropriate period of time, as Article 37b of the Convention prescribes. Non-custodial solutions are often underutilised or greatly lacking.

Over 170 non-governmental organisations around the world have worked to support the Global Study on Children Deprived of Liberty and Professor Nowak's efforts to expose the scope and impact of deprivation of liberty on children. We have contributed our research, consulted with children, mobilised Government support, served on the Study's Advisory Board, and participated in or even organised some of the Study's expert, regional, and thematic consultations.

We believe that like previous UN studies on children, this Study can have a powerful catalytic effect by assessing the reality of the current situation, identifying effective solutions to detention, and providing a roadmap to change. We hope that it will prompt new laws, policies, and practices and help States dramatically reduce the number of children behind bars and locked doors.

We are grateful to Professor Nowak and his team for their tireless efforts. We also warmly thank the members of the Advisory Board, as well as all the members of the NGO Panel who contributed their time on a pro bono basis to support the Study and to make it happen.

We know that this Study is only the beginning of a process. We are committed to work with Member States, the United Nations, and other stakeholders to implement the Study's recommendations. We are committed to a future where no child is deprived of liberty and all children can live to their fullest potential.

Jo Becker
Children's Rights Advocacy Director
Human Rights Watch
Co-Chair, Global Study NGO Panel

Alex Kamarotos
Executive Director
Defence for Children International
Co-Chair, Global Study NGO Panel

Message from the Independent Expert

More than seven million children worldwide are in fact deprived of liberty per year. They are detained in settings such as prisons, pre-trial detention centres, police custody, migration detention centres and institutions of all kinds, including institutions for children with disabilities. Still a conservative estimate, this figure stands in direct contrast to the requirement of the Convention on the Rights of the Child, which clearly states that the detention of children shall be used only as a measure of last resort. This means that children shall be deprived of liberty only in exceptional circumstances on a case by case basis if non-custodial solutions are really not available or appropriate. Although some progress has already been achieved in recent years, it is evident that much more needs to be done in terms of deinstitutionalisation, diversion, ending migration-related detention and other measures in order to comply with the Convention. This is crucial since children under all circumstances have to be protected from the traumatic experiences detention settings inevitably create.

It is our responsibility to give children in detention back their childhood. Children have a right to grow up safe and surrounded by love – if not in their own family, then in a family-type setting. States have a corresponding obligation to support the family, which is the natural and fundamental group unit of society responsible for the care and education of dependent children. Where children are unable to remain with their families, States must make it a matter of priority to invest much more than is currently the case in effective child welfare systems that provide non-custodial alternatives to the deprivation of liberty in numerous settings including institutions, migration detention or in the context of the administration of justice. It remains an undeniable fact that children deprived of liberty are invisible to the large majority of society and their fate constitutes the most overlooked violation of the Convention.

This Global Study on Children Deprived of Liberty is the result of a highly participatory process involving many different stakeholders, including States, UN agencies, regional organisations, civil society, academia and children. I am deeply grateful to hundreds of individuals who contributed to this Global Study, usually on a pro bono basis, from within Governments or National Human Rights Institutions, as members of the UN Inter-Agency Task Force, the Advisory Board, the NGO-Panel or various research groups, which had been established for preparing the different chapters of the Global Study. Crucially, I want to thank all the children who participated in our consultations all over the world and whose invaluable views informed and enriched this Global Study.

Finally, I wish to pay particular tribute to two individuals from the coordination team in Vienna, who achieved so much with so little: Georges Younes, the Study Manager, and Manu Krishan, the Study Coordinator, for their tireless efforts and their constant support and encouragement during the entire process of this exciting, but also highly challenging endeavour. Together, we hope that this Global Study (which needs a comprehensive follow up by States, the United Nations and other stakeholders), will constitute a turning point in the lives of millions of children, make the invisible visible and start a process of liberating children from detention. In achieving this goal, it will foster the aims of the 'Agenda 2030', which strives to end violence against children and to leave no one behind, and in particular no child behind bars.

Manfred Nowak
Independent Expert leading the UN Global Study on Children Deprived of Liberty
Secretary General, Global Campus of Human Rights
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The Global Study on Children Deprived of Liberty has benefited from the support of numerous actors and key stakeholders. I wish to thank hundreds of dedicated individuals for their contributions to this global project. Without the indispensable support and contributions from UN Member States, UN Agencies, Academic Institutions, NGOs and many other actors (who all worked for the most part on a pro-bono basis), the Global Study would not have been possible. The contributions of these key players not only made this Study a reality, but also created a new momentum for children's rights worldwide – in particular for children deprived of liberty.

Friends of the Global Study

My deepest appreciation and gratitude go to all the Member States that have responded to the questionnaire. The information that you provided forms a core element of the Study's process and has given us invaluable insights into the situation of children deprived of liberty worldwide. Thank you.

I would also like to particularly thank the friends of the Global Study, who supported our work with financial contributions. Without such generous support, it would have been impossible to embark on such a comprehensive and crucially needed research endeavour:

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UN Task Force Members and Colleagues

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The Advisory Board has been a constant inspiration throughout the Study. Thank you for your commitment and guidance during the entire process. It is truly very much appreciated:

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- **Malcom EVANS**, Vice-Chair of the UN Global Study Advisory Board, Chair of the UN Subcommittee for the Prevention of Torture and Professor of Public International Law, University of Bristol (United Kingdom).
- **Jo BECKER**, Advocacy director of the Children's Rights Division at Human Rights Watch (United States).
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- **Thomas HAMMARBERG**, former Secretary General of Save the Children and Amnesty International and Former Member of the UN Committee on the Rights of the Child (Sweden)
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- **Leila ZERROUGUI**, Special Representative of the UN Secretary-General and Head of the United Nations Stabilization Mission in the Democratic Republic of the Congo and Former UN Special Representative of the Secretary-General on Children and Armed Conflict (Algeria).

NGO Advisory Panel for the UN Global Study on Children Deprived of Liberty[1]

4.1 Co-Conveners

A very special thanks go to the co-conveners **Jo BECKER**, Human Rights Watch and **Alex KAMAROTOS**, Defence for Children International for their impactful engagement and impressive coordination of the NGO Panel consisting of 170 NGOs worldwide and for being essential advocates in this global endeavour.

1 The full list of all NGOs part of the NGO Panel can be found in Annex III

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Abbreviations and Acronyms

ACHPR - African Charter on Human and Peoples' Rights

ACRWC - African Charter on the Rights and Welfare of the Child

ACHR - American Convention on Human Rights

Arab Charter - Arab Charter on Human Rights

Beijing Rules - UN Standard Minimum Rules for the Administration of Juvenile Justice

CAT – UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CEDAW – UN Convention on the Elimination of all Forms of Discrimination against Women

CERD – International Convention on the Elimination of all Forms of Racial Discrimination

CFR - Charter of Fundamental Rights of the European Union

CMW – International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families

CoE - Council of Europe

CRC - UN Convention on the Rights of the Child

CRPD - UN Convention on the Rights of Persons with Disabilities

ECHR - European Convention on Human Rights

ECtHR - European Court of Human Rights

EU - European Union

FRA - European Union Agency for Fundamental Rights

Havana Rules - UN Rules for the Protection of Juveniles Deprived of Liberty

HRC - Human Rights Council

IACHR - Inter-American Court of Human Rights

ICC - International Criminal Court

ICCPR - International Covenant on Civil and Political Rights

ICESCR – International Covenant on Economic, Social and Cultural Rights

ICRC - International Committee of the Red Cross

ICTY – International Criminal Tribunal for the former Yugoslavia

IE - Independent Expert

ITR - International Tribunal for Rwanda

IOM - International Organization for Migration

Nelson Mandela Rules - UN Standard Minimum Rules for the Treatment of Prisoners

OHCHR - Office of the High Commissioner for Human Rights

OPAC - Optional Protocol to the UN Convention on the Rights of the Child on the Involvement of Children in Armed Conflict

OPCAT - Optional Protocol to the UN Convention against Torture

OPIC - Optional Protocol to the UN Convention on the Rights of the Child on a Communications Procedure

UNGACC - UN Guidelines for the Alternative Care of Children

UNHCR - United Nations High Commissioner for Refugees

UNICEF - United Nations Children's Fund

UNODC - United Nations Office on Drugs and Crime

Riyadh Guidelines - UN Guidelines for the Prevention of Juvenile Delinquency

Tokyo Rules - UN Standard Minimum Rules for Non-custodial Measures

SCSL - Special Court for Sierra Leone

SRSG CAAC – UN Special Representative of the Secretary-General on Children and Armed Conflict

SRSG VAC – UN Special Representative of the Secretary-General on Violence against Children

Vienna Guidelines - Guidelines for Action on Children in the Criminal Justice System

WGAD – UN Working Group on Arbitrary Detention

WGDAW – UN Working Group on the Issue of Discrimination against Women in Law and in Practice

WHO - World Health Organization

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CHAPTER 1

DEPRIVATION OF LIBERTY IS DEPRIVATION OF CHILDHOOD

© MatejDivizna / Getty Images News, detention center for migrants in Bela pod Bezdezem, Czech Republic

When Marta Santos Pais in her function as chair of the UN Inter-Agency Task Force inquired in late summer 2016 whether I would be interested to lead the Global Study on Children Deprived of Liberty, many memories from my time as UN Special Rapporteur on Torture came to the forefront of my mind once more. During the six years of my mandate between 2004 and 2010, I had carried out 18 official fact-finding missions to a broad variety of States in all world regions. Since torture usually takes place behind closed doors, I had used most of my time on mission to carry out unannounced visits to hundreds of places of detention where we conducted confidential interviews with thousands of detainees. I am very grateful to the Governments of these 18 States, for not only inviting me to visit their countries, but also for accepting methods of independent fact-finding. This allowed me to gather a deep insight into the reality of life behind bars.

During these missions, I became witness of unthinkable misery and true suffering. Most difficult to bear was to witness what children behind bars have to endure in many countries of the world. I notably visited and interviewed children in various types of detention facilities, ranging from orphanages to adult prisons. Due to what I discovered during these visits and interviews, I dedicated a section of my 2009 interim report to the General Assembly to 'children in detention'.[1] The situation children face in detention today is as pertinent as it was back during my fact-finding missions. Children deprived of liberty remain particularly vulnerable. Many children fall victim to multiple forms of discrimination due to the fact that they come from poor socio-economic backgrounds, belong to a minority or indigenous group, have a physical or mental impairment or are part of the LGBTI community. Life in prisons and other places of detention usually also follows an invisible social hierarchy, whereby default children find themselves at the bottom (together with other marginalised groups). As such, they are more vulnerable than other detainees to a number of threats rampant in most places of detention – threats including physical, psychological and sexual violence. An additional factor that needs to be considered seriously is that children by virtue of their age have special needs. For instance, children need contact with their families and friends. If these needs cannot be satisfied, they suffer. As children are in their formative years, any form of deprivation of liberty has lasting detrimental effects on their health and development, strongly influencing the rest of their lives.

While considering the offer of the UN Task Force, it was therefore only natural to revisit my memories of the children I met in a 'children's home' in **Karaganda (Kazakhstan)** – some as young as three. I remember noticing that their heads were shaven. I also found out that

1 Cf. UN General Assembly, *Interim Report of the Special Rapporteur on Torture, 3 August 2009*, A/64/215, paras. 61-79. See also Manfred Nowak, *Torture – An Expert's Confrontation with an Everyday Evil*, Philadelphia: University of Pennsylvania Press, 2018.

Children in an orphanage in Kazakhstan, 2009

they had been subjected to corporal punishment on a daily basis. Some of these boys were orphans or had been forcibly separated from their parents, others had been living on the streets before being brought there by the police. Some of the older children were addicted to drugs and others were detained for 'educational purposes' after having committed some kind of petty offence. They were all placed together and had been subjected to the same harsh regime. I still see the fear in their eyes when we asked them about their daily experiences.

In fact, I had looked into many eyes of children in detention, full of fear and sadness. One of the saddest places was the children's ward in the psychiatric hospital of **Balti (Moldova)**, where even very young children had been subdued with sedatives. Many of them were lying in their beds all day, completely apathetic and sadly reminiscent of living corpses.

In some countries, the minimum age of criminal responsibility was at the time of my visit still very low. This means that I found children, as young as 8 or 9 years, in pre-trial detention or even in prisons after having been sentenced by a criminal court. In the children's prison in **Lomé (Togo)**, some of the boys were even confined to their cells for most of the day. In the Kutuarjo juvenile prison in **Java (Indonesia)**, girls were strictly separated from boys. However, since there was only one girl detained at the time of my visit, she in fact served

her sentence in complete solitary confinement. Nevertheless, corporal punishment as official means to uphold discipline in juvenile prisons equally applied to her. Armadale, a juvenile prison for girls in **Jamaica**, had become a symbol for structural violence and lack of empathy for detainees. Collective punishments were meted out even for minor breaches of the prison rules, and the girls were routinely locked up in their overcrowded bedrooms and were prevented from taking part in educational and leisure activities. This resulted in a major riot in which many girls were severely burned and seven died. I am still visited by the memory of interviewing some of the badly traumatised survivors.

Children in a child centre in Togo, 2007

In **Uruguay**, the situation of accused and convicted children, who were held in special child detention facilities in extremely poor conditions, was alarming. The system of detention was based on a punitive approach. Children had no opportunities for education, work or any other rehabilitative activity, and the boys were locked up for up to 22 hours a day in their cells. There were no toilets in the cells, which sometimes forced detainees to wait for hours for a guard to let them go to the toilet. At the Piedras Home, which was a very

isolated place too far away for many poor families to regularly visit their children, the boys had to relieve themselves in bottles and plastic bags, which they threw out of the window, resulting in a repulsive smell around the building.

This smell accompanied us on many fact-finding missions. In many poor countries, the task of providing detainees with sufficient food and water had been delegated in fact to the families of detainees. Time and again I saw families with plastic bottles of water and plastic bags with food entering prisons in order to satisfy the most basic needs of their children and loved ones. Since toilets were often missing, as I witnessed for instance in all police lock-ups in **Equatorial Guinea**, the same plastic bottles were used for urinating and the plastic bags for defecating. In many instances, it was the smell itself that often guided us to where people had been detained. Even at the International Airport of **Athens (Greece)**, we encountered this specific smell, as the holding cells for migrants were so overcrowded that the toilets had ceased functioning.

Children in an overcrowded immigration detention centre in Greece, 2010

In the north of **Greece**, along the Evros River, which marks the border to **Turkey**, I visited various migration detention centres the conditions of which were so dreadful that we assessed them in their entirety as inhuman and degrading. A high proportion of migrants who were crammed together in these overcrowded detention places were children: unaccompanied minors as well as families with small children. Even the police guards who were supposed to keep order declined to enter these cells, and the cleaning staff had given up all efforts to clean the flooded toilets! I will never forget a Somalian woman with two little children who broke down when she realised that the excrements of the broken toilets had flooded the floor where she had prepared a blanket for her babies to sleep. She did not wish to believe that she had entered the European Union.

During most missions, I came across infants and small children, who were growing up with their incarcerated mothers in prisons, simply because they do not have any other caregiver and judges usually do not take the effects of decisions on children into account sufficiently when sentencing their mothers to a prison term. In the highlands of **West Papua (Indonesia)**, I even came across an eleven-year-old boy who was living with his father in a prison.

In **Nepal, Sri Lanka and other war-torn countries**, I interviewed multiple boys and girls, often not older than 14 years, who had been forcibly recruited and exploited by non-State armed groups as child soldiers and who were later detained by the military or State security forces. Often, these children had been subjected to torture by both Government and non-State actors in order to extract intelligence information and/or a confession from these poor kids.

Children living with their mothers in prison in Nepal, 2005

One of the most violent places that I have seen in my life, was the 'torture room' at the Criminal Police Headquarters in **Lago's Panti district (Nigeria)**. There were 125 people, including children, crammed into this extremely hot, humid, and filthy room without a solid roof, who had to sit and sleep on a dirt floor. A hole in the corner was the only toilet. Among these cowering people were three women and several children, the youngest eleven years old. Detainees had been taken to this room to be interrogated and tortured immediately after arrest. Several had been in this room for more than two months. Every single person we spoke to had been severely tortured and the torture had taken place in the presence of the others! All torture instruments were neatly hung on the walls! There was not enough food for everyone, and detainees had to fight among themselves to grasp food. The medical doctor of our team noted severe malnourishment, notably among the children. One of the children whom we interviewed was too weak to stand up.

125 people, including children, crowded into a prison cell in Nigeria, 2007

I recount these personal experiences in such detail because I believe them to illustrate the importance of continuously striving to improve the situation of children worldwide. Though these situations may to some extent have improved since presenting my findings to the General Assembly in 2010, certain issues still remain – as is illustrated by the following chapters. Moreover, the memory of what I witnessed is *the* decisive reason why I finally decided to accept the offer of Marta Santos Pais to lead the Global Study on Children Deprived of Liberty. The process of the Study has once more highlighted to me the views and experiences of detained children. Even now, several years after the experiences recounted above, I am still struck by how similar the situations of children are still today.

I consider this Study as a **follow up to the Global Study on Violence against Children**, published in 2006 under the guidance of Paulo Sergio Pinheiro.[2] As Pinheiro's Study illustrates, violence against children occurs in various settings, including in the family, in schools, in workplaces and in the community. It is worst, however, in care and justice institutions where

2 Paulo Sergio Pinheiro, Independent Expert for the United Nations Secretary General's Study on Violence against Children, *World Report on Violence against Children,* Geneva 2006.

children are deprived of liberty. In my opinion, places of detention constitute settings of structural violence. At the same time, the conditions in places of detention are very little known to the outside world. Prison walls serve two distinct functions: to lock people away from society, and to keep society out. Only very few members of our societies have been inside prisons, police jails, migration detention centres, psychiatric hospitals, orphanages, children's homes, drug rehabilitation centres, institutions for children with disabilities or any other places of detention, and most people have no desire to know what the reality of life behind bars looks like. There is very little interest, let alone empathy, for detainees in general, and for children detainees in particular. Many global statistics cover all aspects of life, but nobody knows how many children are in fact deprived of liberty worldwide or what the conditions of their detention look like.

Taking all of the above into consideration, it was a very timely decision of the **United Nations General Assembly** in December 2014 to invite the Secretary-General to commission an in-depth global study on children deprived of liberty.[3] One of the main aims of the Study is to assess, on the basis of scientific data, the magnitude of the global number of children deprived of liberty in six different situations, including in institutions, for migration related reasons and in the context of the administration of criminal justice. Another goal is to comprehend the root causes and pathways leading to deprivation of liberty of so many children as well as to gather best practices of States that have applied non-custodial solutions instead of detention. The Study also addresses the conditions of detention, taking into account the personal views and experiences of children. Finally, the Study assesses possible justifications for and limits of deprivation of liberty of children in light of all relevant provisions of international law, above all the Convention on the Rights of the Child (CRC). Most importantly, all decisions that deprive children of liberty in whatever setting must meet the high standards of the best interests of the child in Article 3 CRC and the requirement of Article 37(b) CRC, according to which children may only be detained as a measure of last resort and for the shortest appropriate period of time. The Global Study shows that the vast majority of children detained around the world today have been deprived of liberty in violation of these principles. In almost all cases, there would have been non-custodial solutions available, which should have been applied in order to meet the high legal standard of detention as a measure of last resort.

The **main message of the Global Study** is to urge States to better respect and protect the rights of children by drastically reducing the number of children deprived of liberty. This

3 UN General Assembly, *Resolution on the Rights of the Child*, A/69/157, 18 December 2014, para. 52(d).

can be achieved by means of diversion, de-institutionalisation, eradicating migration related detention and applying other non-custodial solutions instead of detaining children. The second most important message is to urge States to give higher recognition to the value of the family as the fundamental group unit of society and, accordingly, invest much more resources in supporting families for their role as primary caregivers for children. The third message is to urge States to adopt a systemic approach to strengthen child justice and child welfare systems and encourage inter-agency cooperation between different stakeholders. Police, prosecutors and judges need to strengthen their cooperation with parents, social workers, teachers, health professionals and all persons involved in the child welfare system with the common aim of assisting children in their personal development, all the while taking into account their agency and right to participate. Together, they should try to avoid, as much as possible, any situation which may finally lead to the deprivation of liberty of children.

As the earlier Global Studies led by Graça Machel and Paulo Sergio Pinheiro, this Study is the result of a **joint effort** by States, international organisations, civil society, the academic community and children. I am deeply grateful to each of the hundreds of individuals who contributed in various functions to the preparation of this joint endeavour. It was not an easy undertaking, as we faced many challenges. Since the General Assembly requested the Study to be financed through voluntary contributions, we faced serious budgetary constraints, which more than once blocked any further progress and almost led to the cancellation of the entire project. Much time was invested into emergency fund raising activities, which severely delayed the finalisation of the Study. At the same time, the fact that we only raised about one fifth of the budget originally foreseen by the United Nations, also prompted many volunteers from civil society and the academic community to contribute pro bono. Without the significant financial support of private foundations, the Study would not have materialised.

The severe **lack of funding** also prevented us unfortunately from fully integrating children into all our regional and thematic consultations and other activities in the course of preparing the Global Study. Since children are true experts in their own rights, it is vital to include their views and experiences at every stage of the design and preparation of such a comprehensive research. It is only thanks to a financial contribution by UNICEF and the joint efforts of many civil society organisations that we could finally interview 274 children in many different countries and enrich the Study by their voices.

Another challenge was **to define the scope of the Study**. Deprivation of liberty means to confine a human being to a narrowly bounded location that he or she cannot leave at will. If we apply this definition to children, we realise that small children are usually

deprived of liberty by their parents for their own protection. They cannot simply leave their home or stroller as the parents have an obligation to protect them against all kinds of dangers on the streets and in the wider community. Usually, parents master this challenge of protecting their infants and small children without unnecessarily restricting their right to personal liberty, but sometimes they may lock them into a closed room, for punitive or preventive reasons. Nevertheless, we decided that it would go beyond the purpose of the Global Study to also cover all forms of deprivation of liberty in the family. This decision opened, however, further questions. What if the parents cannot cope with their infants and place them temporarily or permanently in a privately-run home for children? Usually, small children cannot simply leave a kindergarten or orphanage of their own free will, as they are also in need of protection. In principle, this rule also applies to older children, whether they are in the family, in a private or State institution. In most States, child welfare laws restrict the freedom of children of different ages to go out at night unaccompanied. Strictly speaking, I deprive my 15-year-old son of his right to personal liberty when I prohibit him from leaving home to attend a private party after midnight. The same applies if such rules are imposed in any private or public institution for children with disabilities or for the educational supervision of children. Does this mean that all children who live in an institution are deprived of liberty? How are institutions to be defined? Should we make a distinction between large-scale institutions and small family-like group homes for children? Does it make a difference whether these institutions are run by the State, by a faith group or private enterprise?

After long and highly controversial discussions during various expert meetings, we decided to apply **the definition of deprivation of liberty under international law**, which requires a decision by a judicial or administrative authority.[4] Whether the place of detention (irrespective of being an institution, a migration detention centre or a prison) is run by the State or by a private organisation is not a decisive factor, but there must be some governmental involvement in the decision that leads to the deprivation of liberty. Strictly speaking, this would exclude many children who are placed by their families in a privately-run institution without the active involvement of a governmental authority, although one may argue that these private institutions have been or at least should have been licensed by a decision of a governmental authority. In any case, a certain flexibility remains with respect to the concept of *de jure* and *de facto* deprivation of liberty, at least in private institutions.

4 For the precise legal definition of deprivation of liberty, as applied in the Global Study, see Chapter 4 on the Right to Personal Liberty.

A third challenge was how to **gather sufficient disaggregated data** about the number of children deprived of liberty in order to arrive at scientifically sound global estimates for the different situations covered by the Global Study. In February 2018, we sent out a carefully drafted questionnaire to all States, National Human Rights Institutions, National Preventive Mechanisms, to relevant UN agencies, Non-Governmental Organisations and other stakeholders. We asked them to count all children deprived of liberty at a specific snapshot date (26 June 2018) and to collect annual data, as far as available, for the last 10 years. We received a total of 118 replies from 92 countries, including 67 official State responses. In addition, we collected many more data from official governmental and UN statistics, peer-reviewed literature and other reliable sources and fed them into a specific database created for the Global Study.[5] The data collected are sufficient to make statistical extrapolations and to arrive at scientifically sound global estimates. However, all numbers used in the Global Study are highly conservative estimates, and the real numbers are certainly much higher. There is an urgent need for States and their statistical offices to collect data on the total number of children deprived of liberty on a regular basis and for the United Nations to maintain a comprehensive database, which will allow the assessment of trends. Only if we can read from statistics that diversion, deinstitutionalisation and other non-custodial solutions are more effective and less costly than detention to serve the purpose of preventing crime and providing care and protection to children, will States become more eager to follow others in sharply reducing the number of children deprived of liberty.

This Global Study is **only a first step** to draw the attention of States and the international community to a phenomenon that has largely been ignored in the past: that millions of children of all ages are suffering in many different types of detention in violation of international law, and that we are depriving these children of their childhood and of their future. Depriving children of liberty means to expose them to a form of structural violence, while States have committed themselves in the Agenda 2030 to end all forms of violence against children.[6] I sincerely hope that this Global Study, which is in need of a comprehensive follow up by States, UN agencies, civil society and others, will contribute to the ultimate goal of the Agenda 2030 to leave no one behind and, in particular, to leave no child behind bars.

5 For the methodology and use of data see, Chapters 2 & 3.

6 See United Nations, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, 21 October 2015, Goal 16.2, Available at https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf (accessed 16 September 2019).

CHAPTER 2

STUDY PROCESS AND RESEARCH METHODOLOGY

© Terre des Hommes, Space where children can play with their friends, sing, create artworks or just relax in a child friendly environment ina refugee camp in Bangladesh

CHAPTER 2
STUDY PROCESS AND RESEARCH METHODOLOGY

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1. Background

Following a dedicated campaign by various stakeholders ranging from UN Member States and UN entities to NGOs, the United Nations General Assembly adopted a resolution on 18 December 2014 inviting the Secretary-General to commission an in-depth Global Study on Children Deprived of Liberty.[1] One year later, the General Assembly passed another resolution on 17 December 2015 reminding the UN Member States to support the elaboration of the Global Study.[2] In October 2016, I was appointed as Independent Expert leading the Global Study on Children Deprived of Liberty.

The Study's implementation phase was severely delayed due to lack of funding. The funding of the Study was reliant on 'voluntary contributions' from Member States. In the end, our fundraising efforts were answered by financial contributions from **Austria, Germany, Liechtenstein, Malta, Qatar, Switzerland, the European Union, UNICEF, the Right Livelihood Award Foundation and another private foundation**. I wish to express my sincere gratitude to these 'Friends of the Study' as without their financial contributions, it would have been impossible to conduct such a comprehensive research project.

Working on only one fifth of the originally foreseen budget and despite these minimal resources, activities were maximised, uniting many different stakeholders, including States, UN Agencies, Non-Governmental Organisations (NGOs), National Human Rights Institutions (NHRIs), National Preventive Mechanisms (NPMs), academic institutions and children. With the first year spent on securing the minimum funding to commence the research endeavour, the presentation of the report to the General Assembly was extended to October 2019.[3]

After 3 years of hard and dedicated work of close to 150 researchers worldwide, most of whom worked on a pro-bono basis, 3 expert meetings, 12 international thematic consultations, 274 interviews with children and countless fundraising talks, the Report to the General Assembly was presented on 8 October 2019 in the Third Committee in New York, which summarises the findings of this Global Study.[4]

1 Cf. UN General Assembly, *Rights of the Child*, A/RES/69/157 of 18 December 2015, 3 February 2015, para. 52(d).

2 Cf. UN General Assembly, *Rights of the Child*, A/RES/70/137 of 17 December 2015, 29 February 2016, para. 54.

3 Cf. UN General Assembly, *Rights of the Child*, A/RES/72/245 of 24 December 2017, 22 January 2017, para. 37.

4 Cf. UN General Assembly, *Rights of the Child*, Global Study on Children Deprived of Liberty, A/RES/74/136, 11 July 2019.

Timeline of the Global Study

2014	**March:**	Official launch of the campaign for the Global Study
	May:	Formal letter of support by the CRC-Committee extended to the UN Secretary General
	June:	First expert consultation to discuss the scope of the Study and to galvanise political support (Geneva, Switzerland)
	December:	Adoption of UNGA Resolution A/RES/69/157 formally requesting the commissioning of the Study
2015	**December:**	Adoption of UNGA Resolution A/RES/70/137 recalling previous resolution (2014), encouraging States to support the Global Study
2016	**September:**	Official funding appeal by UN Deputy Secretary General to all UN Member States
	October:	Professor Manfred Nowak formally selected as Independent Expert (I.E.)
	December:	Adoption of UNGA Resolution A/RES/71/177 inviting the I.E. to provide an update on the progress made and to submit a final report at the UNGA 73rd session (October 2018)
2017	**March:**	First Expert Meeting on the development of the questionnaire (Venice, Italy)
	October:	First Interactive Dialogue of the I.E. at the UN General Assembly, informing States that only one fifth of the foreseen budget had been raised (NYC, USA)
	December:	Adoption of the UNGA Resolution A/RES/72/245 inviting the I.E. to update Member States at the UNGA 73rd session on the progress made and to submit a final report to the General Assembly at its 74th session (October 2019).
2018	**February:**	Questionnaire - translated into all UN languages - dispatched by OHCHR to all UN Member States
	April:	Second Expert Meeting on the formation of the research groups for the Global Study (Vienna, Austria)
	September:	Deadline for responses to the questionnaire
	October:	Second Interactive Dialogue of the I.E. at the UNGA, providing an update on the status of the Global Study (NYC, USA)
2019	**March:**	Final Expert Meeting finalising the draft chapters of the Global Study (Venice, Italy)
	July:	Formal submission of the UNGA Report on the Global Study
	October:	Third Interactive Dialogue of the I.E. at the UNGA, formally presenting the UNGA Report (NYC, USA)
	November:	Official presentation of the Global Study (Geneva, Switzerland)

1.1 Constellation of the Global Study Actors

The Study is supported by the UN Inter-Agency Task Force under the chair of the **Special Representative of the Secretary General (SRSG) on Violence against Children (VAC)**. Other members include the **SRSG for Children and Armed Conflict (SRSG CAAC)**, the **Committee on the Rights of the Child (CRC)**, **United Nations Children's Fund (UNICEF)**, the **UN Office on Drugs and Crime (UNODC)**, the **Office of the UN High Commissioner for Refugees (UNHCR)**, the **International Organization for Migration (IOM)**, the **World Health Organization (WHO)** and the **Office of the UN High Commissioner for Human Rights (OHCHR)**. As a platform to provide UN system-wide support to the Study development, the **Task Force** was responsible for **defining the scope** of the Study, while also developing an initial **budget** and **fundraising strategy**. Serving as the Study's secretariat, the **OHCHR** provided invaluable support in coordinating activities with Member States. Countless other international and regional organisations made noteworthy contributions to the Study, for which I am deeply grateful.

The **Advisory Board** to the Study is comprised of 22 highly renowned experts in the fields of children's rights and the right to personal liberty. Its involvement was vital in informing the research process.[5]

The **NGO Panel** for the Study, led by Defence for Children International and Human Rights Watch, consists of 170 NGOs working directly or indirectly on children's deprivation of liberty. Collaborating closely with these organisations was key in the conceptualisation, realisation and implementation of the Study.[6]

Research groups for the Study were chaired by distinguished experts and their institutions from all around the world.[7] Many of these academic institutions are members of the **Global Campus of Human Rights**, a worldwide network of 100 universities. One of these members is the **Ludwig Boltzmann Institute of Human Rights in Vienna**, which coordinated key efforts and components of the Global Study, including the international research activities.

Children from all around the world with experiences of deprivation of liberty were consulted to inform the research of the Global Study. I am grateful to each and everyone for sharing their views with us and enriching this Global Study in the hope that they will make a difference in the eyes of the States and society as a whole.

5 A comprehensive list of the Advisory Board members is provided in the Acknowledgments.

6 A comprehensive list of all 170 members of the NGO Panel is provided in the Annexes.

7 A comprehensive list of the members of all Research Groupsis provided in the Acknowledgments.

1.2 Structural Setup of the Research Process

As a precondition for the effective implementation of the UN Global Study, structures and mechanisms needed to be put in place with clear tasks and responsibilities, including the following roles:

- **UN General Assembly:** mandating the Study
- **UN Secretary-General & UN Interagency Task Force:** Secretary General delegated the authority to the UN Task Force to prepare the ground for the Independent Expert's work and to ensure UN system-wide support and coordination for the Study development
- **Office of the High Commissioner for Human Rights (OHCHR):** Secretarial support for the Study development, assisting the Independent Expert in coordinating activities with Member States and others
- **Independent Expert and Coordination Team at the Ludwig Boltzmann Institute of Human Rights and Global Campus of Human Rights:** responsible for the overall project management, support to fundraising, organising all expert meetings, national, regional and thematic consultations, monitoring the data analysis process and coordinating the 'Data Task Force' as well as coordinating the research, publication and dissemination processes
- **Advisory Board** of qualified international experts: advising the Independent Expert and assisting the Research Groups
- **NGO Panel:** mobilising support and raising awareness worldwide
- **Research Group:** For each of the situations of deprivation of liberty, a research group was established. Additionally, every cross-cutting theme also had a dedicated research group. Research groups are composed of:
    - Lead Researchers, coordinating the group (Research Institutions/academia)
    - Relevant UN agencies from the UN Interagency Task Force
    - Representatives of relevant NGOs
    - Representatives of the Advisory Board

Research Groups & Cross-Cutting Research Groups	Leading Research Institution/ Academia	UN Focal Point	NGO Focal point
Children Deprived of Liberty in the Administration of Justice	Ludwig Boltzmann Institute of Human Rights (BIM) *Austria*	UNODC	Child Rights International Network (CRIN) Defence for Children International (DCI)
Children Living in Prisons with their Primary Caregiver	Global Campus of Human Rights (GCHR) *Italy*	OHCHR	Children of Prisoners Europe (COPE) Quakers
Children Deprived of Liberty for Migration related Reasons	Joint Research Centre / European Commission (JRC/EC) *Belgium*	IOM UNHCR	Global Detention Project (GDP) Human Rights Watch (HRW) International Detention Coalition (IDC)
Children Deprived of Liberty in Institutions	Centre for Child Law, University of Pretoria (CCL/UP) *South Africa*	UNICEF	Lumos SOS Children's Villages International (SOS)
Children Deprived of Liberty in the Context of Armed Conflict	Human Rights Watch & Columbia University (HRW/CU) *United States*	SRSG CAAC	Penal Reform International (PRI) Human Rights Watch (HRW)
Children Deprived of Liberty on Grounds of National Security	Human Rights Watch & Columbia University (HRW/CU) United States	SRSG CAAC	Penal Reform International (PRI) Human Rights Watch (HRW)

Research Groups & Cross-Cutting Research Groups	Leading Research Institution/ Academia	UN Focal Point	NGO Focal point
Views of Children	University College Cork (UCC) *Ireland* Queen's University Belfast (QBU) *United Kingdom*	UNICEF	Terre des Hommes (TdH) and 22 regional NGOs
Impacts on Health	Murdoch Children's Research Institute & University of Melbourne (MCRI/UoM) *Australia*	WHO	
Children with Disabilities	NUI Galway (NUI Gal) *Ireland*	UN Special Rapporteur on Persons with Disabilities (SR Disabilities)	
Gender Dimension	University of Cyprus (UCY) *Cyprus* Chulangkorn University (CHU) *Thailand* Association of Women Lawyers of Senegal (AJS) *Senegal*	UN Working Group on Discrimination against Women (WGDAW)	

Global Study Organigram

2. Methodology

The methodology of the Study places an overall emphasis on the child rights-based approach. In this regard, the **best interests principle (Art 3 CRC)** serves as the **guiding principle** for the entire child rights-based analysis, reviewing both context and justification for deprivation of liberty (content) and decision-making processes in relation to such interference (procedure). The other guiding principles of the Convention on the Rights of the Child, namely **non-discrimination (Article 2 CRC)**, the **right to survival and development (Art 6 CRC)** as well as the **views of the child (Art 12 CRC)** are mainstreamed in the analysis across the entire Global Study. Additionally, the Study particularly seeks to identify non-custodial solutions and their impact on reducing the number of children deprived of liberty.

The Study has focused on six primary situations of deprivation of liberty that children consistently face around the world:

- Children deprived of liberty in the administration of justice
- Children living in prisons with their primary caregiver
- Children deprived of liberty for migration-related reasons
- Children deprived of liberty in institutions
- Children deprived of liberty in the context of armed conflict
- Children deprived of liberty on national security grounds

2.1 Core Research Questions

In order to most usefully apply the child rights-based approach to the above identified focus areas, we have isolated a number of core questions in consultation with all experts and partners involved in the Global Study:

- **What is our current understanding?**

  What is the worldwide **scope** of deprivation of liberty of children, and what are the **conditions** of children living in such situations? What are the pathways and **root causes** for children being deprived of their liberty, and what is the **impact** on their future development and society at large? These questions were designed with the intention to improve current understanding of the phenomenon, both in terms of the quantitative (statistical numbers,

proportions) and qualitative dimensions. Understanding the scope, root causes and impact of such deprivation is instrumental for the development of effective policies, while also ensuring greater visibility and the mobilisation of relevant actors.

▶ **ADDRESS INFORMATION GAP**

- **What are the current responses when children are deprived of liberty?**

  Under which conditions is deprivation of liberty of children justified under international law? To what extent and under which conditions is deprivation of liberty compatible with the best interests of the child and other **child rights principles and standards**? What kind of complaint and reporting mechanisms are accessible to children in relation to conditions of detention? Here, the Study critically reviews the applicable legal framework of deprivation of liberty, including principles of last resort, deprivation for the shortest appropriate period of time as well as procedural safeguards (including physical and mental abuse in the places of detention). These are particularly considered in light of the United Nations Convention on the Rights of the Child and the United Nations Convention on the Rights of Persons with Disabilities as well as other relevant international standards. Moreover, the Study analyses their **implementation in practice**, addressing existing challenges while simultaneously also collecting examples of good practices.

  ▶ **ADDRESS JUSTIFICATION IN PRINCIPLE AND IN PRACTICE**

- **What are the non-custodial solutions and protection measures available for children?**

  How can deprivation of liberty of children and its negative impact be **prevented?** What **non-custodial solutions** to deprivation of liberty are available and have proven to be effective as a child rights-based response? What measures do States undertake to ensure that children are not deprived of liberty? What benefits do States experience when introducing various protection measures and non-custodial solutions to the deprivation of liberty of children? In many countries, efforts are underway to empower children and families, while strengthening child protections systems in order to prevent situations leading to deprivation of liberty. The Study identifies such good practices as alternatives to deprivation of liberty as well as to emphasise beneficial effects of non-custodial solutions and measures for children, society at large and the State institutions.

  ▶ **ADDRESS NON-CUSTODIAL SOLUTIONS PREVENTING DEPRIVATION OF LIBERTY AND MEASURES PROTECTING CHILDREN**

2.2 Cross-cutting Areas

Children deprived of liberty have diverse backgrounds and identities, but also face similar situations and experiences. In order to better understand the commonalities and differences throughout all situations of deprivation of children covered in this Global Study, a red thread was spun examining the following cross-cutting areas into depth:

- Legal framework
- Views and perspectives of children
- Impacts on health
- Children with disabilities
- Gender dimension

3. Research Process

The research process of the Global Study was international, interdisciplinary and interactive. The infographic below depicts the pillars of our research.

3.1 Expert Meetings

Three Expert Meetings, uniting experts from academia and the field, UN officials as well as NGO representatives, have framed, guided and informed the research process:

- The **first Expert Meeting** was held in **Venice in March 2017** hosted at the **European Inter-University Center for Human Rights and Democratization (EIUC), now Global Campus of Human Rights (GCHR)**, bringing together UN agencies, NGOs and international experts to design the questionnaire to be sent to all UN Member States.
- The **second Expert Meeting** brought together the Advisory Board Members, UN agencies as well as academics to be leading different research areas in order to implement the research methodology and form the international research groups. The meeting was held on the **UN premises in Vienna in April 2018**.
- The **third and last Expert Meeting** was again held **in Venice in March 2019**, to present, review and discuss the penultimate versions of all the chapters. All research groups were able to receive feedback from other research groups and discuss areas of convergence and divergence.

3.2 Desk Research

The Study offered a unique opportunity to take stock of available information on situations of children deprived of liberty, the current legal and policy framework and its implementation in practice. For this purpose, the research process continued to include desk research activities, such as:

- Literature review of academic articles and reports
- Review of Concluding Observations of the UN Committee on the Rights of the Child (CRC) in respect of deprivation of liberty, and information from the State reporting process
- Review of reports of additional UN treaty monitoring bodies, such as
  - Committee on the Elimination of Racial Discrimination
  - Human Rights Committee
  - Committee on the Elimination of Discrimination against Women
  - Committee against Torture and its Subcommittee on Prevention of Torture
  - Committee on the Protection of the Rights of All Migrant Workers and Members of their Families
  - Committee on the Rights of Persons with Disabilities

- Review of UN Charter-based bodies, such as
  - Human Rights Council (Universal Periodic Reviews)
  - Special Procedures, such as the Special Rapporteurs on Persons with Disabilities, on Torture, on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health; on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material.
  - Working Groups such as on Arbitrary Detention or Discrimination against Women
- Review reports and data of UN agencies:
  - UNODC
  - UNICEF
  - UNHCR
  - IOM
  - OHCHR
  - WHO
  - SRSG on Violence against Children
  - SRSG on Children and Armed Conflict
- Review of information gathered from National Human Rights Institutions (NHRIs), Global Alliance of National Human Rights Institutions (GANHRI), European Network of Ombudspersons for Children (ENOC), etc.
- Review from partners of the NGO Panel, such as Human Rights Watch (HRW), Defence for Children International (DCI), International Detention Coalition (IDC), Global Detention Project (GDP), Child Rights International Network (CRIN), as well as from National Child Rights Coalitions/Child Rights Connect, etc.

3.3 Data Collection

Various United Nations agencies (UNICEF, UNODC, UNHCR, OHCHR), the ICRC, the European Union Fundamental Rights Agency (FRA), Government organisations, internationally renowned experts in children's rights, child justice, statistics and indicators, and academics came together to design the Global Study questionnaire, which was translated into all UN languages and sent in February 2018 to all UN Member States. The questionnaire consists of 78 questions and was circulated to Governments, National Human Rights Institutions (NHRIs), National Prevention Mechanisms (NPMs), ombudspersons, UN agencies as well as NGOs.

118 replies were received in nearly all UN languages and other languages and translated with the help of the UN Volunteers System. The answers covered quantitative as well as qualitative areas, which are explained in further details in Chapter 3 on Data Collection and Analysis.

3.4 National, Regional and Thematic Consultations

Besides desk research and data collection, the Global Study also engaged in further in-depth analysis on certain issues through **twelve thematic, national and regional consultations** with a broad range of stakeholders, including State authorities, UN agencies, NGOs, NHRIs, NPMs, academia and civil society, as well as children (see table below) in order to cover deeper ground and to widen our research network and international sources. The overall purpose of these processes was to:

- raise awareness of the Global Study process and encouraging further engagement of stakeholders in the Study process, in particular, to support submission of responses to the Study Questionnaire;
- collect additional data on progress and challenges in relation to specific Study areas / regional contexts and developments;
- collect promising practices, in particular on non-custodial solutions;
- receive input and feedback on the Global Study research process, challenges and findings.

Location	Time	Event
Prague, Czech Republic	September 2017	Detention of Children in Social Welfare Institutions
Warsaw, Poland	October 2017	OSCE Human Dimension Seminar on the Rights of the Child
Brussels, Belgium	November 2017	EU Forum on the Rights of the Child
Bangkok, Thailand	May 2018	Regional Consultation for South East Asia (ASEAN)
Paris, France	May 2018	High Level Event at the World Congress on Juvenile Justice
Addis Ababa, Ethiopia	May 2018	Regional Consultation for the African Continent
Pretoria, South Africa	July 2018	Thematic Consultation on Deprivation of Liberty of Children in Institutions
Belgrade, Serbia	September 2018	National Consultation with Serbian Institutions
New York, United States	October 2018	National Consultation with US-based NGOs
Montevideo, Uruguay	October 2018	Regional Consultation for the MERCOSUR Region
Tunis, Tunisia	November 2018	Regional Consultation for the Arabic-speaking MENA Region
Montego Bay, Jamaica	December 2018	Regional consultation for parts of the Caribbean Region

3.5 Engaging Children's Views and Experiences in the Global Study

As mandated by the UNGA Child Rights Resolution of 2014 (§ 52.d), the Study process should include 'consultation with relevant stakeholders, including [...] children'. In this regard, the Global Study benefitted from experiences and lessons learned from previous UN study processes, such as the 2006 UN Study on Violence against Children.

Unfortunately, due to financial constraints, the Global Study was not able to invite children to all consultations. Nevertheless, led by renowned child participation experts and NGOs, the views and experiences of **274 children and adolescents** (204 male; 70 female) between the ages of 10 and 24 from 22 different States were gathered in order to inform the Study. The findings are detailed in the chapter entitled 'Child Participation'.

The Global Study Research Endeavour on a Map

CHAPTER 3

DATA COLLECTION AND ANALYSIS

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1. Data Collection and Analysis

1.1 Global Study Questionnaire

Overall, **118 questionnaire replies from 92 countries** have been submitted, including 41 responses from **Europe**, 27 from **Africa**, 20 from **Asia**, 19 from **North** and **South America** and 11 from **Oceania**.[1] As many as **67 responses have been officially submitted by States** (Governments). Information reported in the responses to the questionnaire has been verified and, if necessary, requests for explanation and/or correction have been sent to the selected stakeholders. In 50 States data collection efforts have been coordinated by the **national focal points** established specifically for the purpose of the Global Study. As replies could have been submitted in any of the six official languages of the UN, they have been carefully translated into English to facilitate analysis by all research groups.

The questionnaire contained two general categories of questions: 1) concerning legislation, public policies and conditions in places of detention and; 2) focusing on numerical data (statistics) on children deprived of liberty on an annual basis (in the period 2008-2017) and on a specific, snapshot date (26 June 2018). The most complete data were collected for the administration of justice – on average stakeholders answered 72% of the questions asked. Other well-reported areas were children living in places of detention with their primary caregiver (59% of questions answered) and institutions (47% of questions answered). For the most underreported area (armed conflict) stakeholders on average answered only 14% of the questions. This was, however, predictable as most of the questions were relevant for countries either experiencing or emerging from the armed conflict. For this reason, the references to the questionnaire are distributed unequally within the Global Study and are particularly numerous in the well-reported areas.

1 Non-Self-Governing Territories have been treated as separate entities if the relevant data were available.

Countries and Territories that submitted Responses to the Global Study Questionnaire

State	Albania
State	Algeria
State	Anguilla
NGO, NHRI, State	Argentina
NHRI, State	Australia
State	Austria
NGO, State	Belgium
State	Benin
State	Bosnia and Herzegovina
NGO, NPM	Brazil
State	Burkina Faso
UN agency	Cambodia
NGO, State	Canada
State	Chad
NHRI	Chile
State	Colombia
State, UN agency	Croatia
Ombuds.	Cyprus
Ombuds., State	Czech Republic
NHRI, State	Denmark
State	Djibouti
NHRI	Dem. Rep. Congo
State	El Salvador
State	Estonia
UN agency	Fiji
State	Finland
NGO, NGO, NHRI, State	France
State	Gambia
State	Georgia
State	Germany
State	Ghana
State	Greece
NPM, State	Honduras
NGO, NHRI	India
UN agency	Iran
State	Iraq
State	Ireland
NGO, State	Italy
State	Kiribati
State	Kuwait
State, UN agency	Lao
NGO, State	Lebanon
State	Liechtenstein
NHRI	Liberia
UN agency	Libya
State	Lithuania
NGO, State	Madagascar
UN agency	Malaysia
State	Mali
UN agency	Marshall Islands
NGO	Mauritania
NHRI, State	Mauritius
NHRI, NPM, State	Mexico
UN agency	Micronesia, F. S.
State	Monaco
NGO	Morocco
UN agency	Myanmar
State	Netherlands
State	Niger
State	Palau
State	Palestine
State	Peru
UN agency	Philippines
NGO, NPM	Poland
Ombuds., State	Portugal
State	Qatar
State	Rep. Congo
NHRI	Romania
State	Russia
UN agency	Samoa
State	Sao Tome Principe
NGO, State	Sierra Leone
Ombuds., State	Slovenia
State	South Africa
State	South Sudan
State	Spain
State	Sri Lanka
State	Sweden
State	Switzerland
State	Tanzania
State	Thailand
UN agency	Tonga
NGO	Tunisia
State	Tuvalu
State	Ukraine
State	United Kingdom
NGO	United States
State	Uruguay
State	Uzbekistan
UN agency	Vanuatu
UN agency	Vietnam
NGO	Yemen
State	Zimbabwe

*NGO, National Human Rights Institution (NHRI), National Prevention Mechanism (NPM), ombudsperson and/or UN agency

Source: responses to the Global Study questionnaire

Specificities of the selected thematic areas required a certain flexibility in choosing additional sources, statistical methods and attributes (features) used in the estimates. The following describes the general principles of data analysis and the detailed, area-specific methodology (a list of variables used in estimates as well as sources of data) have been included in the appendix.[2]

Global Study Database

Based upon manual reviews of all submitted Global Study questionnaire responses, certain challenges have been identified in compiling them into one single database, most prominently because some official data provided by States did not follow the age categorisation of the definition 'child' (0-17) as stipulated under the CRC. Further research was then necessary for disaggregation and use for the research informing the Global Study.

Dealing with a wide range of data submitted by States under the Global Study questionnaire, a well conceptualised system needed to be established for an efficient collection, storage, management and analysis of data. Following this thorough examination, an online database has been designed and tested for its usability and functionalities, including an advanced search engine. The final version of the database is under further development in order to accommodate the harmonisation process of data collection and analysis from different data providers.

As the Global Study encompasses thematic areas relevant for Governments, various UN bodies as well as other stakeholders, the database aims at **ensuring the compatibility with other relevant existing databases**, most notably the Universal Human Rights Index. By building upon the existing mechanisms and frameworks of data collection, the Global Study can monitor the developments and trends in the process of reducing the number of children deprived of liberty worldwide as well as create a platform to share good practices of non-custodial solutions to deprivation of liberty across all situations covered by the Study.

2 See the list of variables and sources included in Appendix I.

1.2 Other Sources

The variety of thematic areas covered by the Global Study required gathering country-level data on the number of children deprived of liberty from numerous sources. Although the priority has been always given to the data submitted under the Global Study questionnaire and extracted from the official registries (e.g. police records), the existing data gap was partially filled with the information reported by international organisations, most notably the UN agencies. These data sources were especially important for estimates in the areas of national security and armed conflict (States were unable to provide data). If there were still many values missing after the inclusion of these sources, then the next step involved extraction of relevant data from peer-reviewed literature. This has been done for the chapters on migration-related detention and children in institutions. Priority has been given to the data provided by public authorities and the conflicting outlying values have been excluded. In case of discrepancies between equally credible and timely information, the most conservative data were chosen. Thus, the **figures presented in the Global Study are treated as minimum estimates**.

Application of regression-based methods required the collection of additional data (so-called predictors[3]) that allowed estimating figures for the countries for which recent data were not available or reliable. For this purpose, two kinds of predictors have been collected:

- General variables (common across all thematic areas): geographical region (according to UNICEF regional classification), population (total population as well as population 0-14 and 0-19 extracted from World Bank/UN DESA), GDP per capita (extracted from the World Bank) and Gini index (inequality index; extracted from World Bank);
- area-specific variables (for the purpose of building a model in a particular thematic area) such as the prison population rate and minimum age of criminal responsibility (in the field of the administration of justice), the international migrant stock and the Human Development Index (in the field of migration), fertility rate and female prison population (in the field of children living in prisons with their primary caregivers).

Selection of predictors has been guided by the relevance (aimed at controlling for the target variables), availability of data (priority was given to data reported by public authorities and international organisations), completeness (predictors with high rate of missing values were excluded) and timeliness (preference was given to the most up-to-date information).

3 'Predictors' are variables regarded as important factors in explaining a certain phenomenon, e.g. for assessing the number of children deprived of liberty in the administration of justice, important factors are *inter alia* the population of children in a particular country, minimum age of criminal responsibility or prison population rate (per 100,000 citizens).

Due to the specificities of the thematic areas, the unique set of variables has been defined in each case.

1.3 Data Analysis

Accuracy of the built models diverged between the areas due to the limitations in the data availability or accessibility. Nevertheless, the information collected allowed for the designing of a dataset that is not only the most comprehensive of the attempts made so far in the area of deprivation of liberty, but above all – tailored to the unique needs of this Global Study.

The number of children deprived of liberty has been estimated using **regression-based models**. These methods allowed for assessing the magnitude of the phenomenon despite the limitations in data availability. During the data analysis, a variety of approaches have been tested, including in particular:

- Multiple linear regression – several independent variables are used to predict the value of a target variable (the number of children deprived of liberty in certain settings);
- multiple imputation by chained equations (performed with predictive mean matching) – missing values are imputed in the iterative process that starts with estimating the variable with the least missing values using complete data (first iteration), followed by estimating the variable with the second least missing values using complete data and, additionally, values imputed in the first step (second iteration) etc.;
- random forest regression – estimation is done by subdividing the dataset based on the values of predictors; typically, one subdivision tree includes three to five variables, meaning that the dataset is divided at three to five stages to create smaller clusters of similar cases (in addition, the same dataset is subdivided many times with various combinations of variables).

The two latter methods have been recognised as the most efficient in predicting unknown values, confirming recent developments in the field of statistics.[4] Separate models have been designed for the following sections: 1) administration of justice, 2) children in migration-related detention, 3) children living in prison with their primary caregivers, 4) children in

4 Anoop D. Shah *et al.*, 'Comparison of Random Forest and Parametric Imputation Models for Imputing Missing Data Using MICE: A CALIBER Study', *American Journal of Epidemiology,* Vol. 179(6), 2014, pp. 764–774. Daniel J. Stekhoven *et al.*, 'MissForest – non-parametric missing value imputation for mixed-type data', *Bioinformatics,* Vol. 28(1), 2012, pp. 112–118. Akbar K. Waljee *et al.*, 'Comparison of imputation methods for missing laboratory data in medicine', *BMJ open,* Vol. 3, 2013, pp. 1–7. Jesper N. Wulff *et al.*, 'Multiple Imputation by Chained Equations in Praxis: Guidelines and Review', *The Electronic Journal of Business Research Methods,* Vol. 15(1), 2017, pp. 41–56.

institutions. Due to the limited data submitted under the Global Study questionnaire, the number of children detained in the context of armed conflict and on the grounds of national security was estimated based on the latest reports from international organisations and a thorough literature review.[5]

Process of Data Analysis

UNIQUE DATASET FOR EACH THEMATIC AREA

Five common variables
(region, total population, children population, GDP per capita, Gini index)

Between 7 and 10 area-specific variables
(e.g. Rule of Law Indicator; female prison population; international migrant stock, Human Development Index)

CONSTRUCTION OF REGRESSION-BASED MODELS

Estimates based on the explanatory variables
(common variables + area-specific variables)

Various statistical methods models tested
(e.g. multiple regression models, random forest regression, multiple imputation by chained equations)

ESTIMATES - NUMBER OF CHILDREN DEPRIVED OF LIBERTY IN SPECIFIC SITUATION

Number of children deprived of liberty annually

Number of children deprived of liberty on any given day
(snaphshot date: 26 June 2018)

5 The number for children detained in the context of armed conflict is based on the figures reported under the UN Monitoring and Reporting Mechanism on grave violations committed against children in situations of armed conflict as well as estimates from UNICEF. For more on armed conflict see: Chapter 13 on Children Deprived of Liberty in the Context of Armed Conflict (4.1. Data: The Number of Children Deprived of Liberty). For more on national security see: Chapter 14 on Children Deprived of Liberty on National Security Grounds (4.1. Data: The Number of Children detained for National Security).

1.4 Results

Estimating the number of children deprived of liberty in all situations covered by the Global Study required available data to be extrapolated to a global scale on the basis of various samples of countries, which differ in size but not in reliability:

- Administration of justice: between 160,000 and 250,000 children detained on any given day in 2018 and **410,000** children detained throughout the year, excluding children in police custody (sample: 124 countries). Estimating the number of children held in police custody required the application of basic extrapolation methods, due to limited data collected under the Global Study questionnaire. This resulted in a very conservative annual estimate of **1,000,000** children deprived of liberty in police custody annually (sample: 25 countries).
- Children in migration-related detention: **330,000** throughout the year (sample: 74 countries).
- Children living with their primary caregivers in prisons: 9,000 at any given day and **19,000** throughout the year (sample: 69 countries).
- Children detained in institutions: ca. **5.4 million** children living in institutions (at risk of deprivation of liberty, sample: 137 countries)[6], of whom approximately 12.4% (ca. **670,000**) are *de jure* deprived of their liberty (sample: 23 countries).[7]
- Children detained in the context of national security: **1,500** throughout the year.
- Children detained in the context of armed conflict: **35,000** throughout the year.

6 Chris Desmond, Kathryn Watt, Anamika Saha, Jialin Huang & Chunling Lu, Prevalence and number of children living in institutional care: global, regional, and country estimates, 'The Lancet Child & Adolescent Health', Vol. 4, Issue 5, pp. 370-377. Estimates based on the data extracted from responses to the Global Study questionnaire, peer-reviewed literature, grey literature as well as Integrated Public Use Microdata Series.

7 The rate of children deprived of liberty in institutions is based on the comparative analysis of replies submitted under the Global Study questionnaire with available data extracted from the external sources (e.g. official statistics). By comparing numbers reported under the questionnaire with the total population of children in institutions, we managed to identify 13 countries that indeed distinguished between the children placed in institutions and children deprived of liberty in these facilities. The sample has been enlarged with additional 10 countries in which the number of children deprived of liberty in institutions was assessed based on the review of legislation (aiming at identification of types of 'closed' institutions) and extraction of statistics on the population of these institutions.

1.5 Accuracy and Limitations

The majority of States that responded to the questionnaire had difficulties in providing comprehensive, up-to-date and disaggregated data on the number of children in various situations of detention. Administrative records are particularly limited in the context of migration, institutions, national security and armed conflict.

Despite the fact that, through the Global Study questionnaire, we managed to collect data from all continents, the response rate varied across the regions. Most of the countries from **Europe** (93% of countries), **Oceania** (71%) and **Americas** (54%) submitted responses to the questionnaires. For **Africa**, the response rate amounted to 50% whilst in **Asia** it was significantly lower (42%). During the data cleaning processes, it turned out that the **Asian States** often reported incomplete figures which, considering the large population of the continent, significantly hindered further statistical analysis. For this reason, future research aimed at verifying these estimates should first **focus on the number of children deprived of liberty in Asia**, in particular **South-Eastern Asia**. Another issue that should be taken up by academia is the improvement of the mathematical model constructed during the Global Study by including variables, which can contribute to more accurate estimates, in particular related to the ethnic diversity and the prevalence of discrimination against minority groups. Further developments of statistical tools and methods are planned in future steps, aiming at designing a dedicated index measuring the level of respect for the freedom of the child (**Child Freedom Index**).

Child Freedom Index

To ensure that no child is left behind by the framework for change as proposed in the respective chapters of the Global Study, the international community should make a joint effort towards the development of a Child Freedom Index. This should be driven by the **shared methodology** that allows for comprehensive assessment of existing legal frameworks, their implementation as well as impact on and perception by children. Only by these means adequate preventive and/or corrective measures can be identified.

As the Global Study was able to identify numerous promising practices, the Child Freedom Index should not merely be a descriptive tool (assessing States' compliance with international human rights law) but a prescriptive one, suggesting the most appropriate measures that should be implemented in a given country. In this regard, quantitative indicators should not be considered as a competitive exercise, but as a **toolkit that can assist States in reducing the number of children deprived of liberty**. This would require, in the first place, compiling an Atlas of Child Freedom that will collect major promising practices, including their regional (local) contexts. Only then, the identified practices can be assigned to the States based on their individual scores in the Child Freedom Index. The latter should take into account the following categories of variables:

- **Legal framework** (e.g. minimum age of criminal responsibility, statutory regulations regarding maximum periods of administrative detention in the context of migration, existing non-custodial measures and community-based solutions);
- **practice** (e.g. existing guidelines for personnel of detention facilities, *de facto* separation between adults and children as well as girls and boys, the number/share of children released from detention or subjected to non-custodial measures);
- **voices of the children** (e.g. children's opinion on the conditions in the detention facilities, opinion on the treatment by the personnel of these facilities);
- **number (share) of children deprived of their liberty** in each of the thematic areas analysed in the Global Study.

As the Child Freedom Index should facilitate transfer of promising practices, it should be driven by the goal of **achieving maximum comparability of data** collected in various countries. Thus, the methodology should be flexible enough to accommodate various standards and approaches in documenting situations of deprivation of liberty. At the same time, the **selection of variables should be driven by both gravity and availability**.

2. Improving Data Collection and Use for the Best Interests of the Child

2.1 Tailor-made Methodologies

The collection of data through the questionnaire revealed a variety of approaches in documenting situations of deprivation of liberty. For instance, while in some areas a common measure is daily statistics (e.g. it prevents from multiple recording of the same person whenever he/she commits an offense), in others it may be misleading (e.g. daily figures do not capture the transient trends existing in the contexts of migration or armed conflict). Thus, our estimates should always be interpreted in their unique contexts. Likewise, the reporting guidelines developed on the international fora as well as national methodologies should be **tailor-made for the particular areas**. The adoption of an inadequate methodology may result in a measurement error leading to erroneous conclusions and wrongfully designed policies.

Capturing the variety of relevant factors and reflecting the complexity of various situations of deprivation of liberty requires the **involvement of professionals from diverse backgrounds**, including at least statisticians, child psychologists and experts in the relevant fields (e.g. migration officers in the context of migration). Moreover, the engagement of IT experts is essential for achieving data interoperability[8] and facilitating access to administrative datasets. At the same time, data collection methodologies should ensure **child participation**, in particular from most marginalised groups and children of different ages, abilities and gender.[9] The CRC-Committee emphasised that children's views should be elicited in the development of policies, decision-making as well as design, assessment, implementation, monitoring and evaluation of programmes.[10] Last but not least, when designing data collection processes, States should include a **feedback mechanism** by which data subjects and data collectors might report existing shortcomings and suggest improvements (e.g. small-scale pilot studies).

8 Interoperability is the ability of computer systems or software to exchange and make use of information (definition according to the Oxford Dictionary). Achieving interoperability require using the same technical standards, definitions, disaggregation of data by same features etc.

9 Save the Children, *Children's participation in the analysis, planning and design of programmes: A guide for Save the Children staff*, 2013.

10 CRC-Committee, *General comment No. 12 (2009): The right of the child to be heard*, CRC/C/GC/12, 20 July 2009, paras. 13, 88 & 126.

Our research has revealed the pressing **need to reach a consensus on definitions**. Although such concepts as institutions[11], disability[12], gender identity or ethnicity can be contested, international human rights law provides some guidance in this matter. In accordance with General Comment No. 9 of the CRC-Committee, the definitions should be broad enough to cover all children who, due to their unique characteristics, may benefit from special protection and the programmes developed for them.[13] Achieving better **data comparability** facilitates not only comparative research but, most importantly, identification and implementation of promising practices. At the same time, States should not limit themselves to establishing an appropriate definition in law, but to ensure that it is understood and interpreted uniformly by the personnel responsible for collecting data. For instance, as some studies have revealed, the limitations in data collection may be related to the lack of adequate training of child welfare workers in identifying children with disabilities.[14]

2.2 Data Disaggregation

Due to the limited data collection capacities as well as lack of awareness, **children are usually represented as a homogenous group** and States rarely provide disaggregation by other features than age and sex. At the same time, during the research phase some groups were found to be particularly vulnerable, e.g. children with disabilities, foreign nationals or LGBTI children. Lack of properly disaggregated data significantly impedes mitigating, identifying and counteracting discrimination.[15]

Analysis of the replies submitted to the Global Study questionnaire revealed that the most complete and detailed data are recorded for children in the administration of justice and children living in prison with their caregivers. At the other end of the spectrum, there

11 Cf. Chapter 12 on Children Deprived of Liberty in Institutions (1.2. Terminology and Concepts).

12 The impact of definitions and methodologies on the results obtained is best illustrated by the study conducted on the population of Syrian refugees in Lebanon. While only 1.4% of UNHCR-registered refugees were recorded as having a 'disability', the survey conducted by the CSOs revealed that 20% of refugees have an 'impairment'. See: Help Age International/Handicap International, 'Hidden victims of the Syrian crisis: disabled, injured and older refugees', 2014, Available at https://reliefweb.int/sites/reliefweb.int/files/resources/Hidden%20victims%20of%20the%20Syrian%20Crisis%20April%202014%20-%20Embargoed%2000.01%209April.pdf (accessed 15 September 2019). Similarly, in the State-party report submitted to the CRC-Committee in 2011, India indicated that the number of children with disabilities living in the country is between 6 and 30 million and disparities in the aggregate estimates are due to different definitions used by various actors collecting data. See: CRC-Committee, *State-party's report: India (2011)*, CRC/C/IND/3-4, Section 3B.3.1, p. 49. For the definition of 'disability' see: Chapter 7 on Children with Disabilities Deprived of Liberty.

13 CRC-Committee, *General comment No. 9 (2006): The rights of children with disabilities*, CRC/C/GC/9, 27 February 2007, para. 19.

14 Patrick Shannon & Maria Agorastou, 'Identifying Children with Developmental Disabilities Receiving Child Protection Services: A National Survey of Child Welfare Administrators', *Families in society: the journal of contemporary human services*, Vol. 87(3), 2006, pp. 351-357.

15 OHCHR, *A Human Rights-Based Approach to Data: Leaving No One Behind in the 2030 Agenda for Sustainable Development*, 2018, p. 7.

were sections devoted to migration, national security and armed conflict. For instance, regarding migration-related detention as many as 47% of replies lacked disaggregation by sex and some countries struggled with providing information whether children were unaccompanied or not.

Interestingly, while Global Study data for the snapshot day was usually disaggregated by sex, this information was lacking in regards to the annual statistics. This data loss may be due to the organisational and technical divergences between the systems used by certain State agencies (e.g. prison authorities) and the national bodies responsible for compiling yearly statistics (especially in the case of decentralised/federal States). In countries with strict data protection laws, the reason may be also the deliberate deletion of information during the archiving processes. Nevertheless, as high-quality data remains necessary for tracking long-term trends, public authorities should ensure that the legal framework as well as the technical means in place facilitate official statistics by, *inter alia*, providing data disaggregated by the key characteristics.

Data disaggregation is also essential for the **monitoring of State compliance with international human rights law**. For this reason, various UN bodies request data disaggregated by certain features, most frequently by age[16], sex/gender[17] or disability[18]. Notwithstanding, to ensure adequate protection of children as well as implementation of SDG No. 16.2, public authorities should intensify their efforts to collect data on other relevant features. Due in part to rapid scientific progress, data are playing an ever-increasing role both in policy-making and decision-making. The UN 2030 Agenda stresses that 'quality, accessible, timely and reliable disaggregated data will be needed to help with the measurement of progress (SGDs) and to ensure that no one is left behind.'[19] This statement should apply to all vulnerable groups, in particular children whose lives will be increasingly co-shaped by data-based solutions such as algorithmic risk assessments used in sentencing.[20] Therefore, States should take all appropriate measures to ensure that the data collected on children taken into any kind of detention are **disaggregated at least by**

16 CRC-Committee (OPAC), *Concluding observations: Saudi Arabia,* CRC/C/OPAC/SAU/CO/1, 2018, para. 15; CRC-Committee, *Concluding observations: United Kingdom (2016)*, CRC/C/GBR/CO/5, para. 77.

17 CERD-Committee, *Concluding observations: Canada*, CERD/C/CAN/CO/21-23, 2017, para. 34; CEDAW-Committee, *Concluding observations: Italy*, CEDAW/C/ITA/CO/7, 2017, para. 50.

18 CRC-Committee, *Concluding observations: Georgia*, CRC/C/GEO/CO/4, 2017, para. 30; CRPD-Committee, *Concluding observations: Argentina*, CRPD/C/ARG/CO/1, 2012, para. 30.

19 UN General Assembly, *Transforming our world: the 2030 Agenda for Sustainable Development*, A/RES/70/1, 25 September 2015, para. 48.

20 Although algorithmic methods have advanced rapidly in recent years, their performance depend primarily on the quality of 'training' data. For the discussion on the accuracy and fairness of using risk assessment tools in the juvenile justice see: Richard Berk, 'Accuracy and Fairness for Juvenile Justice Risk Assessments', *Journal of Empirical Legal Studies*, Vol. 16(1), 2019, pp. 175–194.

age, gender, disability, nationality and cause for detention. One may not forget that the scope of gathered data should be closely related to the specificity of the area concerned, e.g. in the context of migration public authorities should, in addition, record information on the child's migration or displacement status[21], whether the child is accompanied by a legal guardian and so on.

2.3 Data Privacy and Data Protection

Any personal data (in particular biometric data) should be collected and processed in line with the **right to privacy and the principle of confidentiality.**[22] Any data collection procedures or further processing (including sharing and granting access to the data) should be strictly regulated and with proper safeguards in place. In this respect, States should take all appropriate measures to ensure that the amount of data collected is limited to the minimum necessary for the specific purpose (so-called data minimisation) and the retention period does not exceed the legitimate needs.[23] At the same time, every child concerned should be adequately informed and able to exercise control over his/her personal data. Without providing adequate privacy and confidentiality guarantees, certain categories of information may remain severely underreported, e.g. drug use or disability.[24]

Until children have the capacity to make fully informed decisions on this matter, **parents or caregivers should be involved in the management of the child's data**. The existence of a parental (caregiver) bond should not, however, deprive the child of the right not to disclose certain categories of information about himself or herself to a parent (primary caregiver) despite disclosing them to the personnel of a detention facility. For instance, in the Australian state of Victoria, prison staff is responsible for taking all reasonable steps to ensure that in their interactions with family and friends (e.g., in the processing of visits), the information on gender identity of a detainee is not disclosed if the detainee advised so.[25]

21 CRC-Committee, *Concluding observations: United Kingdom of Great Britain and Northern Ireland*, CRC/C/GBR/CO/5, 2016, para. 77(a). CMW-Committee, *Concluding observations: Honduras*, CMW/C/HND/CO/1, 2016, para. 41.

22 OHCHR (2018), *op. cit.*, p. 16. Data privacy refers to the one's informational self-determination (right to exercise effective control over one's personal data), e.g. right to not disclose certain data, right to be informed. The concept of data protection, on the other hand, refers to the obligations of data collectors/controllers to ensure security of stored data. According to the principle of confidentiality, the data controller is responsible for the protection against unlawful and/or unauthorised access, disclosure or theft of personal data.

23 UN Development Group, 'Data Privacy, Ethics and Protection. Guidance Note on Big Data for Achievement of the 2030 Agenda', 2017, p. 6.

24 For the general challenges in collecting data from prisoners see: Zoltán L. Apa *et al.*, 'Challenges and strategies for research in prisons', *Public health nursing,* Boston, Vol. 29(5), 2012, pp. 467-72.

25 Corrections Victoria Commissioner, *Management of Prisoners who are Trans, Gender Diverse or Intersex*, 2019, Available at https://www.corrections.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2019/04/af/aef1f4a78/2.4.1_mgt_trans%2B-genderdiverseintersexv8.docx (accessed 15 September 2019).

At the same time, data protection should be **balanced with the public's right to information**, which means that the aggregated and properly anonymised data should be made publicly accessible to ensure transparency.[26] This may sometimes require anonymisation of certain data, for instance very small numbers that may allow re-identifying an individual as not many people share the same feature (set of features). Although not a common practice, several stakeholders provided anonymised data under the Global Study questionnaire by using less-than operators, e.g. instead of reporting exact number of children in detention, the number <10 was reported.[27] At the same time, State agencies should ensure that appropriately anonymised microdata[28] is made available to academics, civil society organisations and other relevant stakeholders to facilitate the development of accountability mechanisms[29] such as the World Prison Brief (in the field of administration of justice).[30]

2.4 Self-Identification and the Role of Parents (Primary Caregivers)

As legal guardians, parents take decisions on the engagement of children in data collection, considering their developmental level and informational self-determination. The role of parents (primary caregivers) is particularly important in situations where the child is unable to provide comprehensive information due to disability, illiteracy, lack of appropriate language skills or developmental level.

Nevertheless, data should always be recorded in line with Article 12 of the CRC[31] and the **principle of self-identification** that allows capturing a child's unique personal identity characteristics.[32] This means that whenever possible, information should be obtained directly from the child. Application of this principle may sometimes require certain flexibility in data collection procedures, e.g. by providing separate child-friendly questionnaires, tailoring interview settings to the child's age and developmental level as well as providing adequate training to the interviewers.

26 OHCHR (2018), *op. cit.*, p. 14. As aggregation and anonymisation does not necessarily guarantee adequate privacy protection, datasets containing personal information need to be thoroughly examined before release into public domain. See: Joseph A. Cannataci, *Report of the Special Rapporteur on the right to privacy* (2018), A/73/45712, 17 October 2018, para. 67.

27 Global Study questionnaire: Australia (State reply), Netherlands (State reply).

28 Microdata refers to data on the characteristics of individuals, households or other units collected within the particular survey, census or research.

29 OHCHR (2018), *op. cit.*, p. 19.

30 Institute for Criminal Policy Research/Birkbeck University of London, *World Prison Brief*, Available at https://www.prisonstudies.org/ (accessed 15 September 2019).

31 According to Article 12 of the CRC, 'States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.'

32 OHCHR (2018), *op. cit.*, p. 11.

2.5 Sharing Data and Further Use

Public authorities routinely record administrative data produced by individuals in their interaction with the State. Although these data are collected for specific purposes (e.g. registration, record keeping), their potential can be further utilised to increase efficiency of governmental agencies, inform policy-making and for research purposes. As administrative data are **collected systematically** and **cover an entire population** rather than a sample[33], they are of great value in terms of identifying irregularities and providing comprehensive knowledge for planning future policies. Moreover, in some cases, **administrative records are the first and sometimes the only source of data**, e.g. when registering a newborn child or registering refugees on the state border. In this context, responsible disclosure of administrative data is particularly relevant for the public's right to information.

As the analysis of responses to the Global Study questionnaire revealed, one of the main challenges is to ensure efficient data flow between various levels of public administration. For instance, in the section on the administration of justice, some countries provided data disaggregated by region, while indicating that for each region different categories of data were missing.[34] Each of these exemptions hindered comparative analysis and increased the error interval in estimating the number of children deprived of liberty. In order to ensure that decisions on the national level are made on the basis of complete, timely and trustworthy data, **States should develop both the technical means and legal frameworks to facilitate data sharing** between State institutions as well as with relevant non-State actors (e.g. international organisations). This can include, among others, adoption of adequate legislation aiming at harmonisation of data flows between public authorities, establishing common technical and statistical standards for data collection and storage (e.g. metadata standards), adoption of guidelines on responsible data sharing (including data anonymisation) and timely publication of administrative data in open access and accessible format (e.g. downloadable and readable by commonly used software).

33 Roxanne Connelly, Christopher J. Playford, Vernon Gayle & Chris Dibben, 'The role of administrative data in the Big Data revolution in social science research', *Social Science Research*, Vol. 59, 2016, pp. 1–12.

34 Global Study Questionnaire, Australia (State Reply), Democratic Republic of Congo (NHRI Reply), Sri Lanka (State Reply).

At the same time, data sharing should not be interpreted as granting unrestricted access to information to any interested entity. **Ensuring confidentiality** of certain categories of data (e.g. data on health or migration status) is indispensable for obtaining real, trustworthy information and respecting the dignity and safety of the child. For instance, a child willing to enter a public education system should not be afraid that the undocumented migration status will be reported to the immigration authorities and, consequently, lead to detention.[35]

Data sharing is closely linked to the re-use of data. Data obtained on one occasion may turn out to be valuable for other purposes, e.g. data on the children placed in drug treatment institutions may be useful for designing anti-drug policies, developing treatment programmes for drug-addicted children detained in other types of institutions, training professionals or simply further research. Although the secondary use of data can deviate from the purpose of the original data collection, it should be always preceded by ethical assessments and applied in accordance with **the principle of 'doing no harm'**.[36] The data should not be re-used for purposes that adversely affect human rights such as the cooperation of public health administration and immigration enforcement (e.g. as in the case of the United Kingdom[37]).

Data sharing is a culmination of a simplified data cycle (see Figure 2) that will become increasingly important in the digital era. The ease with which data can now be recorded, stored and transferred means that the data collection should not be perceived as a record-keeping exercise for internal purposes of particular agencies, but as an element of a national data ecosystem, in which common efforts of various actors lead to better policy-making, monitoring of existing policies and responsiveness of State agencies. At the same time, reaching the end of the data cycle by sharing information means that other actors enter their own cycle, starting from phase II (data storage) or phase III (data analysis) and are therefore required to fulfil relevant obligations.

35 CMW-Committee, *Concluding observations: Mexico*, CMW/C/MEX/CO/3, 2017, para. 54.

36 OHCHR (2018), *op. cit.*, p. 11.

37 Anna Sexton, Elizabeth Shepherd, Oliver Duke-Williams & Alexandra Eveleigh, 'A balance of trust in the use of Government administrative data', *Archival Science*, Vol. 17(4), 2017, pp. 305–330.

State Obligations at every Stage of the Data Cycle

3. Model for Acquiring and Utilising Data

Data collection under the Global Study questionnaire revealed significant difficulties in acquiring quantitative data. These were related either to the insufficient coordination or cooperation between relevant State institutions or to the unavailability of data.[38] It is recommended that data collection systems are strengthened in all thematic areas covered by the Global Study. However, in some cases States may have to prioritise selected domains, either because of particularly low data collection capabilities or existing legal and technical barriers in accessing, sharing or releasing data. In this respect, the Global Study serves as a 'litmus test' to determine areas of concern. Once these have been identified, States should: 1) adopt appropriate regulatory framework, 2) allocate adequate resources and 3) raise awareness about the data quality in certain areas.

3.1 Regulatory Framework

Acquiring high quality data requires adoption of a regulatory framework that strikes the right balance between the Government's need to collect and utilise information with the rights of individuals, primarily their right to receive, seek and impart information as well as their right to privacy. Only by empowering individuals to exercise their informational self-determination, can public authorities ensure respect for human rights and build trust in the use of public data. In this regard, the legal framework should specify the **rights of data subjects** as well as available **legal remedies and safeguards**. At the same time, legal framework should **facilitate public release of data** generated or acquired by State agencies.

A well-defined regulatory framework is equally important for enhancing **legal certainty** regarding the scope and conditions under which information can be collected by and shared between various State agencies (ensuring adequate data security). A dense web of inconsistent legislative requirements (in developed countries) or lack of adequate regulations and procedures (in less-developed countries) creates significant uncertainty about the availability and accessibility of administrative records. To overcome this barrier, States might develop an **accreditation system** that would facilitate data sharing between the institutions that meet certain criteria, most importantly utilise these data for public

38 For instance: UN Global Study Questionnaire, Tuvalu (State reply) indicated explicitly that many of the institutions did not have proper records of data, therefore the Government was unable to provide information on the number of children in various detention settings.

interest and secure the acquired information from unauthorised access.[39] This would allow for the identification of areas in which data are lacking as well as the indication of specific categories of information needed for policy-makers and assign data collection tasks to the most appropriate agencies.

Data sharing in the area of children's rights can be further facilitated by **maintaining national focal points** that have been successfully established for the purpose of the Global Study in as many as 50 States. These can coordinate and distribute cross-sectional data collection tasks to the relevant agencies. The need for ensuring effective intersectional cooperation has been recently addressed by the CRC-Committee, in particular data-sharing between child protection services, the police and the justice system.[40]

3.2 Allocation of Adequate Resources

Ensuring long-term sustainability of data collection requires provision of adequate financial resources. These should be utilised for the development of infrastructure, in particular ICT infrastructure (e.g. computer systems and software). Although existing technical capacities allow for efficient merging of large datasets to inform policy-making, **low level of data digitalisation** as well as **low interoperability of public data** remain serious obstacles in utilising their full potential.[41]

Adequate resources should also be allocated for **capacity building** among professionals who are data collectors and data users (see Figure 3). Capacity building policies should comprehensively address various data-related activities, in particular designing methodologies of data collection (e.g. designing forms and questionnaires), obtaining data from children (e.g. psychological skills) as well as development of analytical and writing skills among professionals responsible for drafting policy papers. Furthermore, adequate resources should be allocated for **building competencies for intersectional statistical tasks** such as large-scale survey on children deprived of liberty in various settings.

39 The establishment of an accreditation system for the purpose of sharing data between public institutions is among the proposals for the new Data Sharing and Release Bill in Australia. See: Australian Government (Department of the Prime Minister and Cabinet), 'New Australian Government Data Sharing and Release Legislation. Issues Paper for Consultation', 4 July 2018, p. 8. Available at https://www.pmc.gov.au/sites/default/files/publications/australian-government-data-sharing-release-legislation_issues-paper.pdf (accessed 15 September 2019).

40 CRC-Committee, *Concluding observations: Serbia*, CRC/C/SRB/CO/2-3, 2017, para. 33(f); CRC-Committee, *Concluding observations: Malawi*, CRC/C/MWI/CO/3-5, 2017, para. 9(b); CRC-Committee, *Concluding observations: Bulgaria*, CRC/C/BGR/CO/3-5, 2016, para. 28; CRC-Committee, *Concluding observations: Nauru*, CRC/C/NRU/CO/1, 2016, para. 31(d).

41 Administrative data are characterised as having a relatively large number of observations (cases), but a limited number of variables that describe factors influencing certain phenomena. This makes administrative records a useful auxiliary source, but insufficient to be the main source of knowledge for policy-makers. See: Roxanne Connelly *et al.* (2016), *op. cit.*

Different Actors in the Data Cycle

Strengthening institutional data collection and analysis capacity is frequently recommended under various UN mechanisms. Moreover, noting the limited resources available, treaty-based bodies encourage States to **seek technical cooperation from the relevant UN agencies**.[42] Some Governments, in particular from the **Pacific region**, took the opportunity to cooperate with UNICEF when compiling data for the Global Study questionnaire and managed to submit exhaustive information.[43] Such cooperation should be further developed within the framework of the Child Freedom Index.

42 CEDAW-Committee, *Concluding observations: Guatemala*, CEDAW/C/GTM/CO/8-9, 2017, para. 49. CMW-Committee, *Concluding observations: Indonesia*, CMW/C/IDN/CO/1, 2017, para. 19; Human Rights Council, *Report of the Special Rapporteur on the rights of persons with disabilities on her visit to the Democratic People's Republic of Korea*, A/HRC/37/56/Add.1, 2017, para. 91(a).

43 Global Study Questionnaire, Kiribati (State Reply), Tuvalu (State Reply), Palau (State Reply). Further 12 countries from the Pacific and Southeast Asia undertook such cooperation, but did not manage to provide validated responses in time allowing for examination.

3.3 Raising Awareness

Allocation of resources on data collection systems should be intertwined with raising awareness among professionals of the value of administrative data, including data sharing. Even when an appropriate legal framework is in place, State agencies might adopt their own policies that restrict access to administrative records – usually due to confidentiality, public safety or national security concerns.[44] Thus, raising awareness in public administration circles should aim at achieving better understanding that **sharing data and maintaining the highest standards of data confidentiality are not mutually exclusive**. At the same time, policies should be aiming at instilling a **culture of information stewardship** rather than information ownership.[45]

Awareness-raising efforts should address the need for **releasing administrative data into the public domain** (so-called Open Data).[46] Although release of datasets containing personal information, even when data are anonymised, remains questionable in the context of privacy protection[47], States should release data about the performance of relevant State agencies – child justice authorities, social welfare institutions and migration authorities (e.g. number of children residing in State-run or State-authorised institutions). In addition, States should engage in **proactive dissemination of information** on the performance of these agencies and facilitate access to administrative records by designing user-friendly data platforms.

Last but not least, the threefold framework described above should be implemented in line with the principle of **child participation.** This requires that children's voices are taken into account at every stage of designing data collection mechanisms – during the consultations within legislative procedures, when allocating resources, designing tools for officers responsible for data collection and analysing data on children. In the following section of the Study, the perspectives of children are incorporated into a chapter dedicated to their perceptions of detention – an aspect frequently overlooked in the process of designing data collection frameworks.[48] Similarly, the section also points to the lack of clear data sets and administrative records with regard to the disability, gender and health implications faced by children deprived of liberty.[49]

44 Tung-Mou Yang & Terrence A. Maxwell, 'Information-sharing in public organizations: A literature review of interpersonal, intra-organizational and inter-organizational success factors', *Government Information Quarterly*, Vol. 28(2), 2011, pp. 164–175.

45 Ibid.

46 Joseph A. Cannataci, *Report of the Special Rapporteur on the right to privacy*, A/72/43103, 19 October 2017, paras. 77-87.

47 Joseph A. Cannataci, *Report of the Special Rapporteur on the right to privacy*, A/73/45712, 17 October 2018, para. 67.

48 See Chapter 5 on *Views and Perspectives of Children Deprived of Liberty*.

49 See also Chapters 6, 7 & 8.

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CHAPTER 4

RIGHT TO PERSONAL LIBERTY

© Terre des Hommes / UNICEF / Roger LeMoyne, girls in the concrete yard of the women's prison in Port-au-Prince, Haiti

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1. Scope of the Right to Personal Liberty

The right to personal liberty is one of the oldest human rights. The term '*personal liberty*' is often confused with 'liberty' or 'freedom' in a much broader sense, including freedom of movement, expression, religion or the liberal freedom to do whatever one likes as long as one does not interfere with the freedom of others. The concept of 'personal liberty', however, actually relates to a very specific aspect of human freedom, namely the freedom of bodily movement in the narrowest sense.[1] An interference with personal liberty results only from the forceful detention of a person at a certain, narrowly bounded location, such as a prison or other detention facility. A person is deprived of personal liberty if he or she is confined to such a narrowly bounded location, which he or she cannot leave at will. Less grievous restrictions on freedom of bodily movement, such as limitations on domicile or residency, confinement to a certain region of a country, banishment to an island, exile or expulsion do not fall within the scope of the right to personal liberty, but instead interfere with the broader right to freedom of movement.[2] It follows that the distinction between deprivation of liberty and limitation of movement is 'merely one of degree or intensity, and not one of nature or substance'.[3] Criteria which play a role in distinguishing whether a certain restriction of freedom of movement reaches the level of interfering also with the right to personal liberty include the type and place where a person is held, the degree of supervision, the extent of isolation and the availability of social contacts.[4]

The *right to personal liberty is not an absolute right*. On the contrary, all societies use deprivation of liberty as a punishment for serious crimes or as a measure to maintain public order, morals, health or security. With the gradual displacement of other traditional forms of punishment, such as corporal or capital punishment, hard labour, banishment, shame sanctions or depriving perpetrators of certain civil and political rights, imprisonment has even gained significance in the administration of criminal justice over the last centuries. **Article 5 of the European Convention on Human Rights (ECHR)** of 1950 contains an exhaustive list of lawful forms of deprivation of personal liberty, such as imprisonment after conviction by a competent court, pre-trial detention, the detention of a minor for the purpose of educational supervision, the detention of persons for the prevention of the spreading of infectious diseases, the detention of persons of 'unsound mind', of alcoholics,

1 See Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, 2nd ed., N.P. Engel Publisher, Kehl/Strasbourg/Arlington, 2005, p. 160.

2 On the 'gradual difference between deprivation of liberty and limitation of liberty of movement' see, e.g. Ton Liefaard, 'Deprivation of Liberty of Children', Ursula Kilkelly & Ton Liefaard (eds.), *International Human Rights of Children*, Singapore, Springer Publisher, 2018, pp. 321 & 324 ff. with further references.

3 See e.g. the rich case law of the European Court of Human Rights since the well-known case of *Guzzardi v. Italy*, No. 7367/76, 6 November 1980, para. 93.

4 Cf. Liefaard (2018), *op. cit.*, p. 326 with reference to the jurisprudence of the European Court of Human Rights.

drug addicts, vagrants or irregular migrants. **Article 9 of the International Covenant on Civil and Political Rights (ICCPR)** of 1966 does not, however, contain a similar list of lawful forms of deprivation of liberty, but prohibits arbitrary and unlawful arrest and detention, thereby leaving States with a fairly broad discretionary power to define in their laws cases in which persons may be deprived of their right to personal liberty. The UN Human Rights Committee made it clear from the outset that Article 9 ICCPR 'is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc.'[5] Similar provisions in other general regional human rights treaties, such as **Article 7 of the American Convention on Human Rights (ACHR)** of 1969, **Article 6 of the African Charter on Human and Peoples' Rights** of 1981 or **Article 14 of the Arab Charter on Human Rights** of 2004 follow in this respect the model of Article 9 ICCPR. It goes without saying that these provisions of general international human rights law apply equally to children.

Source: African Union, Council of Europe, League of Arab States, OHCHR, Organisation of Amercian States

5 UN Human Rights Committee, *General Comment 8/16*, 27 July 1982, para. 1.

Ratification of International and Regional Treaties Protecting the Right to Personal Liberty

1

BHUTAN
HOLY SEE
NIUE
SAINT KITTS AND NEVIS
SAINT LUCIA
SOLOMON ISLANDS
TONGA
UNITED STATES

2

BRUNEI DARUSSALAM
CHINA
COOK ISLANDS
CUBA
F.S. MICRONESIA
KIRIBATI
MALAYSIA
MYANMAR
OMAN
PALAU
SINGAPORE
SOUTH SUDAN
TAJIKISTAN
TIMOR-LESTE
TUVALU
UZBEKISTAN

3

ANTIGUA AND BARBUDA
BAHAMAS
BANGLADESH
BELARUS
BOTSWANA
CAMEROON
CANADA
COMOROS
DEMOCRATIC PEOPLE'S REPUBLIC OF NORTH KOREA
EQUATORIAL GUINEA
ERITREA
FIJI
GUYANA
INDIA
INDONESIA
IRAN
ISRAEL
JAPAN
KUWAIT
LAO PEOPLE'S DEMOCRATIC REPUBLIC
MARSHALL ISLANDS
NAURU
NEPAL
PAKISTAN
PAPUA NEW GUINEA
REPUBLIC OF KOREA
SAINT VINCENT AND THE GRENADINES
SAMOA
SAUDI ARABIA
SOMALIA
THAILAND
TURKMENISTAN
UNITED ARAB EMIRATES
VANUATU
VIETNAM

4

AFGHANISTAN
ANDORRA
ANGOLA
AUSTRALIA
BAHRAIN
BARBADOS
BELGIUM
BELIZE
CAMBODIA
CHAD
COLOMBIA
CONGO
CÔTE D'IVOIRE
DJIBOUTI
DOMINICA
DOMINICAN REPUBLIC
EGYPT
EL SALVADOR
ESWATINI
ETHIOPIA
GAMBIA
GRENADA
GUINEA
GUINEA-BISSAU
HAITI
IRAQ
IRELAND
JAMAICA
JORDAN
KAZAKHSTAN
KENYA
KYRGYZSTAN
LATVIA
LEBANON
LESOTHO
LIECHTENSTEIN
MALAWI
MALDIVES
MONACO
MONGOLIA
MOROCCO
NAMIBIA
NEW ZEALAND
NORTH MACEDONIA
PHILIPPINES
QATAR
RUSSIAN FEDERATION
SAN MARINO
SÃO TOMÉ AND PRÍNCIPE
SEYCHELLES
SIERRA LEONE
SLOVAKIA
SRI LANKA
SUDAN
SURINAME
SYRIA
TANZANIA
TRINIDAD AND TOBAGO
UGANDA
VENEZUELA
YEMEN
ZAMBIA
ZIMBABWE

5

ALBANIA
ALGERIA
ARGENTINA
ARMENIA
AUSTRIA
AZERBAIJAN
BENIN
BOLIVIA
BOSNIA AND HERZEGOVINA
BRAZIL
BULGARIA
BURKINA FASO
BURUNDI
CABO VERDE
CENTRAL AFRICAN REPUBLIC
CHILE
COSTA RICA
CROATIA
CYPRUS
CZECH REPUBLIC
DEMOCRATIC REPUBLIC OF THE CONGO
DENMARK
ECUADOR
ESTONIA
FINLAND
FRANCE
GABON
GEORGIA
GERMANY
GHANA
GREECE
GUATEMALA
HONDURAS
HUNGARY
ICELAND
ITALY
LIBERIA
LIBYA
LITHUANIA
LUXEMBOURG
MADAGASCAR
MALI
MALTA
MAURITANIA
MAURITIUS
MEXICO
MOLDOVA
MONTENEGRO
MOZAMBIQUE
NETHERLANDS
NICARAGUA
NIGER
NIGERIA
NORWAY
PANAMA
PARAGUAY
PERU
POLAND
PORTUGAL
ROMANIA
RWANDA
SENEGAL
SERBIA
SLOVENIA
SOUTH AFRICA
SPAIN
STATE OF PALESTINE
SWEDEN
SWITZERLAND
TOGO
TUNISIA
TURKEY
UKRAINE
UNITED KINGDOM
URUGUAY

2. The Concept of Deprivation of Liberty

Despite certain ambiguities during the drafting of Article 9 ICCPR, a careful interpretation in light of the object and purpose of the Covenant leads to the conclusion that this provision does not recognise any other form of deprivation of liberty beyond the two terms 'arrest and detention'.[6] The term '*arrest*' refers to the act of depriving personal liberty and generally covers the period up to the point where the person is brought before the competent authority.[7] The word '*detention*' refers to the state of deprivation of liberty, regardless of whether this follows from an arrest (police custody, pre-trial detention), a conviction (imprisonment), kidnapping or some other act.[8] That the term 'detention' covers all forms of deprivation of liberty, both in the context of the administration of criminal justice and beyond, is also confirmed by the use of this term in Article 5 ECHR for the holding of minors, vagrants, drug addicts, migrants or persons in medical quarantine or by the definition of the mandate of the UN Working Group on Arbitrary Detention.[9]

The **Optional Protocol to the UN Convention against Torture (OPCAT)** of 2002 establishes a system of regular visits undertaken by independent international and national bodies (the UN Subcommittee for the Prevention of Torture = SPT and national preventive mechanisms = NPMs) to places where people are deprived of liberty. Article 4 OPCAT requires every State party to allow visits 'to any place under its jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence (hereinafter referred to as places of detention). 'This provision as well as the practice of the SPT and NPMs confirm that the term '*places of detention*' covers all places where a person may be deprived of liberty, such as prisons, police lock-ups, pre-trial detention centres, military prisons, social care institutions, foster homes, institutions for persons with disabilities or for persons addicted to drugs or alcohol, orphanages, children homes, institutions for the educational supervision of children, care homes, old peoples' homes, institutions for palliative care,

6 See Nowak (2005), *op. cit.*, pp. 167 ff.

7 See: UN General Assembly, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, A/RES/43/137, 9 December 1988, which defines 'arrest' as 'the act of apprehending a person for the alleged commitment of an offense or by the action of an authority'.

8 Cf. Nowak (2005), *op. cit.*, p. 169.

9 See: UN Commission on Human Rights, *Question of Arbitrary Detention*, RES/1991/42, 5 March 1991; UN Commission on Human Rights, *Question of Arbitrary Detention*, RES/1997/50, 15 April 1997. See also more generally the practice of the UN Working Group on Arbitrary Detention.

psychiatric hospitals, mental health centres, migration detention centres etc.[10] The Global Study on Children Deprived of Liberty follows this broad definition of the term '*detention*', which covers all forms of deprivation of liberty. This is also in line with Article 11(b) of the **'Havana Rules'**, which defines the term '*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'.[11] The Inter-American Commission of Human Rights defines deprivation of liberty as 'any form of detention, imprisonment, institutionalisation, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority, for reason of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offences'.[12]

10 Cf. Stefanie Krisper, 'Article 4 OPCAT', Moritz Birk, Giuliana Molina & Manfred Nowak (eds.), *Convention against Torture – CAT Commentary,* 2nd ed., Oxford, Oxford University Press, 2019 (in print).

11 UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty,* A/RES/45/113, 2 April 1991. See also the respective definition of 'deprivation of liberty' in: UN General Assembly, *United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice*, A/C.3/69/L.5, 25 September 2014, para. 6(h). According to Rule 21(5) of the European *Rules for Juvenile Offenders* of 5 November 2008 (CM/Rec(2008)11), 'deprivation of liberty' means 'any form of placement in an institution by decision of a judicial or administrative authority, from which the juvenile is not permitted to leave at will'.

12 Inter-American Commission on Human Rights, *Report on the human rights of persons deprived of liberty in the Americas*, Washington, 2011.

International and Regional Legal Instruments Protecting the Right to Personal Liberty

YEAR OF ADOPTION	LEGAL INSTRUMENTS	PARTIES TO THE TREATY
1950	EUROPEAN CONVENTION ON HUMAN RIGHTS	47
1966	INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS	173
1969	AMERICAN CONVENTION ON HUMAN RIGHTS	25
1981	AFRICAN CHARTER ON HUMAN AND PEOPLES' RIGHTS	54
1985	UN STANDARD MINIMUM RULES FOR THE ADMINISTRATION OF JUVENILE JUSTICE ('BEIJING RULES')	
1988	BODY OF PRINCIPLES FOR THE PROTECTION OF ALL PERSONS UNDER ANY FORM OF DETENTION OR IMPRISONMENT	
1989	CONVENTION ON THE RIGHTS OF THE CHILD	196
1990	AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD	48
1990	UN RULES FOR THE PROTECTION OF JUVENILES DEPRIVED OF LIBERTY ('HAVANA RULES')	
1990	UN GUIDELINES FOR THE PREVENTION OF JUVENILE DELINQUENCY ('RIYADH GUIDELINES')	
1991	UN STANDARD MINIMUM RULES FOR NON-CUSTODIAL MEASURES ('TOKYO RULES')	
1997	GUIDELINES FOR ACTION ON CHILDREN IN THE CRIMINAL JUSTICE SYSTEM ('VIENNA GUIDELINES')	
2002	OPTIONAL PROTOCOL TO THE UN CONVENTION AGAINST TORTURE	90
2004	ARAB CHARTER ON HUMAN RIGHTS	14
2006	CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES	180
2009	UN GUIDELINES FOR THE ALTERNATIVE CARE OF CHILDREN	
2015	UN STANDARD MINIMUM RULES FOR THE TREATMENT OF PRISONERS ('NELSON MANDELA RULES')	

SOFT LAW
HARD LAW

3. Deprivation of Liberty of Children

Article 37 of the **Convention on the Rights of the Child (CRC)** combines aspects of the right to life, the right to personal integrity and dignity and the right to personal liberty in one provision. Article 37(a) prohibits torture and other forms of ill-treatment, capital punishment and life imprisonment without possibility of release. Article 37(b) prohibits unlawful or arbitrary deprivation of personal liberty of children. Article 37(c) defines minimum conditions of detention in line with the right to humanity and respect for the inherent dignity of the human person, and Article 37(d) provides every child deprived of liberty with the right to legal assistance in order to challenge the legality of the deprivation of liberty. In the ICCPR, these rights are covered in different provisions, namely Articles 6, 7, 9 and 10.

While Article 9 ICCPR only prohibits unlawful and arbitrary arrest and detention, Article 37(b) CRC goes an important step further: 'The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.' Although there are certain indications in the drafting history of this provision that the terms 'arrest, detention or imprisonment' were meant to be 'applicable only in the context of juvenile justice',[13] the ordinary meaning of this provision, the context in Article 37 and the object and purpose of the treaty in the sense of Article 31(1) of the **Vienna Convention on the Law of Treaties** leave no doubt that these terms are used in line with their meaning in international human rights law, as outlined above.[14] Only the term '*imprisonment*' is restricted to the administration of criminal justice and refers exclusively to detention after conviction by a criminal court.[15] However, '*arrest*' means any act of apprehension of a child by any public authority for any purpose, and '*detention*' is used in the broad sense outlined above, namely covering all forms of deprivation of liberty.[16] Finally, the term 'child' means every human being below the age of eighteen years, as defined in Article 1 CRC.

13 See, e.g., Eva Manco, 'Detention of the Child in the Light of International Law – A Commentary on Article 37 of the United Nation Convention on the Rights of the Child', 7 *Amsterdam Law Forum*, ALF, 2015, pp. 55, 58 ff& 62 (note p. 68 with further references). For the drafting history of this provision see, e.g., Sharon Detrick (ed.), *The United Nations Convention on the Right of the Child: A Guide to the 'TravauxPréparatoires'*, Dordrecht, MartinusNijhoff Publishers, 1992, p. 477; Geraldine Van Bueren, *The International Law on the Rights of the Child*, Dordrecht, Kluwer Academic Publishers, 1995, pp. 209 & 214.

14 Cf. in this respect e.g. Liefaard (2018) *op. cit.*, p. 329: 'More than a quarter of a century later, the protection of children deprived of liberty has clearly moved beyond the context of juvenile justice'.

15 Cf. UN Body of Principles (1988), *op. cit.*, for the definition according to which 'imprisoned person' means 'any person deprived of personal liberty as result of conviction for an offence'.

16 See: William Schabas & Helmut Sax, 'Artice 37 – Prohibition of Torture, Prohibition of Death Penalty and Life Imprisonment and the Deprivation of Liberty', André Alen, Johan van de Lanotte, Eugen Verhellen, Fiona Ang, Eva Berghmans & MiekeVerheyde (eds.), *A Commentary on the United Nations Convention on the Rights of the Child*, Leiden/Boston, MartinusNijhoff Publishers, 2006, pp. 35, 59 ff& 84 ff with reference to the practice of the UN Committee on the Rights of the Child. See also Liefaard (2018), *op. cit.*, 8 ff.

The **African Charter on the Rights and Welfare of the Child** of 1990 does not contain a special provision on the right of children to personal liberty. Article 30 specifies, however, that 'a mother shall not be imprisoned with her child' and requires States parties to 'ensure that a non-custodial sentence will always be first considered when sentencing such mothers'.[17]

For the purpose of the *Global Study on Children Deprived of Liberty*, the UN Task Force and the NGO Panel decided from the outset to structure the Study according to the following *six situations of deprivation of liberty*:

- **Children deprived of liberty in the context of the administration of justice**
- **Children living with their primary caregivers in prison**
- **Children deprived of liberty for migration-related reasons**
- **Children deprived of liberty in institutions**
- **Children deprived of liberty in the context of armed conflict**
- **Children deprived of liberty in the context of national security.**

This means that the Global Study deals with settings of deprivation of liberty for which the State bears direct or indirect responsibility. If children are, for example deprived by their parents of liberty in private homes or by criminal gangs in the context of trafficking of children, these situations will not be covered by the Global Study. If parents place their children, however, in any form of institution, whether State-owned or private, this falls under the term 'deprivation of liberty', as also private institutions must be under some control of State authority. Contrary to the earlier jurisprudence of the European Court of Human Rights,[18] it is today beyond doubt that the subjective element, namely the possible consent of the parents or the child is not relevant in defining whether a child is deprived of liberty or not.[19]

17 See in this respect Chapter 10 on Children Deprived of Liberty with their Primary Caregivers.

18 See: European Court of Human Rights, *Nielsen v. Denmark*, No. 10929/84, 28 November 1988, which ruled that a child's placement in an institution by the parents would not amount to deprivation of liberty. This judgment was strongly criticised, e.g., by Van Bueren (1995), *op. cit.*, pp. 212 ff.; Ursula Kilkelly, *The Child and the European Convention on Human Rights*, Aldershot, Ashgate Publishers, 1999, pp. 35 ff.

19 Cf. Liefaard (2018), *op. cit.*, pp. 326 f.

4. Ensuring Deprivation of Liberty as a Measure of Last Resort and for the Shortest Appropriate Period of Time

As with all human rights, restrictions of their enjoyment are only permissible if provided for in an explicit provision of domestic law (principle of legality or *lawfulness*) and as an exceptional measure in accordance with the principles of proportionality and non-discrimination (principle of *non-arbitrariness*). The prohibition of *arbitrary deprivation of liberty* means that any arrest and detention of human beings must not be manifestly non-proportional, unjust or unpredictable, and the specific manner in which an arrest is made must not be discriminatory.[20] Certain provisions of general human rights law go beyond the requirements of lawfulness and non-arbitrariness and prescribe, for example, that police custody shall only last for a very short period of time (usually not longer than 48 hours) and pre-trial detention 'shall not be the general rule'.[21]

Article 37(b) CRC clearly goes beyond these general limitations on the right to personal liberty by prescribing that arrest, detention or imprisonment of a child 'shall be used only as a measure of last resort and for the shortest appropriate period of time'. This means that children should in principle not be deprived of liberty, and if really necessary in light of the specific circumstances of the case only for a short period of time, and that States are required to apply *non-custodial measures* when dealing with children. In the context of the ***administration of justice***, Article 40(4) CRC provides that a 'variety of dispositions, such as care guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'.[22] With this comprehensive list of non-custodial measures, the CRC clearly indicates that children in conflict with the law should, in principle, be dealt with outside the criminal justice system by means of transferral to the child welfare system or similar non-custodial alternatives.[23] The rule that children in principle shall not be deprived of liberty goes beyond the context of child justice and applies to all situations in which children are at risk of being detained, including in the child welfare system and when children are placed in institutions.

20 Cf. Nowak (2005), *op. cit.*, p. 173.

21 Cf. Article 9(3) ICCPR.

22 See also: UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules')*, A/RES/40/, 29 November 1985, above all Rule 11 (Diversion). See further: UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency ('Riyadh Guidelines')*, A/RES/45/112, 14 December 1990; and UN General Assembly, *United Nations Standard Minimum Rules for Non-custodial Measures ('Tokyo Rules')*, A/RES/45/110, 2 April 1991.

23 See: Barry Goldson, 'Child Imprisonment: A Case for Abolition', *Youth Justice*, Vol. 5(2), 2005, p. 77; Schabas & Sax (2006), *op. cit.*, pp. 81 ff; Ton Liefaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards*, Antwerp/Oxford/Portland, Intersentia Publishing, 2008; Ursula Kilkelly, Louise Forde & Deirdre Malone, *Alternatives to Detention for Juvenile Offenders: Manual for Good Practices in Europe, International Juvenile Justice Observatory*, Brussels, 2016; Liefaard (2018), *op. cit.*, p. 330. See further Chapter 9 on the administration of justice.

In the context of ***immigration control***, the UN Committees on the Rights of the Child and on the Rights of Migrant Workers and their Families, in a recent **joint General Comment**, have taken the strong position that children shall never be deprived of liberty solely on the basis of their or their parents' migration status. They held that 'the possibility of detaining children as a measure of last resort, which may apply in other contexts such as child criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interests of the child and the right to development'.[24] The Committees, therefore, concluded that 'child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family'.[25] From a legal point of view, this joint General Comment seems to indicate that the principle of last resort in Article 37(b) CRC is considered too low a standard and therefore 'not applicable in immigration proceedings'. This would contradict the legal interpretation of this provision as developed above, namely that Article 37(b) CRC applies to all forms of deprivation of liberty. The position of the two UN treaty bodies reflected in their joint General Comment seems to suggest that there is an international trend to move beyond the Article 37(b) standard as far as immigration detention of children is concerned. However, the legal status of this position is still unclear. In our opinion, the principle of the best interests of the child in Article 3 CRC is not in conflict with the principle of last resort in Article 37(b), but both principles reinforce each other.[26]

Similarly difficult legal questions arise when indigenous children, orphans, children living in the streets, children with disabilities, behavioural difficulties, addictions, for 'anti-social behaviour' or for any other reasons are placed in ***institutions***.[27] As the Human Rights Committee has stressed, children placed in institutions are *de facto* deprived of liberty, as they are not allowed to leave these institutions at their free will.[28] With respect to children

24 Cf. *Joint General Comment No. 4 of the Committee on the Protection of the Rights of all Migrant Workers and their Families and No. 23 of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return,* CMW/C/GC/4-CRC/CGC/23, 16 November 2017, para. 10.

25 Ibid., para. 12.

26 Cf. Chapter 9 on the Administration of Justice; See also Liefaard (2018), *op. cit.*, p. 332: here Liefaard comments the above referenced joint General Comment as follows: 'One could indeed question whether deprivation of liberty is in the best interests of the child. However, neither the CRC nor the other standards of international human rights law prohibit immigration detention'. See also the critical analysis of Ciara M. Smyth, 'Toward a complete prohibition on the immigration detention of children', *Human Rights Law Review,* Vol. 19, 2019, pp. 1-36.

27 Cf. Schabas & Sax (2006), *op. cit.*, pp. 81 ff.; Manco (2015), *op. cit.*, pp. 62 ff.; Van Bueren (1995), *op. cit.*; Liefaard (2018), *op. cit.*, pp. 329 ff.

28 Human Rights Committee, General Comment 35 of 2014, CCPR/C/GC/35, para.62, according to which any 'placement of a child in institutional care amounts to deprivation of liberty within the meaning of article 9'.

with disabilities, Article 14(1)(b) of the **Convention on the Rights of Persons with Disabilities** of 2006 provides that 'the existence of a disability shall in no case justify a deprivation of liberty'. In the case of children with disabilities, who are often placed in special institutions, this strict prohibition of any disability-based detention needs to be interpreted together with the principle of the best interests of the child in Article 3(1) CRC and the principle of last resort in Article 37(b) CRC. The **UN Guidelines for the Alternative Care of Children** of 2010 call for an 'overall deinstitutionalization strategy' and emphasise the family as the 'natural environment for the growth, well-being and protection of children'.[29] This approach finds support in Article 20 CRC. As a consequence, 'efforts should primarily be directed to enabling the child to remain in or return to the care of his/her parents and, when appropriate, other close family members. The State should ensure that families have access to forms of support in the caregiving role.'[30]

Pregnant women or mothers with infants should, in principle, not be sentenced to imprisonment so that they can take care of their young children outside of a prison. In this respect Article 30(a) of the **African Charter on the Rights and Welfare of the Child** of 1990 requires States parties to ensure that a non-custodial sentence will always be first considered when sentencing such mothers. However, Article 30(d) goes even a step further and imposes an obligation on States parties to 'ensure that a mother shall not be imprisoned with her child'. This raises again highly difficult questions of interpretation. In our opinion, a more careful balancing of different interests of the mother (or other primary caregivers) and the child need to be taken into account. If the imprisonment of the primary caregiver is unavoidable, children shall only be permitted to stay with their *incarcerated mother* (or other caregiver) if there are no alternatives and if this is in the best interest of the child as stipulated in Article 3 CRC.

In other words, children shall only be detained if all other non-custodial measures have failed or are expected to fail. The test of whether deprivation of liberty as an absolutely exceptional measure is permissible under Articles 3 and 37(b) CRC must be applied on a *case-by-case basis* and might lead to different results with respect to the different situations of deprivation of liberty outlined above. While detention of migrant or refugee children is never permissible and children should, in principle, not be deprived of liberty in institutions, there might be cases in the context of **armed conflict**, the **administration of justice** or in the context of **national security** where no suitable alternative measures are available. Nevertheless, even in such truly exceptional cases, detention must be restricted

29 UN General Assembly, *UN Guidelines for the Alternative Care of Children*, A/RES/64/142, 24 February 2010, paras. 3 & 23.

30 Ibid., para. 3.

to the *shortest appropriate period of time*.[31] The different chapters of the Global Study provide a detailed legal analysis of the principles of 'measure of last resort' and 'shortest appropriate period of time' in their respective contexts.

In its recently adopted **General Comment No. 24** relating to the administration of child justice, the CRC-Committee has specified certain *time limits*.[32] For instance, it recommends to States Parties that no child in conflict with the law below the age of 16 years should be deprived of liberty; police custody should never be longer than 24 hours and pre-trial detention should not last longer than 30 days.[33] However, the Committee has not yet specified a maximum duration of imprisonment of children after conviction by a criminal court. Article 37(a) only prohibits life imprisonment without possibility of release, although the CRC-Committee has observed that life imprisonment with the possibility of release can be regarded on strained terms with the objectives of child justice in Article 40(1) and the best interests of the child in Article 3(1) CRC.[34] In view of the negative consequences of imprisonment for the health and development of children, the Global Study will therefore aim at specifying what 'shortest appropriate period of time' means for the imprisonment of children who have committed serious and violent crimes.

31 Cf. 'Havana Rules', *op. cit.*, Rule 2: stating that deprivation of liberty of a child 'should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases'. On the meaning of the shortest appropriate period of time, which is not necessarily the same as the shortest possible period of time, see Liefaard (2008), *op. cit.*, p. 12.

32 CRC-Committee, *General Comment No. 24 (2019), replacing General Comment No. 10 (2007): Children's rights in juvenile justice,* CRC/C/GC/24, 2019.

33 Cf. 'Beijing Rules', *op. cit.*, Rule 13: providing that detention pending trial shall be used only for the 'shortest possible period of time' and that, whenever possible, 'detention pending trial shall be replaced by alternative measures, such as close supervision, intensive care or placement with a family or in an educational setting or home'. Cf. 'Havana Rules', *op. cit.*, Rule 17: 'Detention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures.'

34 See CRC-Committee, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice,* CRC/C/GC/10, 25 April 2007, para. 77.

5. Conditions of Detention in Line with the Right to Human Dignity

Deprivation of liberty does not mean deprivation of liberties.[35] In other words: When deprived of their right to personal liberty, human beings shall, in principle, keep all other human rights and shall be enabled by State authorities, as far as possible, to exercise these rights in detention.[36] This doctrine of minimal limitations applies in even stronger terms to children who are still in their formative stage. When State authorities decide, as a measure of last resort, to detain children, they have the positive obligation to ensure that these children can in fact enjoy all other rights enshrined in the CRC.

Article 10(1) ICCPR provides that all persons deprived of liberty shall be treated with *humanity* and with respect for the inherent *dignity* of the human person.[37] This general right of detainees applies to all forms of deprivation of liberty. In the context of the administration of criminal justice, Article 10(2) adds that accused persons shall, in principle, be separated from convicted persons and that accused children shall be separated from adults and brought as speedily as possible for adjudication. Finally, Article 10(3) contains the important principle of *rehabilitation of offenders* (as opposed to retributive justice) by providing that the penitentiary system shall aim at the reformation and social rehabilitation of prisoners rather than simply punishing them. Child offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

These remarkable principles of rehabilitation and of a humane and dignified treatment of convicted prisoners were reaffirmed for children deprived of liberty in Article 37(c) CRC.[38] The principle of separation of children from adults was relativised by introducing the principle of the *best interest of the child* in accordance with Article 3 CRC. There might be instances, for example in the case of detention of primary caregivers, where it is in the best

35 UN Human Rights Council, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, Addendum,* A/HRC/13/39/Add.5, 5 February 2010, para. 256. See also: UN General Assembly, *Interim Report of the Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment,* A/64/215, 3 August 2009, p. 19; UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, A/HRC/13/39, 9 February 2010, para. 74.

36 In his interim report to the General Assembly of 3 August 2009, the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, dedicated a special chapter on conditions of detention in general, and another chapter on children in detention. In the latter chapter, he summarised his experiences from his earlier fact-finding missions: A/64/215, *op. cit.*, pp. 38 ff. & 61 ff. See also Manfred Nowak, *Torture: An Expert's Confrontation with an Everyday Evil,* University of Pennsylvania Press, Philadelphia, 2018, pp. 30 ff.

37 See Nowak (2005), pp. 183 ff.

38 Cf., e.g. Schabas & Sax (2006), *op. cit.*, pp. 88 ff; Manco (2015), *op. cit.*, pp. 64 ff.; Liefaard (2018), *op. cit.*, pp. 334 ff. See also the 'Havana Rules', *op. cit.*, and the UN General Assembly, *United Nations Standard Minimum Rules for the Treatment of Prisoners ('Nelson Mandela Rules')*; A/RES/70/175, 17 December 2015.

interest of children to be kept together with their parents. Article 37(c) also adds the right of detained children to maintain contact with their families through correspondence and visits, which is in line with the obligation of States under Article 9 CRC to ensure that a child shall not be separated from his or her parents against their will, and with the principle that parents have the primary responsibility for the upbringing and development of the child, as provided for in Article 18 CRC. These principles must also be taken into consideration when **parents of small children are imprisoned.**

6. Legal Safeguards

Article 37(d) provides that every child deprived of liberty, for whatever reason, shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. This right to *habeas corpus proceedings*, which follows from the general provision of Article 9(4) ICCPR and applies to every form of deprivation of liberty, is particularly important for children. If States, as an exceptional measure of last resort, decide to arrest or detain a child, they must immediately provide the child with appropriate legal assistance to challenge the legality of such a decision. In its **General Comment No. 24 of 2019**, the CRC-Committee confirmed its earlier opinion expressed in **General Comment No. 10 of 2007** that the child should be brought before a competent authority within 24 hours. With respect to the *habeas corpus proceedings*, the Committee stressed that the 'right to a prompt decision means that a decision must be rendered as soon as possible, e.g. within or not later than two weeks after the challenge is made'.[39] One might also argue that the requirement of the 'shortest appropriate period of time' in Article 37(b) calls for periodic judicial review of every deprivation of liberty of children.[40]

The rights to personal liberty, personal integrity and human dignity provide high international legal standards to prevent deprivation of liberty of children. They also create a framework designed to reduce detention of children to an absolute minimum, and in those exceptional cases in which detention is justified as a measure of last resort, they ensure that children

39 Cf. CRC/C/GC/24 (2019), *op. cit.*

40 Cf. Liefaard (2018), *op. cit.*, p. 333. See also Article 25 CRC.

have the right to challenge the legality of their detention. While children are detained for the shortest appropriate period of time, these rights additionally ensure that children are treated with humanity, dignity and respect for all other human rights. Unfortunately, as will be described in detail in the various situations covered by the Global Study, the reality across the world looks totally different. We start by listening to the voices and views of affected children themselves.

CHAPTER 5

VIEWS AND PERSPECTIVES OF CHILDREN DEPRIVED OF LIBERTY

© Terre des Hommes, Engaging with Children, Juvenile Justice Centre, Guinea

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1. Introduction

'Yes, I wanted good things in prison.

Yes, I was in jail and I know what things happen over there.

A minor should not be in prison.

A minor should not be punished.

All I want is to change habits.

Minors want changes for their future.'

'It's the freedom that

we are seeking in this moment.

We won't forget all the things

that happen in prison.

The GSPs [prison staff] hit the minors,

they tire the minors.

Thanks in advance.'

All children have a right to express their views and to have them taken seriously in all matters affecting them (Article 12 CRC). This right clearly applies to children deprived of their liberty, thus requiring that children are consulted both individually and collectively in this context. Fulfilling the right of the child to be heard is instrumental to understanding the lived experiences of children deprived of their liberty and it is integral to ensuring that their rights are protected. As the CRC-Committee has noted: 'the voices of children involved in the child justice system are increasingly becoming a powerful force for improvements and reform, and for the fulfilment of their rights'.[1]

1 CRC-Committee, *General Comment No 24 – Children's rights in juvenile justice*, 2019, CRC/C/GC/24, p. 5, Available at https://www.ohchr.org/Documents/HRBodies/CRC/GC24/GeneralComment24.docx (accessed 15 May 2019).

In order to ensure that children's views were sought and given due weight in the UN Global Study on Children Deprived of their Liberty, a dedicated work stream on child participation was established.[2] The research began by undertaking a review of the existing literature on the views of children deprived of liberty and from this, a methodology respecting children's rights was used to gather the views of children as part of the Global Study. The research team – with unique expertise in children's participation methodologies and international children's rights law – partnered with Terre des Hommes and a range of international NGOs to access and collate the views and experiences of **274 children from 22 countries** across a range of detention settings. The process was not and did not purport to be representative of the views of all children in detention around the world. However, it was nonetheless an important step in ensuring that the views, perspectives and experiences of children deprived of their liberty were taken into account in the Global Study. The research has obvious limitations such as the size, reach and dependence on organisations who were willing and available to facilitate the consultation with children at a local level. Nevertheless, the findings offer rich insights into the experiences and views of the 274 individual children consulted, who included those deprived of their liberty in different types of settings, in different social and geographical contexts, and in different global regions. During the consultation, children talked about the fulfilment of their rights – to family, health and education for instance – and about the importance of ensuring detention is a measure of last resort, highlighting the need for States to use community-based sanctions over detention. Children also told us about the many ways in which they are denied their rights, through experiences of loss, trauma and violence, of stigma and disempowerment. But they also reported experiences of resilience and hope and they detailed the friendships and other strengths that can help them cope with the adversity of their experience.

Taking account of other studies that heard from children deprived of their liberty and the experience of involving children in previous Global Studies, these insights into children's experiences of their rights in detention adds significantly to this Study for a number of reasons. First, and most importantly, it fulfilled children's right to be heard by asking children deprived of their liberty about their rights, thus giving them the opportunity to express their views on matters that affect them. The consultation enabled children to give voice to the full range of their experience, articulated with great depth and colour. Second, in addition to being rights-based, the research used a systematic and transparent methodology whereby national organisations were required to follow a single approach

2 The research team consisted of researchers from the Centre for Children's Rights, Queen's University Belfast as well as the Centre for Children's Rights and Family Law at the School of Law, University College Cork and Terre des Hommes.

to the consultation, co-ordinated internationally by the research team. This enabled the application of a consistent approach to the analysis of the data collected. Third, the consultation enabled the views of 274 individual children to be heard for the first time in a UN Global Study, adding credibility to the Study as a whole. Notwithstanding the limitations of the research, therefore, the findings set out in this summary report are a profoundly important reminder of how our understanding of children's deprivation of liberty can be enriched when children themselves paint that picture.

This summary report is divided into two parts – the first presents an **overview of children's reported experiences of their rights in detention**, and the second **presents the cross-cutting themes that emerged from the consultation**. In order to do justice to the range and depth of views provided by children across the world, a more detailed report will be published separately. Vignettes illustrating the experiences of particular children involved in the consultation are also presented in other chapters of the Global Study.

2. Methods

The consultation part of the Global Study had two phases – the first was a **literature review** of the studies documenting children's views on their rights in detention and the second was a **consultation process** facilitated indirectly by the research team.

2.1 Literature Review

An initial search of available literature documenting the experiences and perspectives of children deprived of their liberty in all contexts was undertaken, with particular emphasis on the views of children. To ensure as inclusive an approach as possible, the research team reached out to a panel of international experts who were invited to share details of any studies documenting the experiences of children deprived of liberty. Resource constraints meant that only studies available in English could be included.

A number of broad themes emerged from the review of the literature. Children spoke about the experience of their confinement, the loss of autonomy and the feeling of isolation,[3] and the quality of information provided to them.[4] Some children reported feeling unsafe or being subjected to violence or ill-treatment.[5] The poor physical conditions of detention,[6] and inadequate access to programmes and services[7] also emerged as significant issues.

However, overall, the search identified a relatively small number of studies that focus wholly or exclusively on documenting the experiences, perspectives and rights of children deprived of their liberty. Moreover, the studies identified appeared to involve small numbers of children and focused on the experience of a specific type of detention in a single jurisdiction. In that respect, the literature review reinforced the importance of undertaking a dedicated consultation for the Global Study to hear directly from detained children about their rights, engaging in as wide a range of jurisdictions as possible with children in a variety of detention settings.

3 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention,* 2014, p. 68; Elizabeth Elliott & Hasantha Gunasekera, *The health and well-being of children in immigration detention: report to the Australian Human Rights Committee Monitoring Visit to Wickham Point Detention Centre,* 16-18 October 2015, p. 20.

4 National Children's Commissioner, *Children's Rights Report 2016,* Australian Human Rights Commission, Sydney, 2016; Children's Commissioner, *'Why are they going to listen to me?': Young people's perspectives on the complaints system in the youth justice system and secure estate,* London, Children's Commissioner, July 2012; Alliance for England, *Speaking Freely: Children and Young People in Europe Talk About Ending Violence in Custody: Research Report,* London, Children's Rights Alliance for England, 2013; Kristina Marku, *Child-Friendly Information for Children in Migration: What Do Children Think?*, Brussels, Council of Europe, 2018, p. 8; Save the Children, *Current immigration detention practice and alternatives for child asylum seekers and refugees in Asia and the Pacific,* Save the Children, May 2017.

5 European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *24th General Report of the CPT 2014,* Brussels, Council of Europe, 2015, para. 97; Children's Rights Alliance for England, *Speaking Freely: Children and Young People in Europe Talk About Ending Violence in Custody: Research Report,* London, Children's Rights Alliance for England; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 26th General Report of the CP 2016, Brussels, Council of Europe, 2017, para. 38; National Children's Commissioner, *Children's Rights Report 2016,* Sydney, Australian Human Rights Commission, 2016, p. 17; Cf. Marku, *op. cit.*, p. 8; Cf. Save the Children (2017), p. 20; Sarah Frankenburg, Andy Chidley & Fatima Husain, *Experiences of the care system: Young people's accounts of living in institutions,* NatCen Social Research & The Lumos Foundation, August 2018, pp. 14-16.

6 Howard League for Penal Reform, *Life Inside 2010: A unique insight into the day-to-day experiences of 15-17 year old males in prison,* London, p. 13; cf. *Children's Rights Report 2016, op. cit.*, p. 167; Human Rights Watch (HRW), *Barely Surviving: Detention, Abuse and Neglect of Migrant Children in Indonesia,* 2013, p. 3; HRW, *Two Years with No Moon: Immigration Detention of Children in Thailand,* 2014; HRW, *'Why Are You Keeping Me Here?': Unaccompanied Children Detained in Greece,* 2016; *HRW, In the Freezer: Abusive Conditions for Women and Children in US Immigration Holding Cells,* 2018; HRW *'It is My Dream to Leave this Place': Children with Disabilities in Serbian Institutions,* 2016; cf. Frankenburg, Chidley & Husain (2018), *op. cit.*, p. 8.

7 Human Rights Watch, *'Without Education They Lost Their Future': Denial of Education to Child Asylum Seekers on the Greek Islands,* 2018; cf. Save the Children (2017) *op. cit.*; cf. HRW, *Barely Surviving* (2013), *op. cit.*; Nils Muiznieks, *Report by Nils Muiznieks, Commissioner for Human Rights of the Council of Europe, following his visit to Bulgaria from 9 to 11 February 2015,* Strasbourg, Council of Europe, October 2015, para. 32.

2.2 Consultations with Children

A children's rights-based approach was used by the research team to inform the research methodology.[8] Researchers worked with a group of children from Ireland with experience of deprivation of liberty who advised on the content and scope of the consultation questions. A **'Facilitators' Pack'** was then developed, setting out the approaches to be used to recruit children and to gather their views safely and ethically, individually or in groups, through face-to-face interviews. Terre des Hommes teams and a number of other organisations and institutions ('the partners') who work with children in detention settings carried out the consultations.

Designing a Research Methodology for Consultations with Children

8 Laura Lundy & Lesley McEvoy, 'Children's rights and research processes: assisting children to (in)formed views', Vol.19(1), *Childhood*, 2012, pp. 129-144.

2.3 Participants and Data Collection

The partners were asked to recruit participants aged 13-17 years, who were deprived of liberty in their respective countries (see infographic below). The sample was opportunistic, with partners approaching detention settings where they had existing contacts, explaining the Study and asking for access to child participants. The children were selected for participation by the staff, with the facilitators checking that the children themselves understood the nature of the consultation and wished to be involved.

In total, responses from **22 countries** were received, and the partner organisations gathered the **views of 274 children** who had experienced deprivation of liberty for various reasons, in a range of mostly State-run institutions. A small number of those who took part were under the age of 13 or over the age of 18 but, in the latter case, they had experience of and reported on their experience of detention while still children. Data were gathered during group consultations and one-to-one interviews. For ethical and practical reasons, verbatim transcripts of the focus groups and interviews were not produced. Partners, where necessary, translated the children's comments into English and reported them on a common template. This detailed the composition of the group, relevant issues of context and conduct of the process, and personal reflections from the facilitator. It also required the facilitators to summarise the main points made under each of the questions, providing verbatim quotations from the children as much as possible. The combined dataset was then analysed within and across each of the core questions using a thematic inductive approach. All data were read by all six members of the core research team, with sub- and cross-cutting themes discussed and revised to ensure consistency and coherence.

Interviewing Children Deprived of Liberty

2.4 Limitations

This consultation has a number of limitations – both in terms of the sample and the methods. First, in terms of the sample, access was arranged via NGOs and, while the coverage is unprecedented in its global reach on this issue, it was unavoidably determined by the availability and willingness of NGO partners to undertake the consultation in each national context. Second, while we are very grateful to the institutions that facilitated access to children thereby enabling children to contribute to the Global Study, the Study would have preferred a more independent, positive environment for the interviews. This would have ensured that children felt more at ease to volunteer their participation. A third limitation may be the type of child who responded to, or was permitted to participate in the consultation. There is no way of knowing whether participants were selected because they were considered to be positive, well-behaved or better able to engage within the institution and with the researchers. At the same time, the fact that the children's responses were both positive and negative would suggest a balanced outcome in this respect. Fourthly, the sample of participants is dominated by the experiences of children within the criminal justice system, with fewer children participating from other types of institutions. Finally, our focus was on children in detention and we did not consult with children who had experiences of alternatives to detention, albeit that some of the children in the consultation had experience of both.

There are also some limitations in the methods employed to collect the views of children. First, focus groups were the main form of data collection notwithstanding that some children will not have felt comfortable or safe giving their views freely in front of their peers. Secondly, in the majority of consultations, an additional adult was required to be present by the State/institution regulation. This may have been a social worker, education worker or institutional staff member who was in place to represent the institution, or an interpreter or parent who was needed to help the child express their views. While their presence was usually required by the institution, it may have impacted, either positively or negatively, on how freely the children expressed their views. Thirdly, findings were not provided as verbatim transcripts, with the initial decision about what to report delegated to facilitators. This means that reporting may not always have been approached consistently. And finally, most of the data were translated into English from the child's own language by the facilitators, which provides scope for misunderstandings and misinterpretation.

Despite these limitations, the consultation, undertaken within a relatively short period of time and with limited resources, represents an important, novel and deliberate effort to include in the Global Study the views and perspectives of a range of children with varied experiences of detention around the world. The value of their contribution is evident from the summary below.

3. Children's Experiences of their Rights when Deprived of Liberty

During the research, children were asked a series of questions about how they experience their rights under the CRC, presented first under the tripartite categorisation of children's rights - **Provision, Protection and Participation**. Representative quotes from the children used throughout this chapter are identified according to UN region rather than country so as to avoid identifying specific children, i.e., **African Groups (AFG); Asia-Pacific Group (APG); Eastern European Group (EEG); Latin American and Caribbean States (LAC); Western European and Others Group (WEOG).** The report also includes coding that identifies the six settings in which the data were collected. These were:

1. Administration of justice (child justice)
2. Children deprived of liberty with their parents
3. Immigration detention
4. Institution (mental health; orphanage)
5. Children associated with armed forces/groups
6. Children accused or convicted of threats to national security

Following this approach, an identifier code is given, for example **M/16/3:WEOG** – alerting the reader that this is the view of a **16 year old male (M/16)** from the **Western European region (WEOG)** with experience of **immigration detention (3)**. When the code **MF** is used, it refers to a child whose gender has not been disclosed.

3.1 Provision

Under the CRC heading of 'provision' rights, children raised concerns about the material conditions they experienced in detention and their enjoyment of their rights to education, access to health care and play and leisure.

a. Standards of Detention

Children complained about crowded or unhygienic living conditions, the quantity and/or quality of food and feeling isolated, particularly in the early stages of detention. These concerns were most often reported by those in child justice institutions or immigration detention, or in relation to detention in police stations. On the latter, one child explained:

> 'Physical condition is weak. Food is not available. There is no cleanliness. There is no healthcare at all'. (MF/12-18/1:AFG)

The physical environment, and adapting to it, was an important feature in the data, and unsurprisingly, the first few days/weeks of detention were very difficult. A significant number of children described overcrowding and poor-quality food and living arrangements. Being placed with adults, who were detained for criminal activity such as 'killers, drug dealers, thieves, and people who have killed for money' (M/19/3:WEOG), further complicated their experience. Some children reported that they were not sufficiently protected while they were there.

> 'We were instructed to sleep on a fixed time and the detention room was very small. It was hard for 45 detainees to stay in such small place. I didn't know how long I had to stay in this place where children were held with adults. It was a strange place, as it was tight and suffocating with poor ventilation, I was feeling strange and afraid while I was in the police station detention room'. (F/12-18/1:AFG)

> 'It is a cold place and where it is difficult to fall asleep'. (M/17-20/1:LAC)

> 'The prison was for mixed ages, there were five rooms for twelve people. The food was very bad (examples mentioned were milk mixed with water offered every four or five days, stiff bread, and tomatoes)'. (M/22/3:WEOG)

> 'Horrible! In the first place the food, the showers ... it happens often that the shower schedule skips us ... The housing conditions. We get bitten by bedbugs'. (M/15-17/1:EEG)

Children who had experience of immigration detention, reported: lack of access to information, no medical assistance, limited communication, poor food and living conditions (mixed ages, lack of clothing or bedding). Food for one young person included watered-down milk, stale bread and tomatoes. Another received one meal a day of boiled rice and vegetables.

b. Education and Training

Almost all children in child justice institutions confirmed that they had access to some form of education and/or training programme. Courses ranged from traditionally recognised State qualifications and literacy and basic skills, to personal and social development programmes (e.g. resilience, drug and alcohol) and vocational training (e.g. plumbing, computing, sewing, woodwork, hairdressing). Some institutions offered a wide range of courses while others were much more limited.

The lack of choice and the need for specific training that would be more useful for job prospects were issues in some institutions. Staff or equipment shortages meant that sometimes not all could avail themselves of opportunities, or training was not provided consistently:

> 'We have a tailoring teacher in here, maybe each week one of us go to tailoring training because shortage of trainer and equipment'. (M/13-17/1:APG)

> 'There are people who used to come here and select children to join vocational training and be released, I am waiting for them, I wish they come'. (M/14-17/1:WEOG)

High staff turnover impacted not only opportunities, but also the relationships that young people had established. Some spoke of positive relationships with teaching and training staff, commenting on their patience, understanding, and sometimes a level of care which was in contrast to detention facility staff. The continual turnover of staff in one institution resulted in the children feeling that they leave because 'most of them become tired for being with us' (M/13-17/1:APG). Staffing was an issue regarding access to education in another institution. Here it was reported that despite the commitment of teachers, staff often cut classes short in order to suit their schedules:

> 'If there is a guard and he doesn't want to stay in school after us "come on, already! Go to your rooms. I want to leave"'. (M/15-17/1:EEG)

In contrast to children in child justice institutions, fewer of those detained as a result of threats to national security had access to education. For some, this had been the case for more than three years:

> 'When I was caught I was studying for science exam. I was good at school, but since I arrived here I lost my ability to study. The centre is not a place to study in'. (M/12-15/6:APG)

Likewise, the experiences of those in orphanages was mixed. While many reported having access to education and training, children with disabilities had varied experiences. Some reported having classes/school only within the institution, and others reported only studying 'from time to time' (MF/18+/2:EEG).

c. Health

Most children in child justice institutions, and all of those detained on national security grounds reported that they had some access to a doctor or medical care. Yet this access varied across the children's accounts. While some were never refused a medical appointment, others only 'sometimes' had access to medical care. A few reported that they were queried when asking for medical assistance:

> 'Questioned about why doctor needed - not let go [to the doctor] all the time'. (M/17/1:WEOG)

> 'Medical care was not very good. If I told the staff of the orphanage that I was ill, they said that I was playing the fool'. (MF/18+/4:EEG)

Lack of access to medical care, alongside the conditions of the institution, could cause or exacerbate poor health. These reports included the following:

> 'I had pneumonia because I catch colds very easy and my immune system is easily affected and the doctor did not give me any treatment. Our health is at risk, because the conditions of living are very bad, the beds, blankets, sheets are dirty and old'. (M/15-17/1:EEG)

> 'Most of the minors in detention are sick not only because of the poor quality of the food they receive, but also because they do not receive effective treatment ... the infirmary is still lacking effective products for the treatment of diseases such as malaria'. (M/15-18/1:AFG)

In one extreme case, the team who conducted the consultation with children in one facility were informed ten days after that one of the children who had participated in the session had died due to a non-identified and non-treated illness, which exemplified the severe lack of adequate medical facilities there.

Moreover, some felt that those with disabilities or complex health needs were sometimes at a disadvantage, not catered for appropriately or experiencing additional risks. A transgender boy in one setting reported that he could not access hormones.

Treatment outside the institutions was reserved for emergencies or specialised care. While it was generally stated that this was provided, some concerns were raised regarding access including the treatment of children during their transfer to medical facilities:

> 'We don't [have] access to good medical care, [the centre] office doesn't move us out for treatment'. (M/13-17/1:APG)

> 'This is shameful, we are transferred to hospital by the accompaniment of the police'. (M/14-17/1:WEOG)

There was less satisfaction with access to psycho-social support. Psychologists/psychiatrists and social workers were available within some institutions, yet reports on engagement with these varied however. While the value of an in-house therapist was noted in an institution housing LGBTI children, others told us that availability did not always equate with effectiveness:

> 'In mental health, they motivate you but don't help you put it into practice. The group encounters we had with psychology were never sincere, and they forced us to attend, and one already learned what one had to say. Those spaces were uncomfortable'. (M/17/1:LAC)

Yet the need for and importance of support for children's mental health needs was evident given the abuse and trauma experienced by many of the children. In two orphanages, for instance, it was noted that there was no access to psychologists or mental health support despite the need for this. Children in a number of child justice institutions also felt there could be better access to psychologists and mental health support rather than this being provided sporadically or in crisis situations:

> 'Mental health is not part of the treatment. Only when they're extreme cases'. (F/17-20/1:LAC)

d. Recreation and Leisure

Many children in justice settings reported having access to sports and recreation activities/facilities, finding this both useful and enjoyable. Some commented favourably on specific organisations that offered activities (often arts based or creative) to them, particularly those external to the institution:

> 'We like when people from outside come and work with us'. (M/16-2/1:EEG)

> 'xxx [charitable organisation] provides us sport and recreation. It is very interesting for us and we enjoy it. It is useful for us'. (M/15-17/1:APG)

> 'There are sport activities that can be organised according to the common will of the group. There are available facilities for every activity such as football, basketball, volleyball or gym'. (M/15-18/1:EEG)

> 'xxx [charitable organisation] helps to have a safe and healthy environment, freedom of movement, and performance of physical exercises and recreational activities for children'. (F/12-18/1:AFG)

Overall, children spoke favourably about having opportunities for sports and leisure. Suggestions for improvement generally related to a greater choice of activities, having more time for sports and leisure and better/more equipment or larger spaces:

> 'The access to sport facilities is restricted for two days per week. It is not enough. We would like to stay longer at the sport activities, since in the rooms there is nothing to do'. (M/15-17/1:EEG)

Likewise, many children talked about boredom and long periods of inactivity. One young person described his period of immigration detention as 'just eat and sleep, like an animal' (M/19/3:WEOG). He described it as 'a silent place' with no social or Internet connections. Additionally, children with disabilities who were/had been in orphanages noted that access varied. Some undertook a range of activities while others appeared to be offered none:

> 'We had different activities, but not for everyone. Many did not have wheelchairs. Some laid in bed all the time. They couldn't go anywhere'. (MF/18+/4:EEG)

3.2 Participation

a. Access to Information

In most cases, the children said that the information they received was more of an induction to the facility and about their responsibilities and behaviours, rather than details of their detainment and legal situation.

> 'In the first day we do not receive any information. In the second day, the psychologist, the educator or the supervisor talk to us. We are informed only about the fact that we can be included in educative programs that we can benefit from certain rewards. They tell us the rules from inside, imposed by the penitentiary'. (M/17/1:EEG)

> 'Good behaviour, to study, to collaborate with cleaning'. (F/17-20/1:LAC)

Those who did not receive relevant information on arrival gained knowledge of their rights, rules and regulations of the facility by word-of-mouth from other children or by doing something wrong.

> 'No information about rights given, length of stay, rules. Rules only mentioned when I get in trouble'. (M/17/1:WEOG)

> 'After a while we had known about [life] here from other children'. (M/13-15/1:APG)

Children's inability to understand information was further complicated when false or inconsistent information was provided. This was evident in all settings in relation to length of stay and next steps in the process, but was particularly relevant for those detained due to reasons of immigration and national security.

> 'Treated as a terrorist, and thought I would stay there all my life'. (M/22/3:WEOG)

> 'I didn't know that I will stay in juvenile centre and I thought I will stay in police station'. (M/12-15/6:APG)

b. Complaints

Many of the children said they were able to access someone who was supportive and listened to their concerns. Some had used this mechanism to complain about things such as food, rooms, and abuses by staff, but there was rarely a response. In general, there was a lack of understanding as to how these concerns were dealt with or resolved.

'Don't feel like views are taken seriously, not listened to, care staff treat us like kids'. (M/17/1:WEOG)

'We think our views are not important for them'. (M/13-15/1:APG)

Some children described experiences of having their requests denied by the judge with no reason given for the denial.

'They didn't hear my point of view, instead the prosecutor was asking me questions and write down his own answers without listening to me'. (F/12-18/1:AFG)

A few children described how complaining about their situation could sometimes make things worse for them and they understood that adults may collude with each other, especially if the complaint referred to abuses by staff.

'If you complained, you were punished. They could lock you or not give food'. (M/F/18/4:EEG)

'If we go to the principal and make a complaint, he is not listening to us. Cause they are colleagues among themselves, and of course he is not taking our side'. (M/17/1:EEG)

c. Privacy and Confidentiality

Some respondents commented that they only experience privacy when in the bathroom. One girl felt her privacy was invaded when she found out that all the information that she spoke about with the psychosocial team was not confidential and was in fact passed on without her knowledge.

'I disliked when all the information was going to be read by the judge'. (F/17-20/1:LAC)

The children in one group said that they did not like it when official visitors come to the institution and took photos of them:

'This is disgusting, they only take photos, they do not talk to us, I was in a holiday and saw our photos on Facebook, this is shameful my friend'. (M14-17/1:WEOG)

d. Religion

For the most part, the children's religious needs were met. For some, this involved praying at night with the teachers as no religious leader was provided (LAC). For others, a chaplain would visit the facility on a regular basis.

'They pray every morning, have access to the books of their religion and perform cultural-religious acts'. (M/18-21/1:LAC)

'St Mary's comes every second Sunday'. (M/17/1:WEOG)

Some felt that the only place they were respected was in their place of worship.

'They (police officers) would not enter while we were inside'. (M/17/3:WEOG)

Conversely, other children reported that their religious needs were either not respected at all or only sporadically. One boy felt that he was being 'forced to pray' (M/12-15/6:APG) while another reported:'They take us to church once every 7-8 months'. (M/17/1:EEG)

3.3 Protection

a. Physical Environment

The vast majority of children stated they did not feel safe, especially when they made mistakes or when they fight with each other.

'No. I felt threatened by the staff of the orphanage'. (M/F/18/4:EEG)

Others reported feeling safe and under no threat of violence, but rather described the stress that accompanied their overall experience of detention.

'We are safe here physically, everything is well, but we have stress all time because every minute have a dream that is being out of here with my families and friends'. (M/13-16/1:APG)

b. Punishment

Violence and other punishments were regularly experienced, which not only involved other children, but also the police and security staff.

> 'There were fights all day, every day. It was too hard. They were fighting with others from day to night for the bed, for the food, for the toilet'. (M/19/3:WEOG)

> 'One could be beaten when he commits mistakes'. (M/14-17/1:WEOG)

> 'When a minor misbehaves towards his friends instead of offering him an educational sanction, he is sent to the convicts' building where the serious criminal offenders are located'. (M/15-18/1:AFG)

One young man described an incident of chemical restraint when he was being unruly.

> 'I was shouting for my rights and they thought I had epilepsy. They gave me medical treatment, but I threw the pills away'. (M/22/3:WEOG)

Some children viewed the use of proportionate restraint as acceptable when children are fighting, to control unruly behaviour and to prevent injury: 'Restraint should be allowed for safety of the staff' (M/16-17/1:WEOG). Strip searches, however, were perceived by one boy as problematic, especially if used for no apparent reason, for example if a boy had no record of drug use (M/16/1:WEOG).

Several children mentioned suffering physical and verbal abuse during arrest and detention. Boys were more likely to describe physical brutality, while girls thought the police were disrespectful and used sexualised language towards them. Some girls also described being physically assaulted.

> 'I would hear people screaming including a minor who had tried to escape they were put in isolation and beaten as repercussion'. (M/22/3:WEOG)

> 'They asked me why I ran away from home. When I didn't answer, why did he slap me?' (F/10-18/1:APG)

The children explained that experiencing disrespectful treatment from staff could increase the chances of riots, retaliation and unrest.

‘The supervisor comes in the evening, after the call, at 10PM and yells at us, “Yo! I will swear about your family if you don’t answer”. And if I am sleeping and I cannot answer him, he swears my family! Some of us have reports filled because of that. You can imagine, some of us have dead parents, or sick, you can imagine that we don’t take it too well. We respond to their swearing, and they are too blame, because they incite us, they start us, but in the end the blame falls on us. I have 12 reports. And I don’t think I have made mistakes for all of them. They cut my right to visitations, to the food from here, I have also been put in isolation’. (M/17/1:EEG)

‘We are some kind of a jungle for them, where they can play, some kind of tiny animals for them’. (M/16/1:EEG)

There were claims about police corruption, and children explained how the police would abuse their position of authority to take bribes, force confessions, and fake evidence to get a case closed.

‘The police man prevented me from eating food for 3 days, he was giving me water only and in the 4th day I confirmed my charge just to eat. The police man said if I confirmed the charge, I will leave the centre and go back home. Not sure why he gave me a false information. I confirmed the charge to go home and now am here since 2 weeks’. (M/12-15/6:APG)

Children also reported that the other children would do ‘crazy things’ to attract assistance and protest against conditions, including self-harm, which was common. Instances of sexual abuse between those in detention were also reported.

‘They were very desperate. Some of them tried to commit suicide and the whole time they talked and looked at each other badly’. (M/14-21/1:EEG)

‘This is the biggest problem that is happening here, in the penitentiary. The homosexuality. The first time it happens to do it against their will, afterwards they do it out of pleasure’. (M/16/1:EEG)

‘And afterwards for cigarettes’. (M/17/1:EEG)

c. Rehabilitation

Differences in institutional experiences were country specific and mostly due to an institutional focus on rehabilitation as opposed to a focus on punishment. Rehabilitation was founded on providing educational and life skills training and respectful care, which tended to prompt self-reflection and a desire among children to make more of their lives.

'Being in prison does not help to change a person, but if receive good advice from those who have experience may help to make the person change'. (M/10-18/1:APG)

'It is useful since it trains us to be responsible, train our behaviour, and change ourselves'. (M/10-18 /1:APG)

Girls with experience of detention for national security reasons said that when relations between each other and the staff are good, they feel like they are in a house not a child centre. In general, girls were more likely to say that staff cared for them and are concerned for their welfare.

'XXX who manages the orphanage was easy to talk to, she is a humble person and always asks us if we are ok'. (F/18/3:AFG)

3.4 Contact with Family

Children had very mixed experiences of contact with families. Some benefitted from regular contact and were supported by staff who recognised its importance for the children's wellbeing and future re-integration:

'Yes, the social workers from X are trying a lot. They meet our parents and families to ensure that we go back safely to our families and join our parents without any problem in the future after we finish our sentence here'. (M/15-17/1:APG)

Many institutions also arranged for children to have home visits. For instance, in some cases when a child had completed half of their sentence, they were allowed to go on home visits. Children especially appreciated it when institutions were flexible about visiting times so that they could maintain contact:

'When your family member comes from a far area, they allow him/her to visit you out of visiting day'. (M/14-18/1:WEOG)

a. Concerns about Access

Other children spoke of a range of difficulties, most common of which was that the detention settings were far from their homes and that made it difficult for families to travel to see them.

> 'My mother came more often when I was at the X penitentiary, it was closer to my house, now she comes more rarely, it's too far and it's expensive. It was better before, because my mother brought me things from home, food'. (M/16-21/1:EEG)

The availability of resources also affected children's contact in other ways. In particular, many children maintained contact with families through their mobile phones. However, these usually had to be paid for by families, with the result that those who could afford it had more contact. Some children reported having to pay to see families when they were in police custody:

> 'I had to pay a lot to make a telephone call or to receive a five-minute visit by my parents. Money is often paid to the police officer in charge'. (MF/12-18/1:AFG)

A particular concern for some was that younger children were not allowed in the detention setting and that meant that they could not see or maintain contact with their younger siblings. Many children expressed a desire to see their brothers and sisters.

> 'I haven't seen my sister since I entered here in three years. I told them and nobody helps me to find her and get in touch with her'. (M/17/1:EEG)

Some children were estranged from their families (because, for example, they had been exploited by them) and others were placed in the institutions by their families. One transgender boy gave this account:

> 'My uncle packed my stuff and threw me out. When I got to the NGO I was still traumatised to understand or recall anything'. (M/17/4:AFG)

Others reported that contact with their families had broken down once they were placed in the institution and that, in some instances, social workers were working to try and rebuild relationships. In other cases, children expressed frustration that they were not supported to find their families or had not been told that their families did not want contact.

> 'I told her that I want her help to find the address of my father because he is not staying at the same place anymore...The social worker recorded what I told her, but months passed and nothing so far'. (M/16/1:EEG)

Many other children also reported that they did not receive visits or contact at all, a situation that was particularly common for children in orphanages:

> 'I hadn't family. Relatives could come to other children once a week'. (MF/18/4:EEG)
>
> 'Ever since I left home, no one has cared to look for me. It was better when my parents were alive'. (F/15/4:AFG)

One boy who had been held in immigration detention when he was aged 17 years reported that no contact was allowed with anyone at all. In another setting, the same boy reported that he was allowed one hour of Wi-Fi that he used for contact with NGOs who could help his asylum case (M/21/3:WEOG). In another country, it was reported that children who did not have families had to wear the standard grey clothes provided by the institution and that they were more vulnerable to exploitation by others in order to secure extra food or cigarettes.

b. The Conditions of Visits

Visits with families were often dependent on good behaviour.

> 'Yes, some are visited by their parents and relatives, however others in view of their recidivism... don't receive any visit'. (MF/15-18/1:AFG)

Some children expressed concern about privacy during visits and the quality of the visits with family, particularly that visits were very short.

> 'We don't have any privacy. Maybe today I want to tell my mother that something happened to me or that I do not feel well. We cannot talk because they stand next to us'. (M/16/1:EEG)

> 'At the visiting room, to exchange with family, it's only 8-10 minutes so the time is too short'. (M/13-17/1:AFG)

c. Contact with Friends

Contact with peers, where safe and appropriate, was seen as important by many children and necessary to facilitate re-integration. For example, one of the participants said he meets his best friend very often. Every time that friend comes, he drives the child's family members as well, so they all visit him together. However, social attitudes often remained a barrier to friendship.

‘For our friends who come to see us, they also need a permit. But few come because their parents often forbid them to continue hanging out with “delinquents” like us’. (M/13-16/1:AFG)

For many others, this was not possible or subject to regulation.

‘It’s a problem, we kept our contact with my family all the time, but with friends not, because most time, they don’t allow to come here for visiting us - staff just allows in our relatives’. (M/13-16/1:APG)

3.5 Preparation for Reintegration

Children were asked ‘What is done to help prepare you for release?’ Many responded that nothing was happening to prepare them for release.

‘Nothing is done to prepare for our exit. Even to go to the sewing workshop, it’s quite a big deal’. (M/14-17/1:AFG)

a. Good Practices

Some children gave examples of existing provision that they considered would help them to reintegrate on release:

‘It is very good that the fact that we are graduating in correctional service is not mentioned in our diplomas and certificates, so all of these certificates and diplomas will be useful for us in the future’. (M/18-21//1:EEG)

‘We receive a lot of important advice about this during our talks during our activities by all the staff for a better reintegration in order to avoid recidivism, to avoid bad company and also the training we receive during the period of detention, allow us to have a purpose in our lives, to have other occupations to better earn an honest living and avoid any harmful temptation’. (MF/14-18/1:AFG)

‘They teach about moral life, how to live, teach vocational skills so that we have some work skill and prepare us to return to the society.’ (MF/12-18/1:APG)

b. Securing Employment or Training

Many children focused on getting paid employment so that they could support themselves and not reoffend.

> 'It would be good to know that they had a job on release'. (M/16-21/1:EEG)

> 'Solicit help to find a job as a cleaning lady given that she is not educated'. (MF/16-18/1:AFG)

Others, who were not receiving any training, commented on the need for a planned programme in another institution:

> 'At X, there will be made some centres to help former detainees with a job and for a period of three months with accommodation. So, they get used to the reintegration in society'. (M/15-17/1:EEG)

> 'A training centre to host children after their release from detention should be created'. (MF/14-18/1:AFG)

c. Supporting their Relationships with their Families and Outside World

The majority of children identified the need for support from parents and families as important to enable them to re-integrate back into society. However, some children did not have families, or said that they did not want to go back to their families, as they were not safe places for them.

> 'Contact the family and prepare for the reinsertion [...] Re-establish parental ties, psychological support'. (M/16-18/1:AFG)

> 'Step down unit when you are month before the end of sentence to be able to live normally and independent'. (M/17/1:WEOG)

3.6 Alternatives to Detention

When asked for suggestions about alternative ways of dealing with children other than detention, some children did not appear to be aware that there was an alternative to detention. A few children justified the use of detention as a warning that got them back on track – 'a lesson learned'. More often, children pleaded that children should not be punished or detained at all:

'Don't arrest and detain children for drug trafficking. They are not able to traffic the narcotics or do not understand about the trafficking. They are used by their parents for this purpose'. (M/15/1:APG)

'Me, I think that prison is not made for children; it is necessary to direct them into education and training centres'. (M/13-17/1:AFG)

Children, irrespective of the setting, almost always focused on the need for community or family-based care as an alternative to detention. These suggestions included the following:

'Have house arrest so that you can still see your family'. (M/16/1:WEOG)

'Getting the relatives to take the initiative and raise the children. Most of the children should not be part of this setting as they still have relatives to take care of them'. (MF/13-17/4:AFG)

'Unaccompanied minors should be connected directly to a legal guardian and hosted in a shelter with support services so that they don't spend even one day in detention. Police stations or prison is not a suitable place for minors'. (M/22/3:WEOG)

a. Value of Alternatives to Detention

Some children justified the need to avoid detention by describing the negative effects and, in particular, the fact that they become more likely to commit further or more serious crimes:

'If you stay with a killer, you will be a killer. If they beat you once or twice, you think 'why can't I do this'? (M/19/3:WEOG)

'Here, the life in prison trains you more for recidivism than for change'. (M/15-17/1:AFG)

Others identified the benefits of community-based diversions:

> 'If I were outside and did some professional training, I would earn money which would put things right. Because the more you last here, the more you will come back here'. (M/15-17/1:AFG)

> 'Here we just eat and sleep; we want a place that will bring change in our lives'. (M/13-16/1:APG)

4. Cross-cutting Themes

In addition to the substantive rights issues highlighted by the participants, a number of cross-cutting themes emerged from the research, as follows:

4.1 Fear, Isolation, Harm and Trauma

A key theme across a significant number of the consultation responses was isolation and fear. This was most evident in accounts of the early stages of detention and pre-detention, and the hostile environment of detention in police stations where children were often unable to associate with others and/or had to wait for long periods without information:

> 'The first day seems like you will [be] isolated a long time and you will wait endlessly for nothing'. (M/15-18,1:EEG)

Fear and confusion were heightened when children were detained initially with adults, and when they were provided with little information about length of stay:

> 'I was detained with adults, who are older than me, feeling insecure most of the time, and I was severely beaten by the police and adult detainees'. (MF/12-18/1:AFG)

In addition to the physical harm experienced by some children deprived of liberty, the above experiences clearly caused emotional harm. Further examples of emotional harm were also prevalent particularly through negative interactions with police or prison officers, including name calling and humiliating searches of girls:[9]

9 Statement of a child during a consultation in Burkina Faso (code AFG for Africa Group).

'I want you to continue to help children like us, because children are the future of the nation. I want also that you help us by giving us something to do, because if we have nothing to do it leads to dilemmas.

Thank you in advance.'

'The police inspection was humiliating'. (MF/12-18/1:AFG)

'Police have beaten us, used bad words and disgraced us'. (M/15-17/1:APG)

'Only one police man spoke English, we could only understand the insults'. (M/17/3:WEOG)

Isolation from family and friends, alongside the pains of confinement, meant that for many the trauma associated with deprivation of liberty was profound, and likely to have lasting impact:

'We are safe here physically, everything is well, but we have stress all time because every minute have a dream that is being out of here with my families and friends'. (M/13-16/1:APG)

'It's the freedom that we are seeking in this moment. We won't forget all the things that happens in prison'. (M/13-17/1:AFG)

Finally, a significant number of children reported feelings of isolation and loneliness in detention, particularly in pre-detention or in police stations. One young woman in a child justice institution was feeling this acutely at the time of the consultation as all the other girls had been released three months previously:

'I am happy when I was with a lot of girls, now I am alone and I think I will be here for a long time'. (F/15/1:APG)

4.2 Coping with Adversity

In spite of the serious nature of the threats around them, some of the children showed resilience and an ability to adapt to the adverse circumstances in which they found themselves.

> 'We shower room by room. We got used to it, even if we wanted or not. We had no choice'. (M/17/1:EEG)

A few children justified the use of detention as a warning that got them back on track by allowing them to think about the consequences of their behaviour and about their future.

> 'It was a bad experience which helped them grow, learn, work hard, be active and think about their family and about the future'. (M/18-21/1:EEG)

They said that facilities focussed on rehabilitation and reintegration provided them with opportunities to engage in purposeful activities, such as education and vocational courses, to enhance their life skills.

> 'I got a lot of courses at [rehabilitation centre]. These courses include sewing and computer courses, and I have been enrolled in a literacy class. These programs are useful for me and after my detention period I can work in a sewing workshop'. (MF/12-18/1:AFG)

While remaining vulnerable to the risks and harms associated with detention, some participants described processes that helped them tolerate the negative effects of stress and conflict. They identified the need for social and other support mechanisms associated with successful adjustment that also enabled them to avoid reoffending.

> 'They teach about moral life, how to live, teach vocational skills so that we have some work skill and prepared us to return back to the society.' (MF/12-18:1/APG)

> 'Support with drug and alcohol addiction'. (M/16/1:WEOG)

The majority described circumstances that led them to feel powerless about their futures, but they also demonstrated resilience and used behaviours and personal relationships to cope while in detention.

> 'At first I was a bit scared, but after a while I became happy because I have a lot of friends here, we shower together, sleep together, eat together, go for outings together. Friends out there are so different from friends in here'. (M/10-18 /1:APG)

The supportive relationships that they developed with other detainees and staff, who they referred to as family, were an important mechanism that helped them to cope.

'When I am in trouble, it is these people I can speak to. The social workers, they are the ones who take good care of us.'[10]

'It is better than being alone in the streets. Here, I am surrounded by my friends and I have made them my family'. (F/16/3:AFG)

'If somebody is sick, we bring him the food in the room, we make him a tea. Sometimes we help each other'. (M/17/1:EEG)

4.3 Disempowerment

The feeling of being disempowered, by systems and by individuals in the system, emerged in many of the responses of the children who participated in the research. A recurring theme was the way in which complicated legal language obscured their understanding of what was happening to them.

'They mention that article, and that article ... They have a law degree, you can imagine. How can we understand?' (M/15-17/1:EEG)

'I didn't understand, because they [judges, defenders, prosecutors] spoke a lot of things. Let's say that they started to say some articles of the laws of adults and as they were "embolataban", so you do not know those laws, then you are lost'. (MF/17-20/1:LAC)

'No not really they used big words that I didn't understand'. (M/16/1:WEOG)

10 Statement of a child during a consultation in Burkina Faso (code AFG for Africa Group).

'In a court decision judges asked our views and they also told us that we should tell the truth and everything that happened and we know, but at the end they call us liars, so we think our opinions are not important in formal meetings'. (M/13-17/1:APG)

'I did not get any information about the duration of my stay in this place as everything was unclear and unknown, all information was incomprehensible for me because I am just a young girl'. (F/12-18/1:AFG)

One child (M/14-17/1:WEOG) described the effect of not understanding legal terms. He said that he signed a paper that he did not understand and therefore did not know what he was signing. Others expressed frustration about not being heard.

'They didn't hear my point of view, instead the prosecutor was asking me questions and write down his own answers without listening to me'. (F/12-18/1:AFG)

The lack of translators meant that children who did not speak the language were disempowered by their inability to understand the information shared with them.

'There are a lot of children that do not speak Romanian and they know only Hungarian and they are put in a room where all the others know only Romanian, and they cannot understand each other'. (M/16/1:EEG)

4.4 Discrimination and Stigma

Children described their experiences of discrimination and stigma as connected to different factors including ethnicity, economic status, (dis)ability, sex or sexual orientation. One group of children discussed how sentences for children were too harsh in general, and that these varied depending on the ethnicity of the young person:

'Differences are made if someone is Roma'. (M/15-17/1:EEG)

A group of children who participated in a focus group in one setting explained that the main factor that led to differences in the duration of pre-trial detention was the economic status of a child's family: children from wealthy families were released quickly after only a few days.

In a focus group amongst orphaned children living in a closed institution, one young person complained about differential treatment on the basis of their disability:

'We had a special school inside the orphanage. Our teachers treated us not like the other children, from outside the orphanage. They did not think we could learn something. I wanted to learn to read. I felt inferior'. (MF/18+/4:EEG)

In the scope of degrading treatment by police, children's narratives highlighted patterns of emasculating language with boys and sexualised language with girls. One of the girls said that the police officer asked her if she wanted to go home with him and sexually harassed her. A girl in another setting reported:

'I was searched in a way that violated my privacy as I was searched by a police officer'. (F/12-18/1:AFG)

One transgender young person described how he was verbally abused by the police, using profane language such as:

'Lesbian motherfucker, he thinks he's a man'. (M/17-20/1:LAC)

The same person reported how he was treated better by the staff of the rehabilitation centre, who respected him because they noticed he was uncomfortable when they called him by his birth name.

In comparison, a transgender boy in another setting explained that he felt discriminated against outside in the community, but not in the institution where he was deprived of liberty.

Finally, several children spoke of the need to address the stigma that accompanies children who are detained after they are released. For example, one child valued the social skills that would improve their social relations so that 'people outside will like me'. (M/14-17/1:WEOG) Another child referred to the importance of professionals in creating acceptance in families and communities:

'The social workers from x work for our reintegration. They meet our parents and families to ensure that we go back safely to our families and join our parents without any problem in the future after we finish our sentence here'. (M/14-17/1:APG)

4.5 Aspirations

Amidst all of this, however, children involved in the consultations spoke about their hopes and aspirations for the future and for their lives beyond detention:

'The fact we are deprived of liberty, doesn't mean we have no future!' (M/14-21/2:EEG)

'I would like to become a footballer. But first I want to learn the Koran to get to know life better'. (M/13/1:AFG)

Many children were focused on their futures, and they often spoke positively about training, education and other programmes provided to them while in detention that would help them once they were released.

'This place provided all kinds of learning and give us opportunity to have access to everything, give us work to try whether it fits us and support us to reach our goal'. (MF/10-18/1:APG)

'There are many projects, hair cutting, bakery, farming, and guitar making. Very useful, give education, language, and how to live, it is for my best interest'. (MF/10-18/1:APG)

'It is very good that the fact that we are graduating in correctional service is not mentioned in our diplomas and certificates, so all of these certificates and diplomas will be useful for us in the future'. (M/18-21/1:EEG)

Participants spoke about their hopes once they were released from detention, including returning to work and to education. They had many suggestions for supports that would help them once they were back in their communities, and particularly for support that would help them not to reoffend.

'Resume his job as a butcher with his father. Go back to school to continue his study'. (MF/16-18/1:AFG)

'Soon, I'm going to raise chickens, I had a four-day training that will continue'. (M/13-17/1:AFG)

5. Conclusions

This short report sought to present the views and experiences of the 274 children deprived of liberty, who contributed to the Global Study. These experiences confirm the views of hundreds of children whom I had interviewed personally in all types of situations during my 18 fact-finding missions as UNSRT. Children have a right to express their views in matters that affect them and, as this study shows, even when deprived of their liberty, children are both capable and willing to do so. This is particularly significant in the challenging environment in which many of them were being consulted.

The children who participated articulated clearly that children should not be deprived of liberty where possible. Rather than being concerned with their own experiences, they demonstrated an acute awareness of the social and emotional 'gaps' that they experienced when being away from their families and their communities. At times, this was expressed in **feelings of loneliness, isolation, and longing for family**. In this regard, they shared their **feelings of confusion and disempowerment**, especially when confronted with systems that they did not understand.

At the same time, as the cross-cutting themes highlight, children deprived of liberty adopt strategies for coping with the adverse experiences that they faced, and articulate a capacity for resilience and coping amidst adversity. They shared their insights regarding the things that, for them, eased the pain of confinement: **friendship, respect and empathy from adults and their peers**.

Children were clear about how detention should be improved and routinely wanted better educational opportunities and better access to healthcare. Apart from material concerns, **children also articulated a need to have someone to turn to, who could listen to them and empathise**. Having someone who kept them informed at every stage and who took their views seriously was crucial. Children also talked about the many other viable alternatives to detention that involved **community-based care**.

At the same time, the gaps in the literature that underpinned this Study highlight the need for greater levels of comprehensive, robust research with children about their own views and experiences in all detention contexts and settings. **Such research needs to be transparent, rights-compliant, accountable and ethical**. There also needs to be room in the analyses for perspectives that do not fit with researchers' pre-conceived views – remaining genuinely open to what children have to say is central to a children's rights approach. Experiences will naturally vary from child to child, and from context to context; individual children will have different experiences from one day to the next and there is thus a vital need to undertake consultations with children that capture and depict the diversity, complexities, and sometimes the contradictions, of children's experiences. There is also a need for

diverse views in research with children. In this regard, any future responses or approaches to children deprived of liberty should include **research with children that is grounded in the many different contexts and realities of children's lived experiences**.

And finally, in line with the children's rights approach, hearing what children have to say also requires feedback to children on what we have heard and what impact their views have had on the listener. In this regard, to be rights compliant, **all research must not only take account of children's views, it must also ensure that children themselves are informed about the impact that their views have had**.

6. Recommendations

1. In all decisions that may lead to the detention of children, States are called upon to most rigorously apply the requirement of **Article 37(b)** of the Convention on the Rights of the Child that deprivation of liberty shall be applied only as a **measure of last resort in exceptional cases**.
2. States should respect the principle provided under **Article 12** of the Convention on the Rights of the Child ensuring that children shall have the right to **express their views freely in all matters affecting them** and that their views shall be given due weight.
3. Acknowledging that children have this right under Article 12, States should do what is necessary in order to **empower children to influence decisions relating to their treatment**.
4. This includes providing children with the power to seek **effective remedies**. Accordingly, States should ensure that effective, child-friendly procedures are set in place so that children can themselves **lodge complaints to an independent and impartial authority** on any grievances and human rights violation during detention.
5. States are strongly encouraged to ratify the third Optional Protocol to the Convention on the Rights of the Child on a communication procedure **(OPIC)**, enabling children to further seek redress for violations of their rights.
6. Based on the views expressed by children in this Study (and elsewhere), States are strongly encouraged to develop and **use community-based sanctions over detention**.
7. States should ensure that **independent monitoring procedures** are established and maintained so as to regularly allow detained children to be heard in a safe and confidential space regarding their treatment.
8. Recognising that gaps in research exist in this area, States are encouraged to support **comprehensive and robust research *with* children** in order to determine what their own views and experiences are. Such research should be conducted in all detention contexts and settings.
9. States should ensure that all research with children are child-friendly, **transparent, rights-compliant, accountable and ethical**.

CHAPTER 6

IMPACTS ON HEALTH OF CHILDREN DEPRIVED OF LIBERTY

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1. Introduction

Children may be deprived of liberty for a variety of reasons and, although these reasons are often not explicitly related to their health status, it remains likely that those deprived of liberty will be distinguished by a high burden of ill health. This is, in part, because the social and structural drivers of deprivation of liberty overlap with the determinants of health. For example, young people who use alcohol or other drugs may be at increased risk of experiencing justice-related detention for offences related to the behavioural effects of substance use (e.g., disinhibition, aggression), or in relation to criminal charges for drug possession, use, or trafficking.[1] Risky substance use in young people is also associated with poor mental health, injury, and infectious disease related to both disinhibited behaviour (e.g., unsafe sex) and injecting drug use.[2] Therefore, one might expect children and adolescents in justice-related detention to be at increased risk of poor mental health, injury-related morbidity (including traumatic brain injury; TBI) and infectious disease. Indeed, recent systematic reviews have documented a high prevalence of mental disorder[3] and infectious disease[4] among **justice-involved young people**, although to date there has been no overarching review of their health status at the global level.

There is also good reason to suspect that children deprived of liberty for other reasons may be at increased risk of poor health. Children in **immigration detention** often come from settings distinguished by civil and political unrest, or war, and may experience inadequate nutrition, limited access to appropriate healthcare, and/or exposure to environmental risk factors for poor health. Experiences of trauma in their home country and/or during the often arduous journey to immigration detention may have resulted in or compounded mental health problems.[5] Similarly, children held in detention in the context of **armed conflict** or **national security** may have experienced significant trauma, and may have been injured in conflict.[6] In settings of civil unrest and armed conflict, disruption to healthcare

1 Matthew D. Phillips, 'Assessing the Impact of Drug Use and Drug Selling on Violent Offending in a Panel of Delinquent Youth', *Journal of Drug Issues,* Vol. 42(3), 2012, pp. 298-316.

2 Dan I. Lubman, Leanne Hides, Murat Yücel & John W. Toumbourou, 'Intervening early to reduce developmentally harmful substance use among youth populations', *The Medical Journal of Australia,* Vol. 187(7), 2007, pp. S22-26; Fiona M. Gore, Paul J. N. Bloem, George C. Patton, Jane Ferguson, Véronique Joseph, Carolyn Coffey, Susan M. Sawyer & Colin D. Mathers, 'Global burden of disease in young people aged 10-24 years: a systematic analysis', *The Lancet,* Vol. 377(9783), 2011, pp. 2093-2102.

3 Seena Fazel, Helen Doll & Niklas Långström, 'Mental disorders among adolescents in juvenile detention and correctional facilities: a systematic review and metaregression analysis of 25 surveys', *J Am Acad Child Adolesc Psychiatry,* Vol. 47(9), 2008, pp. 1010-1019.

4 Stuart A. Kinner, Kathryn Snow, Andrea L. Wirtz, Frederick L. Altice, Chris Beyrer & Kate Dolan, 'Age-specific global prevalence of hepatitis B, hepatitis C, HIV and tuberculosis among incarcerated people: A systematic review', *Journal of Adolescent Health,* Vol. 62(3), 2018, pp. 18-26.

5 Mina Fazel, Ruth V. Reed, Catherine Panter-Brick & Alan Stein, 'Mental health of displaced and refugee children resettled in high-income countries: risk and protective factors', *The Lancet,* Vol. 379(9812), 2012, pp. 266-282; Annette A. M. Gerritsen, Inge Bramsen, Walter Devillé, Loes H. M. van Willigen, Johannes E. Hovens & Henk M. van der Ploeg, 'Physical and mental health of Afghan, Iranian and Somali asylum seekers and refugees living in the Netherlands', *Social Psychiatry and Psychiatric Epidemiology,* Vol. 41(1), 2006, pp. 18-26.

6 John Pearn, 'Children and war', *Journal of Paediatrics and Child Health,* Vol. 39(3), 2003, pp. 166-172.

and other services may have compromised the health of entire populations, including children and adolescents.[7]

In some countries, children are sometimes permitted to **live with their incarcerated primary caregivers**, usually if it is considered to be in the best interests of the child.[8] Arrangements of this sort permit breastfeeding of infants, and promote the development of secure attachment and a prosocial bond between mother and child, which is thought to be mutually beneficial.[9] However, there is strong evidence that the children of parents who experience detention (irrespective of whether the child is also in custody) are at increased risk of a range of poor health outcomes including poor mental health, risky substance use, behavioural problems, and sexually transmitted infection.[10] There is also good evidence that the children of parents who commit crimes are at increased risk of poor health outcomes, whether or not the parent is incarcerated.[11] Imprisonment disproportionately affects the most socio-economically disadvantaged families and communities,[12] among whom the prevalence of poor health and social determinants of poor health is highest.[13] Therefore, irrespective of whether the child of an imprisoned parent experiences deprivation of liberty, one might expect their health to be worse than that of children whose parents have never been imprisoned. The poor health outcomes seen among children living with an incarcerated mother may be due to factors that preceded the parent's incarceration.

7 Constanze Quosh, Liyam Eloul & Rawan Ajlani, 'Mental health of refugees and displaced persons in Syria and surrounding countries: a systematic review', *Intervention*, Vol. 11(3), 2013, pp. 276-94; Mazen Kherallah, Tayeb Alahfez, Zaher Sahloul, Khaldoun D. Eddin & Ghyath Jamil, 'Health care in Syria before and during the crisis', *Avicenna Journal of Medicine,* Vol. 2(3), 2012, p. 51.

8 UN Office on Drugs and Crime, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules')*, A/RES/65/229, 6 October 2010, p. 17.

9 Mary W. Byrne, Lorie S. Goshin & Sarah S. Joestl, 'Intergenerational transmission of attachment for infants raised in a prison nursery', *Attachment & Human Development,* Vol. 12(4), 2010, pp. 375-93; Michelle Sleed, Tessa Baradon & Peter Fonagy, 'New Beginnings for mothers and babies in prison: A cluster randomized controlled trial', *Attachment & Human Development,* Vol. 15(4), 2013, pp. 349-367.

10 Michael E. Roettger, Raymond R. Swisher, Danielle C. Kuhl & Jorge Chavez, 'Paternal incarceration and trajectories of marijuana and other illegal drug use from adolescence into young adulthood: evidence from longitudinal panels of males and females in the United States', *Addiction,* Vol. 106(1), 2010, pp. 121-132; Mohammad R. Hayatbakhsh, Stuart A. Kinner S, Konrad Jamrozik, Jake M. Najman & Abdullah A. Mamun, 'Maternal partner criminality and cannabis use in young adulthood: Prospective study', *Australian and New Zealand Journal of Psychiatry,* Vol. 41(6), 2007, pp. 546-553; Stuart A. Kinner, Rosa Alati, Jackob M. Najman & Gail M. Williams, 'Does paternal arrest and imprisonment lead to child behaviour problems and substance use? A longitudinal analysis', *Journal of Child Psychology and Psychiatry,* Vol. 48(11), 2007, pp. 1148-1156; Joseph Murray, David P. Farrington & Ivana Sekol, 'Children's Antisocial Behavior, Mental Health, Drug Use, and Educational Performance After Parental Incarceration: A Systematic Review and Meta-Analysis', *Psychological Bulletin,* Vol. 138(2), 2012, pp. 175-210; Gianna T. Le, Julianna Deardorff, Maureen Lahiff & Kim G. Harley, 'Intergenerational Associations Between Parental Incarceration and Children's Sexual Risk Taking in Young Adulthood', *Journal of Adolescent Health,* Vol. 64(3), 2019, pp. 398-404.

11 Tyson Whitten, Melanie Burton, Stacy Tzoumakis & Kimberlie Dean, 'Parental Offending and Child Physical Health, Mental Health, and Drug Use Outcomes: A Systematic Literature Review', *Journal of Child and Family Studies,* Vol. 28(5), 2019, pp. 1155-1168.

12 Christopher Wildeman, 'Parental imprisonment, the prison boom, and the concentration of childhood disadvantage', *Demography*, Vol. 46(2), 2009, pp. 265-80; Bruce Western, Becky Kleykamp & Jake Rosenfeld, 'Crime, Punishment, and American Inequality', June 2003, Available at https://pdfs.semanticscholar.org/1fed/4fe0f5e826abb2149eeac797aad4263461ad.pdf (accessed 1 August 2019).

13 Michael Marmot, 'Social determinants of health inequalities', *The Lancet,* Vol. 365(9464), 2005, pp. 1099-1104; Michael Marmot, 'Inclusion health: addressing the causes of the causes', *The Lancet,* Vol. 391(10117), 2017, pp. 186-188.

Similarly, children held in **institutional care** typically come disproportionately from the most socio-economically disadvantaged strata of society[14] and, as such, are likely to suffer disproportionately from health conditions that are more common among disadvantaged groups. These health risks may be compounded by the reasons for the child being in institutional care: for example, where children are in institutional care in relation to experiences of physical, emotional or sexual abuse, the trauma associated with those experiences may increase the risk of mental health problems.[15] Children who have been homeless or otherwise suffered neglect prior to entering institutional care may have had limited access to healthcare including vaccinations, and inadequate nutrition, potentially increasing the risk of both communicable and non-communicable disease.[16]

Children deprived of liberty for notionally therapeutic reasons (e.g., in relation to acute mental illness) by definition suffer from compromised health. However, given the tendency for health conditions to co-occur (e.g., poor mental health increases the risk of obesity),[17] it is important to consider the overall health status of children deprived of liberty in these settings, not only the health condition that precipitated their deprivation of liberty.

1.1 The Impact of Deprivation of Liberty on Health

The concentration of ill health in places where children are deprived of liberty underscores the salience of another important question: **what is the *impact* of deprivation of liberty on health?** In addition to the human rights implications, considered in other chapters of this Study, there are good reasons to suspect that deprivation of liberty might have an adverse impact on the health of children. First, deprivation of liberty is an inherently distressing, potentially traumatic experience and, as such, may have adverse impacts on mental

14 Fred Wulczyn, Robert Gibbons, Lonnie Snowden & Bridgette Lery, 'Poverty, social disadvantage, and the black/white placement gap', *Children and Youth Services Review,* Vol. 35(1), 2013, pp. 65-74; Richard Barth, Judy Wildfire & Rebecca L. Green, 'Placement Into Foster Care and the Interplay of Urbanicity, Child Behavior Problems, and Poverty', *American Journal of Orthopsychiatry,* Vol. 76(3), 2006, pp. 358-66; Lumos, 'Children in Institutions: The Global Picture', 1 January 2017, Available at https://www.wearelumos.org/resources/children-institutions-global-picture/ (Accessed 1 August 2019).

15 Rosana E. Norman, Munkhtsetseg Byambaa M, Rumna De, Alexander Butchart, James Scott & Theo Vos, 'The Long-Term Health Consequences of Child Physical Abuse, Emotional Abuse, and Neglect: A Systematic Review and Meta-Analysis', *PLOS Medicine,* Vol. 9(11), 2012, p.e.1001349.

16 Jennifer Edidin, Zoe Ganim, Scott J. Hunter & Niranjan S. Karnik, 'The Mental and Physical Health of Homeless Youth: A Literature Review', *Child Psychiatry & Human Development,* Vol. 43(3), 2012, pp. 354-375; Angela L. Hudson, Adeline Nyamathi, Barbara Greengold, Alexandra Slagle, Deborah Koniak-Griffin, Farimaz Khalilifard & Daniel Getzoff, 'Health-seeking challenges among homeless youth', *Nursing research,* Vol. 59(3), 2010, pp. 212-218.

17 Merrill Singer, Nicola Bulled, Bayla Ostrach & Emily Mendenhall, 'Syndemics and the biosocial conception of health', *The Lancet.* Vol. 389(10072), 2017, pp. 941-950; Floriana S. Luppino, Leonore M. de Wit, Paul F. Bouvy, Theo Stijnen, Pim Cuijpers, Brenda W. J. H. Penninx & Frans G. Zitman, 'Overweight, obesity, and depression: A systematic review and meta-analysis of longitudinal studies', *Archives of General Psychiatry,* Vol. 67(3), 2010, pp. 220-229; Genevieve Gariepy, D. Nitka & N. Schmitz, 'The association between obesity and anxiety disorders in the population: a systematic review and meta-analysis' *International Journal Of Obesity,* Vol. 34, 2009, pp. 407-419.

health.[18] Second, the particular circumstances in which children are deprived of liberty may be harmful to health. For example, exposure to unsanitary conditions in justice-related detention may increase the risk of infection; concentration of people with infectious diseases such as tuberculosis and HIV in congregate settings such as immigration detention centres may promote the spread of infection; restrictions on movement and physical activity may adversely impact on physical development and increase the risk of obesity; inadequate diet may result in malnutrition; and experiences of trauma due to solitary confinement, abuse or neglect may produce or compound mental health problems.[19]

However, there are also some reasons to suspect that deprivation of liberty might be associated with improvements in some aspects of health, at least for some children, in some settings. Where children are deprived of liberty for therapeutic reasons, for example in response to acute mental illness or suicidal behaviour, appropriate psychiatric treatment in a least restrictive environment can be beneficial,[20] although the evidence regarding when inpatient mental health care is most appropriate for children and adolescents is limited.[21] In the context of extreme poverty and homelessness, children taken into institutional care may benefit from safe shelter, improved nutrition, and improved access to appropriate healthcare. Detention within the child justice system is, at least in most settings, inherently punitive, but even here there are some potentially positive health outcomes, such as delivery of overdue vaccinations,[22] diagnosis and treatment of communicable diseases,[23] and addressing social determinants of health through education and linkage to housing

18 Nicky Stanley, Siân Oram, Sharon Jakobowitz, Joanne Westwood, Rohan Borschmann, Cathy Zimmerman & Louise M. Howard C, 'The health needs and healthcare experiences of young people trafficked into the UK', *Child Abuse and Neglect,* Vol. 59, 2016, pp. 100-110.

19 Steven I. McLaughlin, Philip R. Spradling, Daniel Drociuk, Renée Ridzon, Carol Pozsik & Ida M. Onorato, 'Extensive transmission of Mycobacterium tuberculosis among congregated, HIV-infected prison inmates in South Carolina, United States', *The International Journal of Tuberculosis and Lung Disease,* Vol. 7(7), 2003, pp. 665-672; WHO, WHO Policy on TB Infection Control in Health-Care Facilities, Congregate Settings and Households, WHO/HTM/TB/2009.419, 2009; Kevin Whitley & John S. Rozel, 'Mental Health Care of Detained Youth and Solitary Confinement and Restraint Within Juvenile Detention Facilities', *Child and Adolescent Psychiatric Clinics*, Vol. 25(1), 2016, pp. 71-80.

20 Heather J. Hair, 'Outcomes for Children and Adolescents After Residential Treatment: A Review of Research from 1993 to 2003', *Journal of Child and Family Studies,* Vol. 14(4), 2005, pp. 551-575; Marije Valenkamp, Kathleen Delaney & Fop Verheij, 'Reducing Seclusion and Restraint During Child and Adolescent Inpatient Treatment: Still an Underdeveloped Area of Research', *Journal of Child and Adolescent Psychiatric Nursing,* Vol. 27(4), 2014, pp. 169-174.

21 Devon Indig, Craig Gear & Ann York, 'The role of inpatient care for children and adolescents with moderate-to-severe mental disorders: an Evidence Check rapid review brokered by the Sax Institute for the NSW Ministry of Health, September 2017, Available at https://www.saxinstitute.org.au/wp-content/uploads/Inpatient-care-for-children-and-adolescents-with-moderate-to-severe-ment....pdf (Accessed 2 August 2019).

22 Emilien Jeannot, Tina Huber, Alejandra Casillas, Hans Wolff & Laurent Getaz, 'Immunisation coverage among adolescents in a Swiss juvenile correctional facility', *Acta Paediatrica,* 2016, pp. 1-3; Gregory L. Gaskin, Jason M. Glanz & Ingrid A. Binswanger, Arash Anoshiravani, 'Immunization Coverage Among Juvenile Justice Detainees', *Journal of Correctional Health Care,* Vol. 21(3), 2015, pp. 265-275.

23 David J. Templeton, 'Sexually transmitted infection and blood-borne virus screening in juvenile correctional facilities: A review of the literature and recommendations for Australian centres', *Journal of Clinical Forensic Medicine,* Vol. 13(1), 2006, pp. 30-36. Steven Belenko, Richard Dembo, Matthew Rollie, Kristina Childs & Christopher Salvatore, 'Detecting, preventing, and treating sexually transmitted diseases among adolescent arrestees: An unmet public health need', *American Journal of Public Health,* Vol. 99(6), 2009, pp. 1032-1041.

services on release.[24] Such benefits, to the extent that they are realised, are contingent on the quality of care in places of detention, and must be sustained after release from detention to result in any long-term health gains. Given that any such health benefits would occur in the context of deprivation of liberty, they would be most appropriately characterised as 'regrettable' public health opportunities at best.

Understanding the impact of deprivation of liberty on health is complicated by the fact that, as discussed above, it is likely that many children who experience deprivation of liberty are characterised by pre-existing health problems. As such, evidence of a high prevalence of health problems among children deprived of liberty is not, in and of itself, sufficient evidence to infer a causal relationship. Similarly, although evidence of poor health status among young people who have previously been deprived of liberty may indicate that this experience adversely impacted their health, it is also possible that their health was poor before they were deprived of liberty, and that their experience of deprivation of liberty simply failed to adequately address their unmet health needs. This critical methodological issue, which epidemiologists call 'confounding by indication', requires careful and rigorous research to unpack.

Another complicating factor is that health is not a unitary concept. Although health problems tend to co-occur in marginalised groups, sometimes in a syndemic fashion,[25] exposure to deprivation of liberty could conceivably have an adverse impact on some health indicators, and a favourable impact on others. For example, children in justice-related detention may be traumatised by experiences of solitary confinement, assault or other abuses;[26] but at the same time benefit from vaccination or treatment for infectious diseases.[27] According to the World Health Organization (WHO), health is 'a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity'.[28] A comprehensive understanding of the impact of deprivation of liberty on the health of children and adolescents must consider all of these elements.

24 Joseph C. Gagnon, 'Making the Right Turn: A Research Update on Improving Transition Outcomes among Youth Involved in the Juvenile Corrections System', *National Collaborative on Workforce and Disability: Research Brief,* Issue 3, 2018, pp. 1-28.

25 Marlene M. Eisenberg & Michael B. Blank, 'The syndemic of the triply diagnosed: HIV positives with mental illness and substance abuse or dependence', *Clin Res HIV/AIDS*, Vol. 1, 2014, pp. 1006; Cf. Singer, *op. cit.*, p. 4; Gabriel J. Culbert, Veena Pillai, Joseph Bick, Haider A. Al-Darraji, Jeffrey A. Wickersham, Martin P. Wegman, Alexander R. Bazazi, Enrico Ferro, Michael Copenhaver, Adeeba Kamarulzaman & Frederick L. Altice, 'Confronting the HIV, Tuberculosis, Addiction, and Incarceration Syndemic in Southeast Asia: Lessons Learned from Malaysia' *Journal of Neuroimmune Pharmacology,* Vol. 11(3), 2016, pp. 446-455.

26 Cf. Whitley, *op. cit.*, p. 5.

27 Cf. Templeton, *op. cit.*, p. 5; Belenko, *op. cit.*, p. 5.

28 World Health Organisation, *Constitution of the World Health Organisation,* 7 April 1948, Available at http://apps.who.int/gb/bd/PDF/bd47/EN/constitution-en.pdf?ua=1 (accessed 2 August 2019).

1.2 Aims

Recognising that the health of children deprived of liberty is likely to be poor, that evidence on the health of these young people has never been summarised at the global level, and that the impact of deprivation of liberty on the health of children is currently not well understood, the aims of this Study were to:

1. undertake a rapid, global review of what is known about the health of children deprived of liberty in diverse settings;
2. review and consider the evidence regarding the impact of deprivation of liberty on the health of young people;
3. develop evidence-informed recommendations to maximise the health of children at risk of experiencing deprivation of liberty; and
4. identify priority areas for future research regarding the health of children deprived of liberty.

A Note on Terminology

In this chapter we refer to children, adolescents, and 'young people'. The definitions of these terms are not universally agreed. The World Health Organization (WHO) defines those aged 10-19 years as adolescents, and those aged 15-24 as young people. The Convention on the Rights of the Child (1989) defines anyone under 18 years of age as a child, and in many countries the legal age of majority is 18 years. The recent *Lancet Commission on Adolescent Health and Wellbeing*[29] defined ages 10-14 as early adolescence, 15-19 as late adolescence, and 20-24 as young adulthood. Consistent with what is known about adolescent growth and development, there is an emerging view that the definition of adolescence should be expanded to ages 10-24.[30] In some countries, people aged up to and including 25 years are considered young people. In the interests of brevity and consistency with the overall Study, in this chapter we generally refer to those aged ≤19 years as 'children and adolescents', and those aged ≤25 years as 'young people'.

29 George C. Patton, Susan M. Sawyer, John S. Santelli, David A. Ross, Rima Afifi, Nicholas B. Allen, Monika Arora, Peter Azzopardi, Wendy Baldwin & Christopher Bonell, 'Our future: a Lancet commission on adolescent health and wellbeing', *The Lancet*, Vol. 387(10036), 2016, pp. 2423-2478.

30 Susan M. Sawyer, Peter S. Azzopardi, Dakshitha Wickremarathne & George C. Patton, *'The age of adolescence', The Lancet Child & Adolescent Health*, Vol. 2(3), 2018, pp. 223-228.

2. Method

Our literature search had two components:

Part A was undertaken as part of a scoping review of the health of children deprived of liberty in the administration of justice (hereafter referred to as 'justice-related detention').

Part B was a rapid review of the health of children deprived of liberty

1) for migration-related reasons,
2) for protection or educational reasons (hereafter referred to as 'institutional care'),
3) for notionally therapeutic reasons,
4) in the context of armed conflict or on national security grounds, or
5) living in prison with a parent.

All reviews were global in scope, considered publications in any language, and included articles published from 1980 onwards.

2.1 Part A: Scoping Review – Justice-related Detention

This scoping review was conducted in accordance with Preferred Reporting Items for Systematic Reviews and Meta-Analyses Extension for Scoping Reviews (PRISMA-ScR) guidelines.[31] The protocol for this review was registered in 2016 with the PROSPERO International Prospective Register of Systematic Reviews (#CRD42016041392).

a. Search Strategy and Information Sources

We conducted a systematic search to identify literature on the health of children in justice-related detention. We searched 11 electronic databases: Embase, PsycINFO, ERIC, PubMed, Web of Science, CINCH, Global Health, The Cochrane Database of Systematic Reviews, the Campbell Library, the National Criminal Justice Reference System Abstract Database, and Google Scholar – using variants and combinations of search terms relating to both justice-related detention and physical, mental, sexual, oral, infectious, and neurocognitive health conditions (See Appendix). All databases were searched from 1980 until February 2017 and this was updated by a rapid review in June 2018. We scrutinised the reference lists of

31 Andrea C. Tricco, Erin Lillie, Wasifa Zarin, Kelly K. O'Brien, Heather Colquhoun, Danielle Levac, David Moher, Micah D. J. Peters, Tanya Horsley, Laura Weeks, Susanne Hempel, Elie A. Akl, Christine Chang, Jessie McGowan, Lesley Stewart, Lisa Hartling, Adrian Aldcroft, Michael G. Wilson, Chantelle Garritty, Simon Lewin, Christina M. Godfrey, Marilyn T. Macdonald, Etienne V. Langlois, Karla Soares-Weiser, Jo Moriarty, Tammy Clifford, ÖzgeTunçalp & Sharon E. Straus, 'PRISMA extension for scoping reviews (PRISMA-ScR): Checklist and explanation', *Annals of Internal Medicine,* Vol. 169(7), 2018, pp. 467-473.

published review articles to locate additional relevant publications not identified during the database searches. The authors' professional networks were also used to identify further publications.

b. Inclusion and Exclusion Criteria

Records published from 1980 onwards were potentially eligible for inclusion. Publication format was limited to peer-reviewed journal articles, including all types of review publications (narrative, systematic, meta-analysis). We included publications from any country and in any language. Publications were deemed eligible for inclusion if participants had been deprived of liberty in the administration of justice. As not all countries have a separate child justice system and the age cut-off for justice-related youth detention varies between countries, publications relating to children (aged ≤19 years) under the supervision of adult correctional systems were included, if age-specific findings were available. Publications where participants were aged ≤19 years at the time they were first deprived of liberty, and that reported the prevalence of at least one health outcome, were eligible for inclusion.

Publications were excluded if they reported on health outcomes in selected samples only (e.g., specific categories of detainees, or those referred to healthcare). Publications that reported knowledge of health risk behaviours or intention to engage in health-protective behaviours, but did not report on an actual health outcome, were excluded.

c. Publication Selection

Search results were imported into EndNote reference management software and duplicates were deleted using a standard function. Title and abstract screening was conducted independently by three researchers. Full text review of the remaining publications was then conducted independently by three researchers and reference lists of potentially relevant publications were manually searched. Uncertainty regarding whether publications met the inclusion criteria were resolved through discussion among the researchers. In instances when the full text of potentially relevant publications could not be located, two attempts were made to contact the author(s) via email to request a copy.

d. Quality Assessment

The Joanna Briggs Institute Critical Appraisal Checklist for Prevalence Studies[32] was used to assess the methodological quality of all original publications and to determine the extent to which they addressed the possibility of bias in study design, conduct and analysis. Three researchers independently assessed each publication. Again, any uncertainty regarding the quality of publications was resolved through discussion among the researchers.

2.2 Part B: Rapid Review – Deprivation of Liberty in Other Settings

a. Search Strategy and Information Sources

We conducted a rapid review examining the health of children who have experienced deprivation of liberty 1) for migration-related reasons, 2) in institutional care, 3) for therapeutic reasons, 4) in the context of armed conflict or on national security grounds, or 5) living in prison with a parent. Systematic searches were conducted in September 2018 in two of the most comprehensive and extensive medical and health science databases: Embase and MEDLINE.[33] Combinations of key search terms and subject headings relating to children (e.g., child* or adolescen* or youth*), health (e.g. disease* or mental or malnourish* or disabilit*), deprivation of liberty (e.g., detention or confine* or internment or institution*) and specific deprivation of liberty settings (e.g., refugee*; co-detain*; orphan*; war; terror*) were used (Annex 2.1 and 2.2). Searches were limited to records published from 1980 to ensure that the review focused on contemporary evidence. The search strategy was developed in consultation with a research librarian and content experts. Records published in languages other than English were translated.

32 JBI, *The Joanna Briggs Institute Critical Appraisal tools for use in JBI Systematic Reviews: Checklist for Prevalence Studies*, Joanna Briggs Institute, 2017, Available at https://joannabriggs.org/critical_appraisal_tools (accessed 19 November 2018).

33 Joint Information Systems Committee, *Why You Need Embase and Ovid MEDLINE:* n.d., Available at https://www.jiscmail.ac.uk/cgi-bin/webadmin?A3=ind1209&L=LIS-WMNET&E=base64&P=3495725&B=-----_%3D_NextPart_001_01CD966C.4DF1DB8D&T=application%2Fpdf;%20name=%22Why%20You%20Need%20Embase%20and%20MEDLINE.pdf%22&N=Why%20You%20Need%20Embase%20and%20MEDLINE.pdf (accessed 19 November 2018).

b. Inclusion and Exclusion Criteria

Publications were deemed eligible for inclusion if the population of interest included young people (aged ≤25 years) in settings where they were deprived of liberty, or individuals (any age) who had experienced deprivation of liberty when they were aged 25 years or younger. Only publications examining the following settings were included:

- **Children deprived of liberty for migration-related reasons (e.g., immigration detention centers);**
- **Children deprived of liberty in institutional care for protection or educational reasons (e.g., orphanages);**
- **Children deprived of liberty for therapeutic reasons (e.g., psychiatric hospitals);**
- **Children deprived of liberty in the context of armed conflict or on national security grounds (e.g., prisoners of war); and**
- **Children living in prison with a parent (e.g., babies co-detained in prison with their mothers).**

We examined both the health of young people while deprived of liberty, and the potential health impacts of deprivation of liberty (e.g., developmental delays, impacts on mental health, injuries from being restrained). Quantitative and qualitative publications that reported one or more health outcomes were eligible for inclusion. Peer-reviewed journal articles and grey literature published from 1980 in any language were eligible for inclusion. No restrictions were placed on the quality of the publications as this rapid review aimed to produce an overview of what is currently known about the health of children deprived of liberty.

Publications about individuals aged >25 years at the time of deprivation of liberty, or that included both individuals aged >25 years and individuals aged 25 years or younger but did not stratify by age, were excluded. Similarly, publications that included young people who had and had not experienced deprivation of liberty, where findings were not disaggregated, were excluded. Deprivation of liberty in settings other than those listed above were also excluded. Publications that did not report at least one health outcome were excluded. Publications were also excluded if they reported knowledge of risky health behaviours (e.g., that needle sharing can spread blood-borne viruses) or intentions regarding health behaviours (e.g., wearing a condom at the next sexual encounter), but did not report on actual health behaviours or outcomes. Conference abstracts, case studies, and all records published before 1980 were excluded.

c. Publication Selection

Search results were imported into EndnoteX8, a reference management software, and duplicates were removed using a standard function. Titles and abstracts were first screened for potential eligibility, then full text review of the remaining publications was conducted independently by two researchers. The *a priori* inclusion and exclusion criteria described above were applied. Uncertainty regarding whether publications met the inclusion criteria were resolved through discussion among the authors. The included publications were categorised into one of the included deprivation of liberty settings: children deprived of liberty **1)** for migration-related reasons, **2)** in institutional care, **3)** in institutions for therapeutic reasons, **4)** in the context of armed conflict or on national security grounds, or **5)** living in prison with a parent.

2.3. Results

a. Publication Selection

Part A: Justice-related Detention

The initial search yielded 12,759 articles (12,238 from the original database search, 521 from the rapid update). This number was reduced to 7,765 after duplicates were removed. Of these, 6,692 articles were removed after title and abstract screening. The full texts of the remaining 1,073 articles were screened; of these, 803 were excluded and 270 (233 primary research, 37 reviews) met inclusion criteria. Studies were excluded during full text review for the following reasons: the sample included people aged over 19 years (n=120), the prevalence of the outcome of interest was not reported or could not be calculated (n=125), no outcome of interest was reported (n=119), the sample was selected (n=164), the sample had not experienced justice-related detention (n=145), the sample included both individuals who had and individuals who had not experienced justice-related detention, and the findings could not be disagreggated by detention status (n=72), the definition or the ascertainment of the outcome was poor (n=28), delinquency was self-reported by those in the sample (n=7), it was not possible to confirm whether the sample had experienced justice-related detention (n=3), the publication was not a journal article (n=18), or the full-text of the publication could not be located (n=2). The 233 primary research articles that met inclusion criteria were quality assessed, and of these 56 were excluded on the basis of quality. This left a total of **214 publications** (177 primary research, 37 reviews) for inclusion in the final analysis.

Part B: Health of Children Deprived of Liberty in Other Settings

The combined searches yielded 5,602 publications and 14 additional publications were identified through the authors' professional networks (Figure A2). After duplicates were removed, 3,519 publications were screened by title and abstract, resulting in 383 publications selected for full-text review. In the full-text review 166 studies were excluded for the following reasons: the sample included people aged over 25 years (n=19), no outcome of interest was reported (n=28), the sample had not experienced deprivation of liberty (n=26), the sample included individuals who had and had not experienced deprivation of liberty and the findings were not disaggregated (n=21), the publication focussed on justice-related detention (included in Part A, n=15), sample was the parents in prison, not the children themselves (e.g., the health of pregnant women in prison) (n=3), the design was a case study (n=6), study proposal (n=1), conference abstract/poster/proceedings (n=30), the full text could not be located (n=5) or could not be translated (n=12). This left **217 publications** that met our inclusion criteria and were categorised into the following deprivation of liberty settings: protective and therapeutic institutions (n = 163), migration detention (n = 31), armed conflict and national security (n = 12), and in prison with parents (n = 11). All included publications were published between 1980 and 2018.

A Rapid Literature Review on the Health of Children Deprived of Liberty

3. Results

3.1 The Health of Children in Justice-related Detention

Children who experience detention in the administration of justice constitute a large, marginalised, medically vulnerable population that is largely hidden from public view. More than 60,000 children experience justice-related detention each year in the **United States (US)** alone.[34] Young people who experience justice-related detention often do so within a life trajectory characterised by entrenched disadvantage, instability, abuse and neglect, and limited financial resources.[35] These social and structural drivers of justice-related detention overlap, to a large degree, with the determinants of health. Consistent with this, there is growing evidence that many children in justice-related detention experience complex, co-occurring health conditions and elevated rates of health-compromising behaviours, as discussed below. These include mental disorder[36] and substance dependence,[37] cognitive dysfunction and learning difficulties,[38] sexually-transmitted and blood-borne viral infections,[39,] self-harm and suicidal behaviour,[40] oral disease,[41] and chronic conditions such as asthma.[42] Health-compromising behaviours related to substance use, sexual experiences, and violence all contribute to this poorer health profile.[43] Children who experience justice-related detention have often under-utilised primary and preventive care in the community

34 Elizabeth S. Barnert, Raymond Perry & Robert E. Morris, 'Juvenile incarceration and health', *Academic pediatrics,* Vol. 16(2), 2016, pp. 99-109.

35 Ibid., p, 1; Mana Golzari, Stephen Hunt & Arash Anoshiravani, 'The health status of youth in juvenile detention facilities', *Journal of Adolescent Health,* Vol. 38(6), 2006, pp. 776-820.

36 Cf. Fazel (2008), *op. cit.*, p. 2; Robert F. Eme, 'Attention-Deficit/Hyperactivity Disorder and the Juvenile Justice System', *Journal of Forensic Psychology Practice*, Vol. 8(2), 2008, pp. 174-185.

37 Edward P. Mulvey, Carol A. Schubert & Alex Piquero, 'Pathways to Desistance - Final Technical Report', January 2014, Available at https://www.ncjrs.gov/pdffiles1/nij/grants/244689.pdf (accessed 02 August 2019).

38 Huw Williams, Nathan Hughes, W H. Williams, Prathiba Chitsabesan, Rebecca C. Walesby, Luke T. Mounce & Betony Clasby, 'The prevalence of traumatic brain injury among young offenders in custody: a systematic review', *Journal of head trauma rehabilitation,* Vol. 30(2), 2015, pp. 94-105.

39 Cf. Kinner (2018), *op. cit.*, p. 2.

40 Marquita L. Stokes, Kathleen P. McCoy, Karen M. Abram, Gayle R. Byck & Linda A. Teplin, 'Suicidal ideation and behavior in youth in the juvenile justice system: a review of the literature', *Journal of correctional health care,* Vol. 21(3), 2015, pp. 222-242.

41 Cf. Barnert (2016), *op. cit.*, p.10; Diego C. Oliveira, Fernanda M. Ferreira, Imara de Almeida Castro Morosini, Cassius C. Torres-Pereira, Saul M. Paiva & Fabian C. Fraiz, 'Impact of Oral Health Status on the Oral Health-Related Quality of Life of Brazilian Male Incarcerated Adolescents', *Oral health & preventive dentistry,* Vol. 13(5), 2015.

42 Cf. Fazel (2008), *op. cit.*, p. 2; Golzari, *op. cit.*, p. 10; Stuart A. Kinner, Louise Degenhardt, Carolyn Coffey, Susan M. Sawyer, Stephen Hearps & George C. Patton, 'Complex health needs in the youth justice system: A survey of community-based and custodial offenders', *Journal of Adolescent Health*, Vol. 54(5), 2014, pp. 521-526.

43 Cf. Barnert (2016), *op. cit.*, p.10.

prior to being detained,[44] such that detention often represents the first real opportunity to meaningfully identify their health needs and initiate coordinated care.

a. Mental Disorders

Children in justice-related detention have a markedly higher prevalence of mental disorder than their community peers.[45] It has been reported that two-thirds of detained boys and three-quarters of detained girls in the **US** meet the diagnostic criteria for at least one mental disorder,[46] with substance use disorders, behavioural disorders, and depression being the most prevalent.[47] Further, 27% of detained youth have a severe mental disorder warranting immediate treatment and approximately half receive psychotropic medication whilst detained.[48] The reported prevalence of anxiety disorders in justice-related detention has ranged from 3%-52% for boys and 18%-72% for girls. The reported prevalence of post-traumatic stress disorder (PTSD) has ranged from 0%-53% for boys and 14%-65% for girls. Mood disorders have also been found to be highly prevalent among young people in justice-related detention, with a reported prevalence of depression ranging from 10-15% for boys[49] and 20%-36% for girls.[50] A separate systematic review of the health needs of young

44 Karen A. Abram, Leah D. Paskar, Jason J. Washburn & Linda A. Teplin, 'Perceived Barriers to Mental Health Services Among Youths in Detention', *Journal of the American Academy of Child and Adolescent Psychiatry,* Vol. 47(3), 2008, pp. 301-308.

45 Linda A. Teplin, Karen M. Abram, Gary M. McClelland, Mina K. Dulcan & Amy A. Mericle, 'Psychiatric disorders in youth in juvenile detention, *Archives of general psychiatry,* Vol. 59(12), 2002, pp. 1133-1143; Linda A. Teplin, Karen A. Abram, Gary M. McClelland, Jason J. Washburn & Ann K. Pikus, 'Detecting mental disorder in juvenile detainees: who receives services', *American Journal of Public Health,* Vol. 95(10), 2005, pp. 1773-1780.

46 Cf. Barnert (2016), *op. cit.*, p.10.

47 Jennie L. Shufelt & Joseph J. Cocozza, *Youth with mental health disorders in the juvenile justice system: Results from a multi-state prevalence study,* National Center for Mental Health and Juvenile Justice Delmar, Available at https://www.unicef.org/tdad/usmentalhealthprevalence06(3).pdf (accessed 2 August 2019)

48 Cf. Barnert (2016), *op. cit.*, p. 10; Shufelt, *op. cit.*, p. 11.

49 Cf. Fazel, 2008, *op. cit.*, p. 2. See also: Ahmad Ghanizadeh, Saeed Nouri & Sumbal Nabi, 'Psychiatric problems and suicidal behaviour in incarcerated adolescents in the Islamic Republic of Iran', *Eastern Mediterranean health journal,* Vol. 18(4), 2012, p. 311; Johan Isaksson, Elena L. Grigorenko, Lars Oreland, Britt Af Klinteberg, Roman A. Koposov & Vladislav Ruchkin, 'Exploring possible association between DβH genotype (C1021T), early onset of conduct disorder and psychopathic traits in juvenile delinquents', *European archives of psychiatry and clinical neuroscience,* Vol. 266(8), 2016, pp. 771-773. Roman A. Koposov, Vladislav V. Ruchkin, Martin Eisemann & Pavel I. Sidorov, 'Alcohol abuse in Russian delinquent adolescents', *European child & adolescent psychiatry,* Vol. 14(5), 2005, pp. 254-261; Frank Lindblad, Johan Isaksson, Viktor Heiskala, Roman Koposov & Vladislav Ruchkin, 'Comorbidity and behavior characteristics of Russian male juvenile delinquents with ADHD and conduct disorder', Journal of attention disorders, 2015. Vladisslav Ruchkin, Roman Koposov, Robert Vermeiren & Mary Schwab-Stone, 'Psychopathology and age at onset of conduct problems in juvenile delinquents', *The Journal of clinical psychiatry,* 2003. Vladislav Ruchkin, Roman A. Koposov, Ai Koyanagi & Andrew Stickley, 'Suicidal behavior in juvenile delinquents: the role of ADHD and other comorbid psychiatric disorders', *Child Psychiatry & Human Development,* Vol. 48(5), 2017, pp. 691-698. Vladislav V. Ruchkin, Roman A. Koposov, Britt af Klinteberg, Lars Oreland & Elena L. Grigorenko, 'Platelet MAO-B, personality, and psychopathology', *Journal of Abnormal Psychology,* Vol. 114(3), 2005, p. 477. Yolisha Singh, John Kasinathan & Andrew Kennedy, 'Incarcerated youth mental and physical health: parity of esteem', *International Journal of Human Rights in Healthcare,* Vol. 10(3), 2017, pp. 203-212.

50 Cf. Fazel (2008), *op. cit.*, p. 2; Singh, *op. cit.*, p. 12; Teplin, *op. cit.*, p. 12; Cindy S. Lederman, Gayle A. Dakof, Maria A. Larrea & Hua Li, 'Characteristics of adolescent females in juvenile detention', *International Journal of Law and Psychiatry,* Vol. 27(4), 2004, pp. 321-337.

people in justice-related detention[51] reported a prevalence of psychosis of 2%. Importantly, mental disorders in detained children have been found to be highly comorbid. One US-based study of children in justice-related detention[52] found that 57% of detained girls and 46% of detained boys met the diagnostic criteria for two or more mental disorders, whilst a dual diagnosis of a comorbid mental disorder and substance use disorder was reported by 30% of girls and 20% of boys. Another systematic review[53] reported comorbid mental disorders to be more common among young detained girls than boys, with the prevalence ranging from 40%-100%.

b. Substance Use and Substance Use Disorders

Most young people detained in the child justice system report recently using illicit substances,[54] with the rates of substance use disorder (SUD) in detained young people considerably higher than among their community peers.[55] Established risk factors for illicit substance use – including maltreatment early in life, unstable and dysfunctional family environments, peer and family substance use, and brain injury – are more common among children who come into contact with the child justice system.[56] Illicit drug use inherently involves illegal behaviours (i.e. buying and possessing illicit drugs) and may promote involvement with an antisocial peer network which can reinforce negative social norms and opportunities to break the law. Further, the pharmacological effects of some substances, notably including alcohol and amphetamines, can increase the likelihood of involvement in violent and hostile behaviour.[57] Substance use can interfere with a young person's successful transition to adult roles, including educational attainment and workforce participation, which may increase the

51 Charlotte Lennox, 'The health needs of young people in prison', *Br Med Bull,* Vol. 112, 2014, pp. 17-25.

52 Karen M. Abram, Linda A. Teplin, Gary M. McClelland & Mina K. Dulcan, 'Comorbid psychiatric disorders in youth in juvenile detention', *Archives of general psychiatry,* Vol. 60(11), 2003, pp. 1097-1108.

53 Christopher J. Lennings, Dianna T. Kenny, John Howard, Anthony Arcuri & Liz Mackdacy, 'The relationship between substance abuse and delinquency in female adolescents in Australia', *Psychiatry, Psychology and Law.* Vol. 14(1), 2007, pp. 100-110.

54 Cf. Mulvey, *op. cit.*, p. 11.

55 Gary M. McClelland, Katherine S. Elkington, Linda A. Teplin & Karen A. Abram, 'Multiple substance use disorders in juvenile detainees', *Journal of the American Academy of Child & Adolescent Psychiatry,* Vol. 43(10), 2004, pp. 1215-1224; Linda A. Teplin, Katherine S. Elkington, Gary M. McClelland, Karen M. Abram, Amy A. Mericle & Jason J. Washburn, 'Major mental disorders, substance use disorders, comorbidity, and HIV-AIDS risk behaviors in juvenile detainees', *Psychiatric Services,* Vol. 56(7), 2005, pp. 823-828.

56 Rolf Loeber & David P. Farrington, 'Young children who commit crime: epidemiology, developmental origins, risk factors, early interventions, and policy implications', *Development and psychopathology,* Vol. 12(4), 2000, pp. 737-762.

57 Ira Sommers, Deborah Baskin & Arielle Baskin-Sommers, 'Methamphetamine use among young adults: Health and social consequences', *Addictive Behaviors,* Vol. 31(8), 2006, pp. 1469-1476; Amy Kirwan, Brendan Quinn, Rebecca Winter, Stuart A. Kinner, Paul Dietze & Mark Stoové, 'Correlates of property crime in a cohort of recently released prisoners with a history of injecting drug use', Harm *reduction journal,* Vol. 12(1), 2015, p. 23; Kelli A. Komro KA, Carolyn L. Williams, Jean L. Forster, Cheryl L. Perry, Kian Farbakhsh & Melissa H. Stigler, 'The Relationship Between Adolescent Alcohol Use and Delinquent and Violent Behaviors', *Journal of Child & Adolescent Substance Abuse,* Vol. 9(2), 2000, pp. 13-28.

likelihood of coming into contact with the child justice system.[58] There is growing evidence that early identification and treatment of SUD (particularly treatments that incorporate family members) can lead to reductions in cannabis use, alcohol consumption, and non-drug-related offending among justice-involved young people.[59] Recommendations for drug treatment embedded within justice-related detention settings include routine screening of all children to identify substance use problems as early as possible, family involvement in drug treatment, and continuation of drug treatment from detention into the community.[60] The Joint UNODC/WHO Programme on Drug Dependence Treatment and Care recognises that SUDs are primarily a health rather than a criminal justice concern and, in recognition of the reality that many people with SUDs are nevertheless subjected to criminal justice sanctions, recommends that the criminal justice system should collaborate closely with health and social services to facilitate treatment in the healthcare system during periods of incarceration.[61]

c. Communicable Diseases

Several studies have reported an elevated prevalence of many communicable diseases, sexually transmitted infections (STIs), and associated risk-taking behaviours among children in justice-related detention, when compared to their community peers.[62] A recent systematic review of blood-borne virus prevalence among young people in justice-related detention[63] reported estimates ranging from 0%–25% for hepatitis B virus (HBV) surface antigen, 0–71% for hepatitis C virus (HCV) antibodies, and 0%–16% for HIV infection. The reported prevalence of HIV was higher in studies from **African countries** (2%–16%) compared with those from other regions (0%–5%).[64] Other reviews have also noted a low HIV prevalence in studies of children in justice-related detention in high-income countries, despite early sexual debut and unsafe sex being commonly reported, highlighting important opportunities

58 Wayne D. Hall, George C. Patton, Emily Stockings, Megan Weier, Michael Lynskey, Katherine I. Morley & Louisa Degenhardt, 'Why young people's substance use matters for global health', *Lancet Psychiatry,* Vol. 3(3), 2016, pp. 265-279.

59 Laurie Chassin, George Knight, Delfino Vargas-Chanes, Sandra H. Losoya & Diana Naranjo, 'Substance Use Treatment Outcomes in a Sample of Male Serious Juvenile Offenders', *Journal of substance abuse treatment,* Vol. 36(2), 2009, pp. 183-194.

60 Models for Change Resource Center Partnership, *To Decrease Juvenile Offending, Make Effective Drug Treatment a Priority,* 2014, Available at https://www.pathwaysstudy.pitt.edu/documents/MacArthur%20Brief%20Make%20Effective%20Drug%20Treatment%20a%20Priority.pdf (accessed 2 August 2019).

61 UN Office on Drugs and Crime, *International Standards for the Treatment of Drug Use Disorders,* March 2017, p. 11.

62 Cf. Barnert (2016), *op. cit.*, p. 11; Teplin (2005), *op. cit.*, p. 13; Linda A. Teplin, Amy A. Mericle, Gary M. McClelland & Karen A. Abram, 'HIV and AIDS risk behaviors in juvenile detainees: Implications for public health policy', *American Journal of Public Health,* Vol. 93(6), 2003, pp. 906-912; Gary M. McClelland, Linda A. Teplin, Karen A. Abram & Naomi Jacobs, 'HIV and AIDS risk behaviors among female jail detainees: implications for public health policy', *American Journal of Public Health,* Vol. 92(5), 2002, pp. 818-825.

63 Cf. Kinner (2018), *op. cit.*, p. 2.

64 Ibid., p. 14.

for education and HIV prevention in justice-related detention.[65] Justice-related detention also provides an important opportunity for catch-up vaccination to protect against HBV and other communicable diseases.[66] Routine screening for chlamydia and gonorrhea for children in justice-related detention is recommended by the US Centres for Disease Control.[67] A systematic review of chlamydia and gonorrhoea prevalence among young people in justice-related detention in the **US** reported that 10%–33% of girls and 6%–14% of boys tested positive for chlamydia, and 5%–23% of girls and 1%–6% of boys tested positive for gonorrhea.[68] The high prevalence of chlamydia among young people in justice-related detention highlights the importance of STI screening in justice-related detention settings, which may also create opportunities for engagement on broader elements of sexual and reproductive health. Several studies have documented that a high proportion of detained adolescent girls have experienced childhood sexual abuse and intimate partner violence,[69] highlighting the need for trauma-informed approaches to sexual health (e.g., allowing self-collected specimens rather than pairing STI screening with gynaecological examinations)[70] in this population.

d. Neurodevelopmental Disorders

The prevalence of various neurodevelopmental disabilities among children in justice-related detention is consistently higher than in the general population.[71] Similar findings

65 Cf. Templeton, *op. cit.*, p. 5. See also: Paula K. Braverman, Pamela J. Murray, William P. Adelman, Cora C. Breuner, David A. Levine, Arik V. Marcell, Rebecca F. O' Brien, Loretta E. Gavin, Rachel J. Miller & Jorge L. Pinzon, B Shain, 'Health care for children and adolescents in the juvenile correctional care system', *Pediatrics*, Vol. 107(4), 2011, pp. 799-803.

66 European Centre for Disease Prevention and Control, European Monitoring Centre for Drugs and Drug Addiction, 'Public health guidance on prevention and control of blood-borne viruses in prison settings', 23 July 2018, Available at https://ecdc.europa.eu/en/publications-data/public-health-guidance-prevention-control-bloodborne-viruses-prison-settings (accessed 2 August 2019).

67 Kimberley A. Workowski & Gail A. Bolan, 'Sexually Transmitted Diseases Treatment Guidelines', *Morbidity and Mortality Weekly Report,* Vol. 64(RR-03), 2015, p. 1.

68 Cf. Belenko, *op. cit.*, p. 5.

69 Candice L. Odgers, Summer J. Robins & Michael A. Russell, 'Morbidity and Mortality Risk Among the "Forgotten Few": Why Are Girls in the Justice System in Such Poor Health?', *Law and Human Behavior,* Vol. 34(6), 2010, pp. 429-441; Laura F. Salazar, Richard A. Crosby & Ralph J. Diclemente, 'Exploring the mediating mechanism between gender-based violence and biologically confirmed Chlamydia among detained adolescent girls', *Violence Against Women*, Vol. 15(3), 2009, pp. 258-275.

70 Cynthia M. Holland-Hall, Harold C. Wiesenfeld & Pamela J. Murray, 'Self-collected vaginal swabs for the detection of multiple sexually transmitted infections in adolescent girls', *Journal of Pediatric and Adolescent Gynecology,* Vol. 15(5), 2002, pp. 307-313.

71 Leo Kroll, Justine Rothwell, D Bradley, P Shah, S Bailey & R Harrington, 'Mental health needs of boys in secure care for serious or persistent offending: a prospective, longitudinal study', *The Lancet,* Vol. 359(9322), 2002, pp. 1975-1979. Prathiba Chitsabesan, Leo Kroll, Sue Bailey, Cassandra Kenning, Stephanie Sneider, Wendy MacDonald & Lousie Theodosiou, 'Mental health needs of young offenders in custody and the community', *British Journal of Psychiatry,* Vol. 188(6), 2006, pp. 534-540. Victoria Herrington, 'Assessing the prevalence of intellectual disability among young male prisoners', *Journal of Intellectual Disability Research,* Vol. 53(5), 2009, pp. 397-410. Mark Allerton & Una Champion, 'NSW young people in custody health survey: a summary of some key findings', 2003, Available at https://www.justicehealth.nsw.gov.au/publications/ypichs.pdf (accessed 2 August 2019). Leigh Haysom, Devon Indig, Elizabeth Moore & Cadeyrn Gaskin, 'Intellectual disability in young people in custody in New South Wales, Australia–prevalence and markers', *Journal of Intellectual Disability Research*, Vol. 58(11), 2014, pp. 1004-1014.

have been reported with respect to communication impairments, with a majority of children in justice-related detention having some form of difficulty with language that significantly affects day-to-day functioning.[72] TBI are also common among children in justice-related detention, with one recent review[73] reporting that 32%-50% report having experienced a TBI resulting in loss of consciousness at some point in their childhood, compared to a prevalence of 5%-24% within the general population.[74] The prevalence of fetal alcohol spectrum disorder (FASD) is also higher among children in justice-related detention, with studies reporting a prevalence of 11%-36%,[75] compared to estimates of 2%–5% among children in **Western countries**.[76] Each of these studies reported particularly high rates among detained Indigenous children (19%-47%), indicating that FASD cannot be readily separated from complex issues of intergenerational disadvantage, poor access to healthcare, and risk of parental mental health difficulties.[77] The restricted focus on FASD in **North America** and **Australia** is indicative of the geographically uneven spread of research evidence regarding childhood neurodevelopmental disabilities. The vast majority of studies have been undertaken in **Australia**, **Canada**, the **UK** or the **US**, with little evidence available from low- and middle-income countries.

e. Self-Harm and Suicidal Behaviour

The incidence of self-harm and suicidal behaviour is higher among children in justice-related detention than among their community peers.[78] The reported prevalence of lifetime suicidal behaviour during justice-related detention ranges from 4%-23% and this increases

72 Ibid., p. 15.

73 Cf. Williams, *op. cit.*, p. 11.

74 Ibid., p. 15.

75 Carol Bower, Rochelle Watkins, Raewyn C. Mutch, Rhonda Marriott, Jacinta Freeman, Natalie R. Kippin, Bernadette Safe, Carmela Pestell, Candy S. C. Cheung & Helen Shield, 'Fetal alcohol spectrum disorder and youth justice: a prevalence study among young people sentenced to detention in *Western Australia', BMJ Open,* Vol. 8(2), 2018, pp. e019605.

76 Philip A. May, Phillip J. Gossage, Wendy O. Kalberg, Luther K. Robinson, David Buckley, Melanie Manning & Eugene H. Hoyme, 'Prevalence and epidemiologic characteristics of FASD from various research methods with an emphasis on recent in–school studies', *Developmental disabilities research reviews,* Vol. 15(3), 2009, pp. 176-192.

77 Naomi Adelson, 'The embodiment of inequity: Health disparities in Aboriginal Canada', *Canadian Journal of Public Health/Revue Canadienne de Sante'e Publique,* Vol. 96(2), 2005, pp. S45-S61.

78 Cf. Stokes, *op. cit.*, p. 11; Hygiea Casiano, Laurence Y. Katz, Daniel Globerman & Jitender Sareen, 'Suicide and Deliberate Self-injurious Behavior in Juvenile Correctional Facilities: A Review', *Journal of the Canadian Academy of Child and Adolescent Psychiatry,* Vol. 22(2), 2013, pp. 118-124; Rohan Borschmann, Carolyn Coffey, Paul Moran, Stephen Hearps, Louisa Degenhardt, Stuart A. Kinner & George C. Patton, 'Self-harm in young offenders', *Suicide and Life-Threatening Behavior,* Vol. 44(6), 2014, pp. 651-652; Lushan V. Hettiarachchi, Stuart A. Kinner, Holly Tibble & Rohan Borschmann, 'Self-harm among young people detained in the youth justice system in Sri Lanka', *International journal of environmental research and public health,* Vol. 15(2), 2018, p. 209; Stepahnie Shepherd, Benjamin Spivak, Rohan Borschmann, Stuart A. Kinner & Henning Hachtel, 'Correlates of self-harm and suicide attempts in justice-involved young people', PLOS One, Vol. 13(2), 2018, p. e0193172; Karen M. Abram, Jeanne Y. Choe, Jason J. Washburn, Linda A. Teplin, Devon C. King & Mina K. Dulcan, 'Suicidal ideation and behaviors among youths in juvenile detention', *Journal of the American Academy of Child & Adolescent Psychiatry,* Vol. 47(3), 2008, pp. 291-300.

to 6%-27% following release from detention. Research has indicated that stresses related to justice-related detention, separation from family and peers, abuse histories, substance use, mental health disorders, and impulsive personality traits contribute to the elevated suicide risk among young people in or previously in justice-related detention.[79] Youth who have experienced justice-related detention die by suicide at a rate more than four times greater than the general adolescent population.[80] Importantly, whilst suicide accounts for less than 1% of all deaths among children in justice-related detention,[81] the risk of suicide following release from this form of detention has been estimated to be two-to-nine times greater than that of community peers who have not experienced justice-related detention.[82]

f. Mortality

Young people who have experienced justice-related detention die at a rate that is orders of magnitude higher than that of their community peers, most often due to drug overdose, suicide, injury and violence.[83] In some settings, gang membership and substance use problems have been proposed as mediators for the heightened mortality risk seen in this population.[84]

79 Cf. Barnert (2016), *op. cit.*, p.10; Teplin (2002), *op. cit.*, p. 11; Paula Braverman & Robert Morris, 'The health of youth in the juvenile justice system', *Juvenile Justice: Advancing Research, Policy, and Practice,* 2011, pp. 44-67; Golzari, *op. cit.*, p. 10.

80 Cf. Barnert (2016), *op. cit.*, p.10; John M. Memory, 'Juvenile suicides in secure detention facilities: Correction of published rates', *Death Studies,* Vol. 13(5), 1989, pp. 455-463.

81 Catherine A. Gallagher & Adam Dobrin, 'Facility-level characteristics associated with serious suicide attempts and deaths from suicide in juvenile justice residential facilities', *Suicide & life-threatening behavior*, Vol. 36(3), 2006, pp. 363-75; Keith Hawton, Louise Linsell, Tunde Adeniji, Amir Sariaslan & Seena Fazel, 'Self-harm in prisons in England and Wales: an epidemiological study of prevalence, risk factors, clustering, and subsequent suicide', *The Lancet,* Vol. 383(9923), 2014, pp. 1147-1154; Linda A. Teplin, Gary M. McClelland, Karen A. Abram & Darinka Mileusnic, 'Early violent death among delinquent youth: a prospective longitudinal study', *Pediatrics*, Vol. 115(6), 2005, pp. 1586-1593.

82 Cf. Memory, *op. cit.*, p. 16; Hawton, *op. cit.*, p. 16; Catherine A. Gallagher & Adam Dobrin, 'Deaths in juvenile justice residential facilities', *The Journal of adolescent health,* Vol. 38(6), 2006, pp. 662-668; Doug Gray, Jennifer Achilles, Trisha Keller, David Tate, Lois Haggard, Robert Rolfs, Calvert Cazier, John Workman & William McMahon, 'Utah youth suicide study, phase I: government agency contact before death', *J Am Acad Child Adolesc Psychiatry,* Vol. 41(4), 2002, pp. 427-434; Carolyn Coffey, Friederike Veit, Rory Wolfe, Eileen Cini & George C. Patton, 'Mortality in young offenders: retrospective cohort study', *BMJ*, Vol. 326(7398), 2003, p. 1064.

83 Ibid., p. 16; Linda A. Teplin, Jessica A. Jakubowski, Karen A. Abram, Nichole D. Olson, Marquita L. Stokes & Leah J. Welty, 'Firearm homicide and other causes of death in delinquents: a 16-year prospective study', *Pediatrics*, Vol. 134(1), 2014, pp. 63-73; Stuart A. Kinner, Louisa Degenhardt, Carolyn Coffey, Stephen Hearps, Matthew Spittal, Susan M. Sawyer & George C. Patton, 'Substance use and risk of death in young offenders: A prospective data linkage study', *Drug and Alcohol Review,* Vol. 34(1), 2015, pp. 46-50; Linda A. Teplin, 'Death in Delinquents: A 16-Year Prospective Study of Risk of Premature Mortality', 2017 *AAAS Annual Meeting (February 16-20, 2017),* 2017; Cf. Teplin (2005), *op. cit.*, p. 16; Carolyn Coffey, Rory Wolfe, Andrew W. Lovett, Paul Moran, Eileen Cini & George C. Patton, 'Predicting death in young offenders: a retrospective cohort study', *Medical Journal of Australia,* Vol. 181(9), 2004, pp. 473-477.

84 Laurie Chassin, Alex R. Piquero, Sandra H. Losoya, Andre D. Mansion & Carol A. Schubert, 'Joint consideration of distal and proximal predictors of premature mortality among serious juvenile offenders', *Journal of Adolescent Health,* Vol. 52(6), 2013, pp. 689-696.

In the **US**, young people released from justice-related detention are at four-fold increased risk of death compared to the general adolescent population rate, with homicide accounting for more than two-thirds of all deaths.[85]

g. The Impact of Justice-related Detention on Health

As outlined above, there is considerable evidence documenting a history of poor physical and mental health among children in justice-related detention. However, justice-related detention is itself an important determinant of future health.[86] The available evidence regarding the longitudinal impacts of justice-related detention on health suggests that experiencing any period of detention during adolescence or young adulthood is associated with poorer general health,[87] severe functional limitations,[88] hypertension,[89] and a higher prevalence of overweight and obesity during adulthood.[90] Additionally, recent **US-based** research demonstrated that justice-related detention and incarceration are related to health in a dose-dependent fashion, noting that a longer cumulative duration of detention during adolescence and young adulthood was independently associated with poorer physical and mental health outcomes later in adulthood.[91] Proposed causal mechanisms include increased exposure to communicable diseases, trauma in detention facilities, physical or sexual traumas sustained in detention, and social barriers following release from detention relating to stigma and social isolation.[92] Justice-related detention also likely erodes mental health,[93] and may compound existing socioeconomic and psychosocial health risks in vulnerable populations.[94]

85 Cf. Barnert (2016), *op. cit.*, p. 10; Teplin (2014), *op. cit.*, p. 17; Teplin (2005), *op. cit.*, p. 16.

86 Cf. Barnert (2016), *op. cit.*, p. 10.

87 Michael Massoglia, 'Incarceration, health, and racial disparities in health', *Law & Society Review,* Vol. 42(2), 2008, pp. 275-306.

88 Jason Schnittker & John Andrea, 'Enduring stigma: the long-term effects of incarceration on health', *Journal of health and social behavior,* Vol. 48(2), 2007, pp. 115-130.

89 Michael Massoglia, 'Incarceration as exposure: the prison, infectious disease, and other stress-related illnesses', *Journal of health and social behavior,* Vol. 49(1), 2008, pp. 56-71.

90 Cf. Barnert (2016), *op. cit.*, p. 10; Brian Houle, 'The effect of incarceration on adult male BMI trajectories, USA, 1981–2006', *Journal of racial and ethnic health disparities,* Vol. 1(1), 2014, pp. 21-28.

91 Elizabeth S. Barnert, Rebecca R. Dudovitz, Bergen B. Nelson, Tumaini R. Coker, Christopher Biely, Ning Li & Paul J. Chung, 'How does incarcerating young people affect their adult health outcomes?', *Pediatrics*, Vol. 139(2), 2017, pp. e20162624.

92 Cf. Shufelt, *op. cit.*, p. 11; Coffey (2003), *op. cit.*, p. 17.

93 Bruce Western & Becky Pettit, 'Collateral costs: Incarceration's effect on economic mobility', 2010, Available at https://www.pewtrusts.org/en/research-and-analysis/reports/0001/01/01/collateral-costs (accessed on 2 August 2019).

94 Cf. Schnittker, *op. cit.*, p. 17; Barnert (2017), *op. cit.*, p. 18.

Most Common Health Problems of Children Deprived of Liberty in the Justice System

NEURODEVELOPMENTAL DISORDERS
- difficulty with language
- alcohol spectrum disorder
- traumatic brain injury

SUBSTANCE USE DISORDERS
- drug use
- alcohol consumption

MENTAL DISORDERS
- behavioural disorder
- depression and anxiety disorder
- post-traumatic stress disorder
- psychosis

SELF-HARM AND SUICIDAL BEHAVIOUR
caused by:
- separation from family and peers
- abuse
- substance use
- mental health disorders

MORTALITY
caused by:
- drug overdose
- suicide
- injury
- violence
- gang membership

COMMUNICABLE DISEASES
- blood-born viruses (hepatitis B, hepatitis C, HIV infections)
- sexually transmitted diseases

3.2 The Health of Children Living with their Mother in Prison

Our rapid review identified **10 studies** globally examining the health of children living with their mother in prison. Most of these were characterised by significant methodological limitations.

a. Mental Health and Cognitive Development

There is some evidence that children living with their mothers in prison are at increased risk of mental health problems and impaired cognitive development, although the methodological quality of most of that evidence is weak. A study of 27 children residing in a **Turkish** prison with their mothers reported that 27% screened positive for adjustment disorder, 12% for separation anxiety disorder, and 8% for conduct disorder.[95] One in three of these children screened positive for developmental delays.[96] A **Spanish** study of 127 children residing in prison with their mothers reported that their cognitive and motor development was comparable to that of children in the general population.[97] This study also found that children who received less stimulation exhibited poorer development after 18 months of age.[98] Another study, from **Argentina**, measured cognitive and language development in a sample of 68 children detained with their mothers and found that the average scores in the sample were slightly below the average of the general population, and that older children (who had spent more time in prison) had lower scores, suggesting a possible dose-response relationship between incarceration and impaired cognitive and language development.[99]

Fewer studies have considered the impact of having a child live with their incarcerated mother on subsequent mental health outcomes. One **US** study compared the mental health of 47 preschool-aged children who spent their first 1-18 months in a prison nursery that was implementing 'developmentally supportive' programming, with the mental health of children separated from their mothers in their infancy during her incarceration.[100] Children who spent their infancy in the prison nursery reported lower anxiety/depression scores

95 Meryem O. Kutuk, Ebru Altintas, Ali E. Tufan, Gulen Guler, Betul Aslan, Nurgul Aytan & Ozgur Kutuk, 'Developmental delays and psychiatric diagnoses are elevated in offspring staying in prisons with their mothers', *Scientific Reports*, Vol. 8(1), 2018, p. 1856.

96 Ibid., p. 18.

97 Jésus M. Jiménez & Jésus Palacios, 'When home is in jail: Child development in Spanish penitentiary units', *Infant and Child Development: An International Journal of Research and Practice*, Vol. 12(5), 2003, pp. 461-474.

98 Ibid, p. 18.

99 Horacio Lejarrag, Clemente Berardi, Susana Ortale, María M. Contreras, Adriana Sanjurjo, Celina Lejarraga, Cáceres Martinez Caceres & Lilian Rodriguez, 'Growth, development, social integration and parenting practices on children living with their mothers in prison', *Archivos Argentinos de Pediatria*, Vol. 109(6), 2011, pp. 485-491.

100 Lorie S. Goshin, Mary W. Byrne & Barbara Blanchard-Lewis, 'Preschool Outcomes of Children Who Lived as Infants in a Prison Nursery', *Prison Journal*, Vol. 94(2), 2014, pp. 139-158.

compared to those separated from their mothers.[101] The researchers argued that in spite of high levels of contextual risk in the post-release period, prison nursery co-residence could increase resilience to anxious/depressed behaviour problems in the preschool period, and that attachment security could be a protective factor.[102]

b. Infectious Disease

In a sample of 30 children residing in a **Sri Lankan** prison with their mothers, 13% had respiratory infections, 7% impetigo, 23% scabies, and 10% head lice.[103] Among 127 children born to incarcerated mothers and living with them in a **Spanish** prison, the prevalence of HIV and hepatitis (type unspecified) was 9% and 8% respectively.[104]

One retrospective cohort study conducted in **Brazil**, where children may reside with their incarcerated mothers for a period of six months to six years following birth, examined whether the prevalence of infectious disease and/or the incidence of mother-child transmission of disease differed for incarcerated and non-incarcerated women. The researchers examined differences in the estimated prevalence of mother-to-child transmission of syphilis, and the incidence of congenital syphilis, between non-incarcerated women and 104 women (with 109 children) incarcerated in Brazilian prisons. The prevalence of HIV was 6.6 times greater and syphilis 6.7 times greater in incarcerated women than in non-incarcerated women. Consistent with this, the estimated prevalence of mother-to-child transmission of syphilis was substantially higher in incarcerated women (67%) than in non-incarcerated women (37%),[105] and the incidence of congenital syphilis was markedly higher for living newborns born to incarcerated women (58.1 per 1,000) compared with those born to non-incarcerated women (4.6 per 1,000).[106] Compared with non-incarcerated women, incarcerated women started antenatal care later in their pregnancies and were less likely to have received an adequate number of consultations, or to have received HIV or syphilis testing during pregnancy.[107]

101 Lorie S. Goshin, Mary W. Byrne & Barbara Blanchard-Lewis, 'Preschool Outcomes of Children Who Lived as Infants in a Prison Nursery', *Prison Journal*, Vol. 94(2), 2014, pp. 139-158.

102 Ibid., p. 19.

103 Manouri P. Senanayake, Jithangi K. Arachchi & Pujitha Wickremasinghe, 'Children of imprisoned mothers', *Ceylon Med J*, Vol. 46(2), 2001, pp. 51-53.

104 Cf. Jiménez, *op. cit.*, p. 18.

105 Rosa M. S. M. Domingues, Maria D. C. P. Pereira, Barbara Ayres, Alexandra Roma Sánchez & Bernard Larouzé, 'Prevalence of syphilis and HIV infection during pregnancy in incarcerated women and the incidence of congenital syphilis in births in prison in Brazil', *Cad Saude Publica,* Vol. 33(11), 2017, pp. e00183616.

106 Ibid., p. 19.

107 Ibid., p. 19.

c. Oral Health

A **Sri Lankan** study of 30 children detained with their mothers reported a prevalence of dental caries of 7%.[108] Another cross-sectional study, conducted in the **United Arab Emirates (UAE)**, evaluated the oral health status of 128 children aged ≤6 years detained with their mothers in nine **UAE** prison nurseries, and compared this with the oral health status of non-detained children recruited from primary healthcare centres. There was no difference in the prevalence of dental caries between the groups of children, although in this study the prevalence in both groups was exceptionally high (>90%).[109] The children deprived of liberty were found to have poorer oral hygiene according to a standard clinical assessment (94%) compared with their non-detained counterparts (82%). The prevalence of gingivitis was also higher in detained children (59%) compared with non-detained children (31%).[110] Additionally, detained children exhibited higher treatment need and received less restorative treatment and care relative to children in the community.[111] This study also reported that the caregivers of the children experiencing incarceration had poor oral healthcare knowledge,[112] and suggested that this may explain why these children were not accessing oral healthcare available to them in prison.

3.3 The Health of Children Deprived of Liberty in the Context of Armed Conflict or National Security

Experiences of war, conflict or terrorism can lead to a complex range of injuries, disabilities and health conditions. Common consequences of armed conflict such as displacement from homes and communities, degradation and loss of basic services, and destruction of social, economic and cultural life often result in disruption and trauma.[113] Situations of armed conflict may also result in children being deprived of their liberty, including being detained by armed groups who may be state actors and/or non-State groups. For children, vulnerability may be exacerbated by separation from parents and peers, potentially due to the parents' death or internment. Children are maturing psychologically and, as such, may

108 Cf. Senanayake, *op. cit.*, p. 19.

109 Anas Al Salami, Manal Halabi, Manal Hussein & Mawlood Kowash, 'Oral health status of pre-school children of incarcerated mothers in United Arab Emirates prison nurseries and oral health knowledge and attitudes of their caregivers', *Eur Arch Paediatr Dent,* Vol. 13, p. 13.

110 Ibid., p. 20.

111 Ibid., p. 20.

112 Ibid., p. 20.

113 Rita Giacaman, Niveen M. Abu-Rmeileh, Abdullatif Husseini, Hana Saab & William Boyce, 'Humiliation: the invisible trauma of war for Palestinian youth', *Public Health,* Vol. 121(8), 2007, pp. 563-571; discussion pp. 72-77.

not fully comprehend the reasons for events whilst experiencing extreme emotions, such as being fearful when being tortured for information or being threatened with death for not complying with demands.[114]

In our rapid review of the literature we identified very few studies that looked specifically at the health of children deprived of liberty in the context of armed conflict or national security, or that explicitly considered the impact of such deprivation on subsequent health outcomes. As such, this chapter reflects the evidence available to us, which largely focuses on the health of children in the context of armed conflict, rather than those deprived of liberty in these settings specifically. Whilst some of the experiences discussed may take place in the context of deprivation of liberty, the studies we identified were not restricted to these contexts. This is an important gap in the literature.

In reviewing the available (albeit limited) literature, we identified underlying key themes across different forms of conflict (e.g., inter-state, civil, terror), geo-political areas, and time, that seem to be associated with the presence, severity and duration of mental health and disability outcomes experienced by children and adolescents in the context of armed conflict. These include: the dosage and chronicity of traumatic events[115]; degradation of support systems (including loss of family);[116] and humiliation induced by conflict and war-like situations.[117] It should also be noted that there is a related and nascent literature suggesting that chronic stress at key developmental periods may affect brain system development relevant to the 'fight/flight/freeze' response, resulting in stronger reactivity to threat and weaker emotional regulation.[118] This literature may be relevant when considering later behavioural problems in these children, such as hypervigilance for threat, which is a commonly-observed response in children exposed to armed conflict.

By definition, torture involves inflicting pain (mental or physical), potentially in order to extract information or compel behaviour; it may take the form of assault or direct deprivation of warmth, food or other necessities. The Special Rapporteur on Torture, on the basis of 18 fact-finding missions to States in all world regions, concluded that torture is a 'global phenomenon': 'In the vast majority of States, torture not only occurs in isolated cases, but is practised in a more regular, widespread and even systematic manner.'[119] We identified

114 Trudy M. Mooren & Rolf J. Kleber, 'The significance of experiences of war and migration in older age: Long-term consequences in child survivors from the Dutch East Indies', *International Psychogeriatrics,* Vol. 25(11), 2013, pp. 1783-1794.

115 Jan I. Kizilhan & Michael Noll-Hussong, 'Post-traumatic stress disorder among former Islamic State child soldiers in northern Iraq', *Br J Psychiatry,* Vol. 213(1), 2018, pp. 425-429.

116 Cf. Mooren, *op. cit.*, p. 20; Kizilhan, *op. cit.*, p. 21.

117 Cf. Mooren, *op. cit.*, p. 20.

118 Ryan J. Herringa, 'Trauma, PTSD, and the Developing Brain', *Current Psychiatry Reports,* Vol. 19(10), 2017, p. 69.

119 Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment* (M. Nowak), A/HRC/13/39, 9 February 2010, para. 68.

one narrative review that considered some of the health consequences of torture during political violence, civil unrest and war, for children.[120] The authors of this review summarised statements by the Foundation for the Protection of Children Injured by States of Exception (PIDEE), which supported more than 3,000 child victims of repression during the 1970s to 1990s in **Chile**. The authors reported that some children assisted by PIDEE had witnessed the beating and detention of family members, and/or were themselves tortured.[121] These children experienced long-term problems in cognition, sleep, and mood (e.g., irritability, crying). The authors also noted 415 cases of torture in the **Philippines** (1976 to 1995) where this pattern was mirrored; children experienced disrupted sleep (seemingly consistent with PTSD), apathy, helplessness, behavioural changes (e.g., increased aggression), and cognitive problems (poor memory and attention). In another case series, the authors summarised medical/photographic documentation of the effects of torture for 133 street children in **Guatemala** and **Honduras**. In addition to documented evidence of physical injuries such as bruises, lacerations, burns, or fractures, the authors noted that the most chronic consequence of torture for most was ongoing pain and psychophysiologic symptoms.[122]

Another potentially traumatising aspect of exposure to war and conflict is the experience of humiliation. In one study, researchers examined the impact of humiliation in war-like conditions on the health of 3,415 **Palestinian** children, using a survey adapted from the WHO Health Behaviour in School-Aged Children Survey.[123] They observed a dose-response relationship between the number of forms of humiliation experienced, and subjective health complaints (somatic symptoms), even after adjusting for sex, residence, and exposure to violence. The researchers also found that children in refugee camps reported more subjective health complaints than those living in villages.[124]

There are thought to be around 300,000 Children Associated with Armed Forces and Armed Groups (CAAFAG) worldwide.[125] A cross-sectional analysis of data from a survey of former child soldiers (FCS) in **Sierra Leone** (N=260; 89% male) between 2002 and 2004 identified a range of experiences of adversity and trauma. They were abducted on average at about 10 years of age and, although boys (42%) were more likely than girls (28%) to have been

120 José Quiroga, 'Torture in children', *Torture*, Vol. 19(2), 2009, pp. 66-87.

121 Ibid., p. 21.

122 Ibid., p. 21.

123 Candace Currie, Saoirse N. Gabhainn & Emmanuelle Godeau, 'The International HNCC. The Health Behaviour in School-aged Children: WHO Collaborative Cross-National (HBSC) Study: origins, concept, history and development 1982–2008', *International Journal of Public Health*, Vol. 54(2), 2009, pp. 131-139.

124 Cf. Giacaman, *op. cit.*, p. 20.

125 Teresa S. Betancourt, Ivelina I. Borisova, Marie de la Soudière & John Williamson, 'Sierra Leone's child soldiers: war exposures and mental health problems by gender', *The Journal of adolescent health: official publication of the Society for Adolescent Medicine*, Vol. 9(1), 2011, pp. 21-28.

trained as soldiers, boys and girls were equally likely to have been involved in injuring or killing others. These children reported high rates of exposure to distressing and traumatic events, with girls particularly likely to report having been raped (44% F, 5% M); many suffered beatings, torture and threats to life.[126] Levels of clinical anxiety and depression were high for both females (80%/72%) and males (52%/55%). Death of a parent was associated with symptoms of mood disorder. Two further studies have investigated the health and wellbeing of child soldiers compared to non-soldiers.[127] A cross-sectional study of 141 approximately fifteen year old FCS in **Nepal**, matched by age and gender with never-conscripted (NS) children, found that the FCS had higher levels of mental health problems than the NC children (depression 53% *vs*. 24%; anxiety 46% *vs*. 38%; PTSD 55% *vs*. 20%; general 'impairment' of functioning in day-to-day life 62% *vs*. 45%).[128] After adjusting for the level of trauma exposure, FCS were found to be 2.4 times more likely than NC children to be depressed; and 6.8 times more likely to have PTSD if they were girls, and 3.8 times more so for boys. These findings suggest that although the extent of exposure to trauma is an important driver of mental health problems in FCS, other aspects of the experience of war and conflict are also relevant.

Another study[129] explored the experiences of FCS held captive for at least three months between 2014 and 2017 by Islamic State in **Iraq** and **Syria**. Yazidi boys who were FCS (N=81) were compared with two groups of non-FCS refugee children who were Yazidi (N=32) and Muslim (N=31) boys from the same area.[130] All three groups were on average 12 years of age. Many participants from both FCS and refugee groups had witnessed killings, including of family members. A larger proportion of FCS children were identified as having mental health problems, compared to Yazidi and Muslim control groups (anxiety: 45% *vs*. 34% and 32%; somatoform: 49% *vs*. 28% and 25%; personality: 15% *vs*. 6% and 10%; somatic: 51% *vs*. 31% and 32%). The FCS also had significantly higher scores for PTSD and depression. Once again, these findings indicate that although 'trauma dosage' is important, the experiences of FCS contain elements over and above established concepts of trauma that may contribute to poor mental health.

126 Teresa S. Betancourt, Ivelina I. Borisova, Marie de la Soudière & John Williamson, 'Sierra Leone's child soldiers: war exposures and mental health problems by gender', The Journal of adolescent health: official publication of the Society for Adolescent Medicine, Vol. 9(1), 2011, pp. 22.

127 Cf. Kizilhan, *op. cit.*, p. 21; Brandon A. Kohrt, Mark J. D. Jordans, Wietse A. Tol, Rebecca A. Speckman, Sujen M. Maharjan, Carol M. Worthman & Ivan H. Komproe, 'Comparison of mental health between former child soldiers and children never conscripted by armed groups in Nepal', *JAMA*, Vol. 300(6), 2008, pp. 691-702.

128 Ibid., p. 22.

129 Cf. Kizilhan, *op. cit.*, p. 21.

130 Ibid., p. 21.

Findings from surveys can quantify the health-related experiences of FCS, but may not adequately characterise the complexity of their experiences. We identified one qualitative study of support staff in transit and training centres for FCS in the **Democratic Republic of Congo**. Based on semi-structured interviews with 11 staff, the authors identified key themes relevant to disability and poor mental health in FCS including: how the children had been forced to participate in atrocities against their will; had suffered catastrophic injuries such as amputated limbs; had behavioural problems including a tendency to aggression; addiction problems which often contributed to experiences of severe poverty; and were traumatised, reported feelings of sadness and hopelessness, and suicidal ideation.[131] Consistent with this, a recent narrative review concluded that disabilities and severe poverty are intricately linked for FCS – with each increasing risk of the other – and that both are risk factors for recruitment and abduction.[132] Indeed, such children may be extremely marginalised in their societies due to combined stigma and discrimination due to their impairments and their status as FCS.[133] This likely compounds their disadvantage, and makes them even more likely to be both distressed and at risk of being victims of future crimes, such as being forced into further violent criminal activity. It is clear that systems are needed to re-integrate affected children, to reduce distress and vulnerability to further exploitation.

The health and psychological effects of war and conflict can be very long lasting, particularly when there is significant 'dosage' of trauma experience. One study[134] compared the mental health of 255 child survivors of WWII in the former **Dutch East Indies** (DEI; now **Indonesia**) who had re-located to the **Netherlands**, with that of WWII child survivors in **Europe**, and other comparison groups. The DEI group had experienced more 'war situations' (e.g. wounding), internment and forced labour, and had higher levels of PTSD symptoms than the survivors of WWII in Europe. However, they also reported greater access to, and use of, psychosocial support groups, suggesting that some consideration had been made of their increased support needs. The DEI group had also experienced a greater degree of adversity, including family separation and humiliation. In a narrative review of the history of child refugee survivors of the Greek Civil War it was noted that many had health problems at the time (scabies, typhus, trachoma, malnutrition).[135] Although specific mental health and disability issues were not recorded, it was reported that children bore "psychological scar[s]" sixty years later.

131 Steinar Johannessen & Helge Holgersen, 'Former Child Soldiers' Problems and Needs: Congolese Experiences', *Qualitative Health Research*, Vol. 24(1), 2014, pp. 55-66.

132 Dustin Johnson & Shelly Whitman, 'Child soldiers and disability: gaps in knowledge and opportunities for change', *Third World Thematics: A TWQ Journal*, Vol. 1(3), 2016, pp. 307-320.

133 Ibid., p. 23.

134 Cf. Mooren, *op. cit.*, p. 20.

135 Leonidas Rempelakos, Effie Poulakou-Rebelakou & Dimitri Ploumpidis, 'Health care for refugee children during the Greek Civil War (1946-1949)', *Acta Med Hist Adriat*, Vol. 12(1), 2014, pp. 135-152.

3.4 The Health of Children in Immigration Detention

a. Mental Health

The majority of peer-reviewed and grey literature examining the health of children who have experienced immigration detention has focused on mental health[136] and has been conducted in high-income countries, frequently **Australia**.[137] There is little information available regarding the health status of children in detention that can be considered in isolation from the impact of immigration detention on health. This likely reflects the difficulties of accessing information in immigration detention settings, lack of data on the health of detained asylum seekers before detention, and the difficulty of meaningfully comparing the health situation of children in detention with those outside.[138]

Children in immigration detention are vulnerable to experiencing serious mental health disorders. A range of factors have been posited as contributing to psychological problems in children in immigration detention, including torture and trauma prior to arrival, the breakdown of families within detention, the length of detention and uncertainties about outcomes, and witnessing trauma within detention.[139] There is broad recognition that children in immigration detention are very likely to have been exposed to considerable levels of pre-detention trauma and that this is relevant to both their mental health in detention and their vulnerability to the effects of additional trauma in detention.[140]

We found no peer-reviewed studies that reliably measured the prevalence of mental health disorders among children in immigration detention. While precise prevalence estimates are difficult, efforts have been made to build an evidence base by way of observational reports by clinicians, which consistently indicate a high prevalence of serious disorders in detained children.

136 Cf. Fazel (2012), *op. cit.*, p. 2; Ruth V. Reed, Mina Fazel, Lynne Jones, Catherine Panter-Brick & Alan Stein, 'Mental health of displaced and refugee children resettled in low-income and middle-income countries: risk and protective factors', *The Lancet,* Vol. 379(9812), 2012, pp. 250-265; Katy Robjant, Rita Hassan & Cornelius Katona, 'Mental health implications of detaining asylum seekers: systematic review', *Br J Psychiatry,* Vol. 194(4), 2009, pp. 306-312; M. von Werthern, Katy Robjant, Z. Chui, R. Schon, L. Ottisova, Claire Mason & Cornelius Katona, 'The impact of immigration detention on mental health: a systematic review', *BMC Psychiatry,* Vol. 18(1), 2018, p. 382.

137 Cf. Fazel (2012), *op. cit.*, p. 2; Robjant, *op. cit.*, p. 23; von Werthern, *op. cit.*, p. 23.

138 Trang Thomas & Winnie Lau, *Psychological well being of child and adolescent refugee and asylum seekers: Overview of major research findings of the past ten years, 2002,* Available at https://www.humanrights.gov.au/our-work/psychological-well-being-child-and-adolescent-refugee-and-asylum-seekers (accessed 4 August 2019).

139 Ibid., p. 24; Australian Human Rights Commission (AHRC), *A last resort? National Inquiry into Children in Immigration Detention,* 1 April 2004, pp. 1-925; Terry Hutchinson & Fiona Martin, 'Australia's human rights obligations relating to the mental health of refugee children in detention', *Int J Law Psychiatry,* Vol. 27(6), 2004, pp. 529-547.

140 Laura N. C. Wood, 'Impact of punitive immigration policies, parent-child separation and child detention on the mental health and development of children', *BMJ Paediatrics Open,* Vol. 2(1), 2008, p. e.000338.

Comprehensive collections of observations by clinicians were documented in the evidence to two large public inquiries into children in immigration detention in **Australia** in 2004 and 2014. These inquiries also considered evidence provided by children and their families, detention centre medical staff and other interested parties, and reviewed primary documents from Government departments. One of the key findings from the 2004 report was that children in immigration detention for long periods of time are at high risk of serious mental health-related harm.[141] This inquiry found that there were high levels of serious development delays, and of depression, anxiety, PTSD and self-harm among children in immigration detention. The report did not seek to estimate prevalence as it noted the difficulties in doing this with any degree of accuracy.

The lack of baseline data regarding the mental health of children in detention was identified as a significant problem in the 2014 **Australian** inquiry.[142] In the Australian context, this was associated with the use in detention of different clinical assessment tools to those used in routine clinical practice in the community. This was remedied in 2014, which enabled the first direct comparisons to be made of clinical assessments. These assessments, of 243 children aged 5 to 17 years in immigration detention centres, were undertaken by detention medical staff from April 2014 to June 2014 and reviewed by the 2014 inquiry. This revealed that 34% of children had mental health disorders comparable in seriousness to children referred to hospital-based child mental health out-patient services for psychiatric treatment. The inquiry noted that fewer than 2% of children in the Australian population had mental health disorders at this level.

Two studies[143] that reanalysed **Australian** Government data from the 2014 inquiry[144] may provide the most reliable peer-reviewed data on the prevalence of mental health disorders in this population. However, synthesis of findings across these studies is difficult as each appears to have a different sub-set of the original Government data.[145] Mares and colleagues[146] found that out of 26 children (aged 12-17 years) who had a complete mental

141 Cf. AHRC, *op. cit.*, p. 24.

142 Gillian Triggs, 'The Forgotten Children: National Inquiry into Children in Immigration Detention 2014', *Med J Aust,* Vol. 202(11), 2015, pp. 553-555.

143 Peter Young & Michael S. Gordon, 'Mental health screening in immigration detention: A fresh look at Australian government data', *Australasian Psychiatry,* Vol. 24(1), 2016, pp. 19-22; Sarah Mares, 'The Mental Health of Children and Parents Detained on Christmas Island: Secondary Analysis of an Australian Human Rights Commission Data Set', *Health Hum Rights,* Vol. 18(2), 2016, pp. 219-232; Karen Zwi, Sarah Mares, Dania Nathanson, Alvin Kuowei Tay & Derrick Silove, 'The impact of detention on the social-emotional wellbeing of children seeking asylum: a comparison with community-based children', *Eur Child Adolesc Psychiatry,* Vol. 27(4), 2018, pp. 411-422.

144 Cf. Triggs, *op. cit.*, p. 24.

145 Ibid., p. 25.

146 Cf. Mares (2016), *op. cit.*, p. 25.

health assessment, all met the criteria for mixed anxiety and depression and 86% (n=22) had a severe disorder. Young and colleagues examined 243 children aged five to 17 years and found that one third (n=83) had clinical symptoms that required tertiary outpatient mental health assessment.[147]

A small cohort of 24 children whose families were receiving free legal assistance in challenging their detention in a **British** immigration center also reported a high prevalence of mental health disorders.[148] Of 11 children aged five to 10 years who had a psychological assessment, all displayed symptoms of depression and anxiety and were disorientated, confused and frightened by the detention setting; 10 had sleep problems, including nightmares and difficulty falling or remaining asleep.[149] Younger children aged one to four years (n=8) experienced developmental delays, including regression of language (n=4), mild language delay (n=3), loss of previously acquired cognitive skills (n=2), and being selectively mute (n=1). However, it is unknown how representative this sample is of all children in immigration detention.

Case series of children referred to mental health services during immigration detention have found that a high proportion had mental health disorders. It should be noted that these samples are not representative of the population in the detention centre and are likely biased towards poor mental health. Von Werthern and colleagues' review[150] describes a cases series of 74 **Cuban** children referred to a psychiatric clinic while in immigration detention. All children in this case series had severe to very severe post-traumatic stress symptoms.[151]

A later **Australian** case series of 20 children consecutively referred to a child mental health service found that a high proportion were experiencing mood disturbance and post-traumatic symptoms.[152] Of 10 children under five years old, half (n=5) had delays in language and social development and/or emotional and behavioural dysregulation.[153] Of the older children aged six to 17 years (n=10), all met clinical criteria for PTSD and major depression with suicidal ideation, eight had self-harmed, and seven had symptoms of anxiety disorder.[154]

147 Cf. Young, *op. cit.*, p. 25.

148 Ann Lorek, Kimberly Ehntholt, Anne Nesbitt, Emmanuel Wey, Chip Githinji, Eve Rossor & Rush Wickramasinghe, 'The mental and physical health difficulties of children held within a British immigration detention center: a pilot study', *Child Abuse Negl,* Vol. 33(9), 2009, pp. 573-585.

149 Ibid., p. 25.

150 Cf. von Werthern, *op. cit.*, p. 23.

151 Ibid., p. 25.

152 Sarah Mares & Jon Jureidini, 'Psychiatric assessment of children and families in immigration detention - Clinical, administrative and ethical issues', *Australian and New Zealand Journal of Public Health,* Vol. 28(6), 2004, pp. 520-526.

153 Ibid., p. 26.

154 Ibid., p. 26.

The authors followed up participants 12 months later, but only reported general information on the families of the children, not specific information on the children themselves. The authors noted that the wellbeing of the families who remained in immigration detention had deteriorated, with family members becoming agitated and suicidal.[155]

b. Other Health Outcomes in Immigration Detention

Very limited information is available regarding health outcomes other than mental health. One study of a small cohort of 24 children whose families were receiving free legal assistance in challenging their detention in a **British** immigration centre, reported some information on the physical health of the children.[156] The authors noted that while many of the symptoms reported were common in childhood (e.g., fever n=5, eczema n=4, cough n=9, abdominal pain n=9, vomiting n=4) the parents were concerned that pre-existing symptoms had worsened while the child had been in detention.[157] Of the 14 children for whom there was data for a growth assessment, eight had lost weight since admission to the detention setting.[158]

c. The Impact of Immigration Detention on Health

We found four systematic reviews examining the mental health of refugees in various countries and settings (detention and the community). All four reviews argued that immigration detention has an adverse impact on the mental health of children, although the evidence in support of these arguments was weak.[159] A very small number of studies examining the health of children in immigration detention was included in these reviews. The earliest was published in 2009 and only examined immigration detention in **Australia**, the **United Kingdom** and the **United States**.[160] Of the ten studies included in this review, only three examined children who had been exposed to immigration detention.[161] An update of this systematic review, published in 2018, was not restricted by country and included an additional 21 studies.[162] Of these, only six examined children who had experienced

155 Sarah Mares & Jon Jureidini, 'Psychiatric assessment of children and families in immigration detention - Clinical, administrative andethical issues', *Australian and New Zealand Journal of Public Health*, Vol. 28(6), 2004, p.26.

156 Cf. Lorek, *op. cit.*, p. 25.

157 Ibid., p. 26.

158 Ibid., p. 26.

159 Cf. Fazel (2012), *op. cit.*, p. 2; Reed, *op. cit.*, p. 23; Robjant, *op. cit.*, p. 23; von Werthen, *op. cit.*, p. 23.

160 Cf. Robjant, *op. cit.*, p. 23

161 Cf. Mares, *op. cit.*, p. 26; Zachary Steel, Shakeh Momartin, Catherine Bateman, Atena Hafshejani, Derrick M. Silove, Naleya Everson, Konya Roy, Michael Dudley, Louise Newman & Bijou Blick, 'Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in *Australia', Australian and New Zealand Journal of Public Health,* Vol. 28(6), 2004, pp. 527-536; Aamer Sultan & Kevin O'Sullivan, 'Psychological disturbances in asylum seekers held in long term detention: a participant-observer account', *The Medical Journal of Australia,* Vol. 175(11-12), 2001, pp. 593-596.

162 Cf. von Werthen, *op. cit.*, p. 23.

immigration detention.[163] The other two systematic reviews examined risk and protective factors for mental health in refugee children resettled in high[164] and low- and middle-income countries.[165] Of the 44 studies included in Fazel and colleagues' review,[166] only five examined children exposed to immigration detention, of which three were included in the previously mentioned systematic reviews.[167] Of the 27 studies included in Reed and colleagues' review,[168] only four examined the health of children exposed to immigration detention.

Despite the findings of the above systematic reviews, there are a number of significant methodological limitations in the literature that preclude causal inferences being made about the association between immigration detention and the mental health of children. Studies often have small sample sizes, report descriptive results, do not have a comparison group, use cross-sectional data, have selected samples, do not report participation rates such that the representativeness and generalisability of the findings are unknown, and rely on self-report to assess mental health.[169] As such, these studies are unable to reliably assess whether detention independently impacts the mental health of children. As mentioned previously, it is likely that the mental health of children in immigration detention will also be impacted by their experiences before migration, and the migration journey, as well as migration detention. However, it is not unreasonable to postulate that detaining a group of vulnerable children who have already experienced trauma and hardship will adversely impact their health and exacerbate existing mental health disorders.[170]

A number of studies have argued that immigration detention is detrimental to children as it exposes them to distressing incidents.[171] While in immigration detention, children may witness suicides and self-harm of other detainees[172] or family members;[173] be physically or

163 Cf. von Werthen, *op. cit.*, p. 26.

164 Cf. Fazel (2012), *op. cit.*, p. 2.

165 Cf. Reed, *op. cit.*, p. 23.

166 Cf. Fazel (2012), *op. cit.*, p. 2.

167 Cf. Robjant, *op. cit.*, p. 23; von Werthen, *op. cit.*, p. 23.

168 Cf. Reed, *op. cit.*, p. 23.

169 Cf. Fazel (2012), *op. cit.*, p. 2; Reed, *op. cit.*, p. 23; Robjant, *op. cit.*, p. 23; von Werthen, *op. cit.*, p. 23.

170 Cf. Wood, *op. cit.*, p. 24.

171 Cf. Mares, *op. cit.*, p. 26; Steel, *op. cit.*, p. 26; Michael Dudley, Zachary Steel, Sarah Mares & Louise Newman, 'Children and young people in immigration detention', *Curr Opin Psychiatry,* Vol. 25(4), 2012, pp. 285-292; Kimberly A. Ehntholt, David Trickey, Jean Harris Hendriks, Hannah Chambers, Mark Scott & William Yule, 'Mental health of unaccompanied asylum-seeking adolescents previously held in British detention centres', *Clin Child Psychol Psychiatry,* Vol. 23(2), 2018, pp. 238-257; Eugenio M. Rothe, John Lewis, Hector Castillo-Matos, Orestes Martinez, Ruben Busquets & Igna Martinez, 'Posttraumatic stress disorder among Cuban children and adolescents after release from a refugee camp', *Psychiatric Services,* Vol. 53(8), 2002, pp. 970-976.

172 Cf. Mares, *op. cit.*, p. 26; Steel, *op. cit.*, p. 26; Ethnolt, *op. cit.*, p. 27.

173 Cf. Mares, *op. cit.*, p. 26.

verbally assaulted by detention officers;[174] witness fights between detainees, or experience being handcuffed, detained in solitary confinement, or being called by a number instead of their name;[175] or be subjected to body searches that may involve removing clothing.[176] Traumatic experiences during detention may have long-term effects. Reed and colleagues[177] reported that experiencing violence during detention was a risk factor for withdrawn behaviour in children four to six months after release from immigration detention. An **Australian** study published in 2016, in which experienced paediatricians assessed 49 children in a remote detention centre, described them as 'amongst the most traumatised children the paediatricians have ever seen'.[178]

We found few studies that compared the mental health of children in immigration detention to that of another group. Studies comparing children in immigration detention to children who are not detained typically find poorer mental health in the children in immigration detention. Zwi and colleagues[179] found that, compared to non-detained refugee children, those who were detained in Australian immigration detention centres had significantly impaired social-emotional wellbeing as measured by conduct disorder, emotional problems, and hyperactivity. Reed and colleagues' review[180] reported that children in refugee camps in **Palestine** were more likely than Palestinian children in urban and rural areas to experience anxiety.

Two studies have retrospectively assessed the mental health of children who have experienced immigration detention, in an effort to consider the association between detention and mental health.[181] The first used validated tools to examine the mental health of a cohort of 20 children detained in an **Australian** immigration detention centre.[182] This study compared the mental health of children during detention to the mental health of the same children prior to detention (measured retrospectively).[183] They found

174 Cf. Steel, *op. cit.*, p. 26; Ethnolt, *op. cit.*, p. 27.

175 Cf. Steel, *op. cit.*, p. 26.

176 Cf. Ethnolt, *op. cit.*, p. 27.

177 Cf. Reed, *op. cit.*, p. 23.

178 Elizabeth Elliot & Hasantha Gunasekera, 'The health and well-being of children in immigration detention', 4 February 2016, Available at https://www.humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/health-and-well-being-children-immigration (accessed 4 August 2019).

179 Cf. Zwi, *op. cit.*, p. 25.

180 Cf. Reed, *op. cit.*, p. 23.

181 Cf. Steel, *op. cit.*, p. 26; Ethnolt, *op. cit.*, p. 27.

182 Cf. Steel, *op. cit.*, p. 26.

183 Ibid., p. 28.

a tenfold increase in psychiatric disorders among children after being detained.[184] All children in the sample were diagnosed with at least one psychiatric disorder and 80% (n=16) were diagnosed with multiple disorders.[185] The majority of children (n=19) were diagnosed with major depressive disorder (MDD) and half were diagnosed with PTSD.[186] The second study examined 35 children who had previously been detained in immigration detention as their ages were disputed by **British** authorities.[187] Clinicians retrospectively assessed the mental health of these children during their detention. The authors argued that the children's detention was associated with the development or exacerbation of PTSD (n = 10, 29%; n = 18, 51%, respectively) or MDD (n = 8, 23%; n = 14,40%, respectively).[188] However, both of these studies involved small, selected samples and, as mental health was measured retrospectively in interviews, these findings are vulnerable to recall bias and may overestimate the impact of detention.

Very limited information is available on how the restrictiveness of an immigration detention setting impacts the mental health of children. Fazel and colleagues' review[189] reported that while all unaccompanied children seeking asylum have been found to have high levels of emotional and post-traumatic stress symptoms, those in more restrictive immigration settings in the **Netherlands** suffered higher levels of symptoms compared to those who were in a setting that offered more autonomy. Girls appeared to be particularly vulnerable to emotional problems, anxiety, and depression in more restrictive settings.[190] Similarly, Reed and colleagues[191] reported that in **Central America**, refugee children living in camps had higher levels of psychological distress than those living in settlements. These children had also experienced higher levels of civic violence in comparison to children in the settlements.

184 Cf. Steel, *op. cit.*, p. 28.
185 Ibid., p. 28.
186 Ibid., p. 28.
187 Cf. Steel, *op. cit.*, p. 26.
188 Ibid., p. 28.
189 Cf. Fazel (2012), *op. cit.*, p. 2.
190 Ibid., p. 29.
191 Cf. Reed, *op. cit.*, p. 23.

3.5 The Health of Children in Institutional Care

Children who are raised in institutional care for welfare or educational reasons include those who are orphaned, abandoned, living on the streets, removed from their families for reasons such as abuse, neglect or an inability to provide adequate care, or have significant health or developmental difficulties perceived to require specialist care. The magnitude of research on this population is made apparent by a recent systematic review of systematic reviews, undertaken by Carr and colleagues,[192] examining outcomes for children in institutional care who are 'exposed to severe neglect' - defined as 'failure to meet children's basic physical, developmental, and emotional needs due to inadequate resources'. Eighteen systematic reviews were identified, including a total of 451 distinct primary studies with a combined sample size of 1.75 million individuals. Severe neglect was found to be associated with a wide range of subsequent negative outcomes, including under the domains of physical health, mental health, and cognitive development. In the section that follows, these systematic reviews are supplemented by a selection of additional studies, chosen to illustrate evidence from a range of institutional and international contexts. Although there appear to be some exceptions, the preponderance of the evidence suggests that institutionalisation of children – particularly during critical developmental periods – is associated with adverse impacts on physical health and development, mental health, and cognitive development.[193]

192 Alan Carr, Hollie Duff & Fiona Craddock, 'A Systematic Review of Reviews of the Outcome of Severe Neglect in Underresourced Childcare Institutions', *Trauma Violence Abuse Rev J*, 2018, p. e1524838018777788.

193 Anne E. Berens & Charles A. Nelson, 'The science of early adversity: is there a role for large institutions in the care of vulnerable children?', *The Lancet*, Vol. 386(9991), 2015, pp. 388-398.

The Observed Negative Impact of Institutional Care on the Health of Children

a. Physical Growth

A systematic review covering a wide range of high-income country contexts found that immediately post-institutionalisation international adoptees, aged three years or less, showed significant delays in physical growth when compared with non-adopted controls.[194] Longer term impact was also apparent, with those adopted out of institutional care being of significantly shorter stature than general population controls in adolescence and early adulthood.[195]

One key study in the area is the St Petersburg-USA Orphanage Intervention Research Project, which provided baseline assessments and follow-up after the international adoption of 749 residents in three homes for babies in **Russia**.[196] Findings at baseline revealed marked delay

194 Marinus Van Ijzendoorn, Marian Bakermans-Kranenburg & Femmie Juffer, 'Plasticity of growth in height, weight, and head circumference: meta-analytic evidence of massive catch-up after international adoption', *J Dev Behav Pediatr,* Vol. 28(4), 2007, pp. 334-343.

195 Ibid., p. 30.

196 Robert B. McCall, Christina J. Groark, Brandi N. Hawk, Megan M. Julian, Emily C. Merz, Johana M. Rosas, Rifkat Muhamedrahimov, Oleg I. Palmov & Natasha V. Nikiforova, 'Early Caregiver-Child Interaction and Children's Development: Lessons from the St. Petersburg-USA Orphanage Intervention Research Project', *Clin Child Fam Psychol Rev,* Vol. 22(2), 2019, pp. 208-224.

in early physical growth when compared to Russian standards for child anthropometry, despite adequate nutrition being provided.[197] These findings were also well illustrated in the Bucharest Early Intervention Project (BEIP), which traced the development of 136 **Romanian** children who were institutionalised during early infancy.[198] Those in institutional settings at baseline were found to have 'poorer growth' relative to birthweight than the community control group;[199] a finding replicated in another Romanian study.[200]

However, the literature is not entirely consistent, with some evidence suggesting the importance of the quality of care, in addition to the nature of the care environment. For example, a study comparing **Spanish** children in large-scale institutions to small family-style residential group care identified a strongly significant improvement for the smaller family-style group institution in the majority of measures of child growth and nutritional health.[201] One **Italian** study documented stable growth and physical development amongst children living in group homes when comparing a baseline assessment with two year follow-up,[202] and a study in a **Russian** baby home noted that, whilst growth delays were common on institutional entry, there was significant improvement for babies and children whilst institutionalised, although the children largely remained below average.[203]

One major international comparative study in low- and lower-middle income countries suggests that institutional care may be more protective of children than community alternatives. These findings should arguably be interpreted as evidence of a need for greater investment in community alternatives to institutional care, rather than evidence that institutional care is preferable. Positive Outcomes for Orphans (POFO) is a longitudinal

197 St. Petersburg-USA Orphanage Research Team, 'Characteristics of children, caregivers, and orphanages for young children in St. Petersburg, Russian Federation', *Applied Developmental Psychology,* Vol. 26, 2005, pp. 477-506.

198 Kathryn L. Humphreys, Mary Margaret Gleason, Stacy S. Drury, Devi Miron, Charles A. Nelson, Nathan A. Fox & Charles H. Zeanah, 'Effects of institutional rearing and foster care on psychopathology at age 12 years in Romania: follow-up of an open, randomised controlled trial', *Lancet Psychiatry,* Vol. 2(7), 2015, pp. 625-634.

199 Anna T. Smyke, Sebastian F. Koga, Dana E. Johnson, Nathan A. Fox, Peter J Marshall, Charles A. Nelson & Charles H. Zeanah, 'The caregiving context in institution-reared and family-reared infants and toddlers in Romania', *Journal of Child Psychology and Psychiatry and Allied Disciplines,* Vol. 48(2), 2017, pp. 210-218; Dana E. Johnson, Alva Tang, Alisa N. Almas, Kathryn A. Degnan, Katie A. Mclaughlin, Charles A. Nelson, Nathan A. Fox, Charles H. Zeanah & Stacy S. Drury, 'Caregiving Disruptions Affect Growth and Pubertal Development in Early Adolescence in Institutionalized and Fostered Romanian Children: A Randomized Clinical Trial', *J Pediatr,* Vol. 203, 2018, pp. 345-353.e3.

200 Dana E. Johnson, Laurie C. Miller, Sandra Iverson, William Thomas, Barbara Franchino, Kathryn Dole, Marybeth T. Kiernan, Michael K. Georgieff & Margaret K. Hostetter, 'The health of children adopted from Romania', *Jama*, Vol. 268(24), 1992, pp. 3446-3451.

201 A. Munoz-Hoyos, M. C. Augustin-Morales, C. Ruiz-Cosano, A. Molina-Carballo, J. M. Fernandez-Garcia & G. Galdo-Munoz, 'Institutional childcare and the affective deficiency syndrome: consequences on growth, nutrition and development', *Early Hum Dev,* Vol. 65, 2001, pp. S145-152.

202 Pietro Ferrara, Antonio M. Leone, Lorenza Romani, Chiara Guadagno & Francesco Alvaro, 'The long stay in group homes and mental health status of children: A two-year follow-up', *Minerva Psichiatrica,* Vol. 56(3), 2015, pp. 109-115.

203 Laurie C. Miller, Wilma Chan, Aina Litvinova, Arkady Rubin, Linda Tirella & Sharon Cermak, 'Medical diagnoses and growth of children residing in Russian orphanages', *Acta Paediatr,* Vol. 96(12), 2007, pp. 1765-1769.

study of a six to 12 year old cohort of 'orphans and abandoned children' living in institutional (N=1,357) or family-based (N=1,480) community care within five low- and middle-income countries: **Cambodia**, **Ethiopia**, **Kenya**, **India**, and **Tanzania**.[204] The study explored whether institutional care is associated with worse health and wellbeing than family-based care; at both baseline and three-year follow up this hypothesis was found to be false. At baseline, a range of indicators of physical growth were found to be 'no worse [...] and generally better' among institutionalised children than among those in community settings.[205] At three-year follow-up, children in institutional care showed significantly greater physical growth, although differences between the two populations were small.[206]

Some evidence of apparently protective institutional care was also reported in a study of 2,862 orphaned or separated children in **Kenya**, including 1,337 in institutional care, 1,425 in family care, and 100 living on the streets. In this study the researchers assessed malnutrition through availability of an 'adequate diet', as defined by World Health Organization criteria.[207] Young people living in households were found to be significantly less likely to have an adequate diet than those living in institutions, although with no significant differences in relation to weight-for-age, weight-for-height, or BMI-for-age.

b. Physical Health

In some country contexts, institutional care can increase the risk of infectious disease. For example, in a **Brazilian** study, 43% of 287 children contracted infectious diseases whilst resident in a group home.[208] Similarly, a substantially higher prevalence of tuberculosis was found in three **Haitian** orphanages than in the general population.[209] A study in **Jamaica**, which retrospectively screened for outbreaks of tuberculosis, scabies, and varicella, found that the knowledge and management of these conditions within a residential institution for abandoned children with HIV was generally limited, potentially contributing to more

204 Kathryn Whetten *et al.*, 'A Comparison of the Wellbeing of Orphans and Abandoned Children ages 6-12 in Institutional and Community-based Care Settings in 5 less Wealthy Nations', *PlosOne*, Vol. 4(12) p. e8169, 2009.

205 Ibid., p. 31.

206 Kathryn Whetten, Jan Ostermann, Brian W. Pence, Rachel A. Whetten, Lynne C. Messer, Sumedha Ariely, Karen O'Donnell, Augustine I. Wasonga, Vanroth Vann, Dafrosa Itemba, Misganaw Eticha, Ira Madan & Nathan M. Thielman, 'Three-year change in the wellbeing of orphaned and separated children in institutional and family-based care settings in five low- and middle-income countries', *PLoS ONE,* Vol. 9(8), 2014, p. e104872.

207 Paula Braitstein, Samuel Ayaya, Winstone M. Nyandiko, Allan Kamanda, Julius Koech, Peter Gisore, Lukoye Atwoli, Rachel C. Vreeman, Corey Duefield & David O. Ayuku, 'Nutritional status of orphaned and separated children and adolescents living in community and institutional environments in uasin Gishu County, Kenya', *PLoS ONE*, Vol. 8(7), 2013, p. e70054.

208 Lília C. Cavalcante, Celina M. C. Magalhaes, & Fernando Pontes, 'Health and disease processes among institutionalized children: an ecological vision', *Ciencia & Saude Coletiva,* Vol. 14(2), 2009, pp. 615-625.

209 Judith Francis, Alison Reed, Fitsum Yohannes, Michel Dodard & Arthur M. Fournier, 'Screening for tuberculosis among orphans in a developing country', *Am J Prev Med,* Vol. 22(2), 2002, pp. 117-119.

frequent cases amongst those in group care.[210] A cross-sectional study in **Argentina** focused on the seroprevalence of toxocariasis in the context of unsanitary conditions and poverty, and identified a significantly greater chance of orphaned children being infected as age advanced, likely due to increased duration of institutionalisation heightening the likelihood of contact with the parasite.[211] High rates of medical conditions post-institutionalisation have also been reported in **Romania**, including hepatitis B and parasites.[212]

Negative impacts of institutional care on physical health are also apparent in high-income countries. In **Canada**, those institutionalised from birth had significantly more chronic illnesses, and more frequent reporting of stress-related health problems.[213] Frequent medical diagnoses have also been identified in a sample of **Russian** children residing in a baby home, including rickets, developmental delay, foetal alcohol syndrome, and anaemia.[214] In the **US**, increased risk of cardiovascular and metabolic problems was identified amongst an older group of children post-adoption, with increased risk among those with significantly stunted growth.[215]

Once again, however, the evidence is not entirely consistent, with some evidence of comparatively positive outcomes following institutional care, including in improved disease progression among a cohort of 325 Romanian children who were HIV-infected.[216] Compared to those in 'family home' style institutions, children living with their biological families were more likely to experience CD4 decline and death than were children in institutions. As noted above, these findings should arguably be interpreted as evidence of a need for greater investment in community alternatives to institutional care, rather than evidence that institutional care is preferable.

210 M. Geoghagen, Russell B. Pierre, Tracy Evans-Gilbert, B. Rodriguez & Celia D. C. Christie, 'Tuberculosis, chickenpox and scabies outbreaks in an orphanage for children with HIV/AIDS in Jamaica', *West Indian Med J,* Vol. 53(5), 2004, pp. 346-351.

211 Susana Archelli, Graciela I. Santillan, Reinaldo Fonrouge, Graciela Cespedes, Lola Burgos & Nilda Radman, 'Toxocariasis: seroprevalence in abandoned-institutionalized children and infants', *Rev Argent Microbiol,* Vol. 46(1), 2014, pp. 3-6.

212 Cf. Johnson (1992), *op. cit.*, p. 30.

213 John J. Sigal, Christopher J. Perry, Michel Rossignol & Marie C. Ouimet, 'Unwanted infants: psychological and physical consequences of inadequate orphanage care 50 years later', *Am J Orthopsychiatry,* Vol. 73(1), 2003, pp. 3-12; John J. Sigal, Michel Rossignol & Christopher J. Perry, 'Some psychological and physical consequences in middle-aged adults of underfunded institutional care in childhood', *J Nerv Ment Dis,* Vol. 187(1), 1999, pp. 57-59.

214 Cf. Miller, *op. cit.*, p. 31.

215 Brie M. Reid, Michelle M. Harbin, Jessica L. Arend, Aaron S. Kelly, Donald R. Dengel & Megan R. Gunnar, 'Early Life Adversity with Height Stunting Is Associated with Cardiometabolic Risk in Adolescents Independent of Body Mass Index', *J Pediatr,* Vol. 202, 2018, pp. 143-149.

216 Margaret Ferris, Keith Burau, Ana M. Constantin, Stefania Mihale, Nancy Murray, Alina Preda, Michael Ross & Mark W. Kline, 'Influence of institutionalization on time to HIV disease progression in a cohort of Romanian children and teens', *Pediatrics.* Vol. 120(6), 2007, pp. e1476-1480.

c. Mental Health

Three systematic reviews highlight the mental health of children in institutional care. Across a wide range of high-income country contexts, international adoptees who have experienced severe neglect in institutional care exhibit significantly more mental health difficulties than non-adopted controls.[217] Significant associations between early institutionalisation and ADHD[218] and mental health problems in adulthood have also been identified.[219]

Several **Romanian** studies suggest a heightened risk of psychiatric symptoms following experiences of institutionalisation,[220] including within the BEIP,[221] in which children who had experienced institutionalisation after abandonment had significantly greater prevalence of psychiatric disorders at ages 54 months[222] and 12 years,[223] as well as a significantly higher numbers of symptoms of internalising disorders, externalising disorders, and ADHD at both ages.[224]

Such findings are mirrored across a wide range of high-income countries. This includes indication of greater prevalence of psychiatric symptoms among institutionalised children in **Canada**,[225] **Germany**,[226] and **Italy**.[227] Similarly, in **Mexico**, a cross-sectional

217 Femmie Juffer & Marinus H. Van Ijzendoorn, 'Behavior problems and mental health referrals of international adoptees: A meta-analysis', *Jama*, Vol. 293, 2005, pp. 2501-2515.

218 Kenneth Latimer, Philip M. J. Wilson, Jeremy Kemp, Lucy Thompson, Fiona Sim, C Gillberg, Christine Puckering & Helen Minnis, 'Disruptive behaviour disorders: a systematic review of environmental antenatal and early years risk factors', *Child: Care, Health and Development,* Vol. 38(5), 2012, pp. 611-628.

219 Margaret Grant, Alan Rushton & John Simmonds, 'Is early experience destiny? Review of research on long-term outcomes following international adoption with special reference to the British Chinese adoption study', *The Scientific World Journal,* Vol. 2016, 2016, p. 6303490.

220 B. Heidi Ellis, Philip A. Fisher & Sonia Zaharie, 'Predictors of disruptive behavior, developmental delays, anxiety, and affective symptomatology among institutionally reared romanian children', *J Am Acad Child Adolesc Psychiatry,* Vol. 43(10), 2004, pp. 1283-1292; Mark Kennedy, Jana Kreppner, Nicky Knights, Robert Kumsta, Barbara Maughan, Dennis Golm, Michael Rutter, Wolff Schlotz, Edmund J. S. Sonuga-Barke, 'Early severe institutional deprivation is associated with a persistent variant of adult attention-deficit/hyperactivity disorder: clinical presentation, developmental continuities and life circumstances in the English and Romanian Adoptees study', *J Child Psychol Psychiatry,* Vol. 57(10), 2016, pp. 1113-25. Pierre Pluye, Yves Lehingue, Charles Aussilloux, Iona Popa & Claude Aiguesvives, 'Mental and behavior disorders in children placed in long term care institutions in Hunedoara, Cluj and Timis, Romania', *Sante*, Vol. 11(1), 2001, pp. 5-12.

221 Charles A. Nelson, Charles H. Zeanah, Nathan A. Fox, Peter J. Marshall, Anna T. Smyke & Donald Guthrie, 'Cognitive recovery in socially deprived young children: the Bucharest Early Intervention Project', *Science*, Vol. 318(5858), 2007, pp. 1937-1940.

222 Charles H. Zeanah, Helen L. Egger, Anna T. Smyke, Charles A. Nelson, Nathan A. Fox, Peter J. Marshall & Donald Guthrie, 'Institutional rearing and psychiatric disorders in Romanian preschool children', *Am J Psychiatry,* Vol. 166(7), 2009, pp. 777-785.

223 Cf. Humphreys, *op. cit.*, p. 30.

224 Ibid., p. 3; Katie A. McLaughlin, Charles H. Zeanah, Nathan A. Fox & Charles A. Nelson, 'Attachment security as a mechanism linking foster care placement to improved mental health outcomes in previously institutionalized children', *J Child Psychol Psychiatry,* Vol. 53(1), 2012, pp. 46-55.

225 Cf. Sigal (1999), *op. cit.*, p. 32; J Perry, John Sigal, Sophie Boucher, Nikolas Pare & Marie Ouimet, 'Personal strengths and traumatic experiences among institutionalized children given up at birth (Les Enfants de Duplessis--Duplessis' children): II: Adaptation in late adulthood', *J Nerv Ment Dis,* Vol. 193(12), 2005, pp. 783-789.

226 Katrin Niemann & Frank Hasler, '"Children's and Adolescents" Mental Health in Residential Youth Care Settings', *Prax Kinderpsychol Kinderpsychiatr,* Vol. 63(7), 2014, pp. 590-606; Jakob Nuetzel, Marc Schmid, Lutz Goldbeck, Joerg M. Fegert, 'Psychiatric support for children and adolescents in residential care in a German sample', *Prax Kinderpsychol Kinderpsychiatr,* Vol. 54(8), 2005, pp. 627-644.

227 Cf. Ferrara, *op. cit.*, p. 30.

matched pairs design established that institutionalised children were significantly more likely to display both severe and minor depressive symptoms.[228] Higher levels of behavioural and emotional problems have also been identified in three cross-sectional **Finnish** studies,[229] alongside a relatively high percentage of children with evidence of suicidality (32%).[230] Follow up assessments from the St Petersburg-USA Orphanage Intervention Research Project demonstrate continuation of emotional and behavioural problems.[231] There is also evidence of substantially higher levels of hyperactivity and inattention in children reared in **British** residential group care, compared to both those in foster care and classroom controls.[232] A further finding is an increased risk of substance misuse; a large sample of institutionalised **Dutch** adolescents displayed significantly higher levels of tobacco smoking, cannabis and hard drug use, compared to a control group of adolescents attending special educational settings.[233]

The emergence of mental health difficulties may relate to experiences of trauma, adversity and abuse related to institutionalisation, and are therefore disproportionately prevalent among children in institutional care. There is also evidence that institutionalisation can further increase risk of trauma or abuse. For example, one **British** study highlighted that children in residential or foster care are at increased risk of child maltreatment and abuse, potentially contributing to long-standing emotional, behavioural, and learning difficulties.[234] This is also demonstrated in an **Austrian** study examining a group of adult survivors of childhood maltreatment in residential foster care institutions. Those with previous history of institutionalisation experienced higher exposure to childhood maltreatment, significantly higher prevalence rates in

228 Ana-Maria Chavez-Hernandez, Fredi-Everardo Correa-Romero, Irma-Beatriz Acosta-Rojas, Karen-Viviana Cardoso-Espindola, Gustavo M Padilla-Gallegos & Isabel Valadez-Figueroa, 'Suicidal Ideation, Depressive Symptomatology, and Self-Concept: A Comparison Between Mexican Institutionalized and Noninstitutionalized Children', *Suicide Life Threat Behav,* Vol. 48(2), 2018, pp. 193-198.

229 Raija Hukkanen, Andre Sourander, Lasse Bergroth & J Piha, 'Psychosocial factors and adequacy of services for children in children's homes', *Eur Child Adolesc Psychiatry,* Vol. 8(4), 1999, pp. 268-275: Raija Hukkanen, Andre Sourander, Paivi Santalahti & Lasse Bergroth, 'Have psychiatric problems of children in children's homes increased?', *Nordic Journal of Psychiatry,* Vol. 59(6), 2005, pp. 481-485.

230 Raija Hukkanen, Andre Sourander & Lasse Bergroth, 'Suicidal ideation and behavior in children's homes', *Nordic Journal of Psychiatry,* Vol. 57(2), 2003, pp. 131-137.

231 Brandi N. Hawk, Robert B. McCall, Christina J. Groark, Rifkat J Muhamedrahimov & Oleg I. Palmov, 'Caregiver Sensitivity and Consistency and Children's Prior Family Experience as Contexts for Early Development within Institutions', *Infant Mental Health Journal,* Vol. 39(4), 2018, pp. 432-448; Emily C. Merz & Robert B. McCall, 'Behavior problems in children adopted from socially-emotionally depriving institutions', *Journal of abnormal child psychology,* Vol. 38(4), 2010, pp. 459-470.

232 Penny Roy, Michael Rutter & Andrew Pickles, 'Institutional care: risk from family background or pattern of rearing?', *J Child Psychol Psychiatry,* Vol. 41(2), 2000, pp. 139-149.

233 Annelies Kepper, Regina van den Eijnden, Karin Monshouwer & Wilma Vollebergh, 'Understanding the elevated risk of substance use by adolescents in special education and residential youth care: the role of individual, family and peer factors', *Eur Child Adolesc Psychiatry,* Vol. 23(6), pp. 461-472.

234 Georgina F. Hobbs, Christopher J. Hobbs & Jane M. Wynne, 'Abuse of children in foster and residential care', *Child Abuse Negl,* Vol. 23(12), 1999, pp. 1239-1252.

nearly all mental disorder categories, and suffered from higher symptom of distress in all dimensions of psychopathology than their community control peers.[235]

The POFO study found that the annual incidence of 'potentially traumatic events' was significantly lower in institutional settings (24%) than in community settings (30%), including lower annual incidence of physical or sexual abuse in institutional settings (13%) than in community settings (19%).[236] Nevertheless, significantly fewer emotional difficulties were apparent among children in community settings, although differences between the two populations were consistently of a small magnitude.[237] A similar finding has been reported regarding risky sexual behaviours and exploitation among a cohort of 1,365 **Kenyan** children aged 10.[238] Children in institutional care were significantly less likely than those in family care settings to report engaging in transactional sex or to have experienced forced sex, when controlling for age, sex, and orphan status. Once again, these findings highlight the need for greater investment in safe and appropriate community alternatives to institutionalisation for vulnerable children.

d. Cognitive Development

Eight systematic reviews and meta-analyses demonstrate associations between severe institutional neglect and delayed cognitive development. Seven reviews show a significant association between severe neglect and lower IQ.[239] For example, the IQs of children raised in institutions were found to be 17-20 points lower than those raised in family settings.[240] Other

235 Brigitte Lueger-Schuster, Matthias Knefel, Tobias M. Gluck, Reinhold Jagsch, Viktoria Kantor & Dina Weindl, 'Child abuse and neglect in institutional settings, cumulative lifetime traumatization, and psychopathological long-term correlates in adult survivors: The Vienna Institutional Abuse Study', *Child Abuse Negl,* Vol. 76, 2018, pp. 488-501.

236 Gender (in) differences in prevalence and incidence of traumatic experiences among orphaned and separated children living in five low- and middle-income countries.

237 Cf. Whetten (2014), *op. cit.*, p. 31.

238 Lonnie Embleton, Joram Nyandat, David Ayuku, Edwin Sang, Allan Kamanda, Samuel Ayaya, Winstone Nyandiko, Peter Gisore, Rachel Vreeman, Lukoye Atwoli, Omar Galarraga, Mary A. Ott & Paula Braitstein, 'Sexual Behavior Among Orphaned Adolescents in Western Kenya: A Comparison of Institutional- and Family-Based Care Settings', *J Adolesc Health,* Vol. 60(4), 2017, pp. 417-424.

239 Mogens N. Christoffersen, 'A study of adopted children, their environment, and development: A systematic review', *Adoption Quarterly,* Vol. 15, 2012, pp. 220-237; Conni Fensbo, 'Mental and behavioral outcome of inter-ethnic adoptees: A review of the literature', *Eur Child Adolesc Psychiatry,* Vol. 13, 2004, pp. 55-63; Rebecca Johnson, Kevin Browne & Catherine Hamilton-Giachritsis, 'Young children in institutional care at risk of harm', *Trauma Violence Abuse Rev* J, Vol. 7, 2006, pp. 34-60; Femmie Juffer, Chloe Finet, Harriet Vermeer & Linda van den Dries, 'Attachment and cognitive and motor development in the first years after adoption: A review of studies on internationally adopted children from China', *Prax Kinderpsychol Kinderpsychiatr,* Vol. 64, 2014, pp. 774-792; Lorraine Sherr, Kathryn J. Roberts & Natasha Gandhi, 'Child violence experiences in institutionalised/orphanage care', *Psychol Health Med,* Vol. 22(sup1), 2017, pp. 31-57; Marinus H. van IJzendoorn, Maartje P. C. Luijk & Femmie Juffer, 'Adoption and cognitive development: A meta-analytic comparison of adopted and non-adopted children's IQ and school performance', Psychological Bulletin, Vol. 131, 2008, pp. 301-316; Marinus H. van IJzendoorn, Femmie Juffer & Caroline W. K. Poelhuis, 'IQ of children growing up in children's homes: A meta-analysis on IQ delays in orphanages', Vol. 54, 2005, pp. 341-366.

240 Cf. Christoffersen, *op. cit.*, p. 35; Kathleen A. Scott, 'Language outcomes of school-aged internationally adopted children: A systematic review of the literature', *Topics in Language Disorders,* Vol. 29, 2009, pp. 65-81.

studies suggest that, following adoption, IQs become similar to those of children raised in birth families and were significantly higher than in children who remain institutionalised. A significant association has also been identified between severe institutional neglect and specific learning difficulties.[241] There are inconsistent findings regarding language delay, with one meta-analysis finding a small but significant association,[242] and another finding no such association.[243] Given that children in institutional care may have a pre-existing disability (e.g., due to foetal alcohol effects), it is difficult to determine from this observational evidence the extent to which developmental delay can be attributed to experiences of institutionalisation.

In **Russia**, a quasi-experimental study showed that children in various forms of institutional care (including a baby home, children's home, and residential school for children with special needs) significantly underperformed their age- and gender-matched adopted peers at age 5 on a comprehensive battery of standardised measures covering cognition, language, and early learning.[244] Results from two St Petersburg-USA Orphanage Intervention Research Project studies also indicate significant deficits in executive function for Russian children with a history of institutionalisation.[245] However, this study also suggests that these difficulties can be partially overcome with appropriate support and resources, including through an intervention designed to improve caregiving, which was found to yield substantially improved development compared to those who received 'care as usual'.[246]

Several studies have traced the impact of international adoption on the subsequent development of institutionalised children. For example, Rutter and colleagues[247] compared cognitive and social functioning at age 6 of **Romanian** children who had experienced institutionalisation early in life and were subsequently adopted into **British** families, with UK-born children adopted before the age of 6 months. For the majority of Romanian

241 Cf. van IJzendoorn (2008), *op. cit.*, p. 35.

242 Ibid., p. 35.

243 Cf. Scott, *op. cit.*, p. 35.

244 Natalia Rakhlin, Sascha Hein, Niamh Doyle, Lesley Hart, Roman Koposov, Donna Macomber, Vladislav Ruchkin, Anastasia Strelina, Mei Tan & Elena L. Grigorenko, 'Sources of heterogeneity in developmental outcomes of children with past and current experiences of institutionalization in Russia: A four-group comparison', *Am J Orthopsychiatry,* Vol. 87(3), 2017, pp. 242-255.

245 Cf. McCall, *op. cit.*, p. 30; Emily C. Merz & Robert B. McCall, 'Parent ratings of executive functioning behavior in children adopted from psychosocially depriving institutions', *Journal of Child Psychology & Psychiatry,* Vol. 52(5), 2011, pp. 537-46; Emily C. Merz, Robert B. McCall, Amanda J. Wright & Beatriz Luna, 'Inhibitory control and working memory in children adopted from psychosocially depriving institutions', *Journal of Abnormal Child Psychology,* Vol. 41, 2013, pp. 879-890.

246 Cf. Hawk, *op. cit.*, p. 34.

247 Michael Rutter & Thomas G. O'Connor, 'Are There Biological Programming Effects for Psychological Development? Findings from a Study of Romanian Adoptees', *Developmental Psychology,* Vol. 40(1), 2004, pp. 81-94.

children, cognitive and social functioning was normal and comparable; however, for a significant minority there were 'major persistent deficits'.

Some smaller studies have produced conflicting results. One retrospective **French** study observed significant improvements in general functioning for children residing in a welfare centre, alongside a slight reduction in the number suffering from psychiatric disorders on institution exit.[248] Whilst there were still marked difficulties in social and academic functioning, this suggests that in some contexts there may be potential for developmental catch-up within institutions. A **Swedish** cross-sectional study examining the health of children reared in adoptive, foster, and biological homes following institutionalisation during early infancy, highlighted the importance of permanency of care and parenting capability for health and development, as opposed to an exclusive focus on detention itself.[249] Once again the POFO study shows similar cognitive development among those in institutions and those in family-based community care, both at baseline[250] and at three-year follow up.[251]

3.6 The Health of Children in Therapeutic Institutions

In comparison to the literature regarding institutional care, research regarding the impact of institutionalisation in therapeutic institutions on health is more limited and disconnected. Children enter therapeutic institutions with pre-existing health conditions, and it is the aim of such institutions to treat and improve these conditions. For example, children admitted involuntarily to child and adolescent psychiatric wards by definition have significant mental health problems. However, whilst there appears to be a robust literature on improvement of the specific health needs identified prior to institutionalisation, there is less literature regarding the potential child health implications of the detention itself. For example, although there is evidence that children in psychiatric wards can experience improvements in mental health,[252] the evidence for this is mixed,[253] and less is known about the impact of

248 Maurice Tanguy, Daniel Rosseau, Mireille Roze, Phillipe Duverger, Silvie Nguyen & Serge Fanello, 'Course and progression of children admitted before 4 years of age in a French child welfare center', *Arch Pediatr*, Vol. 22(11), 2015, pp. 1129-1139.

249 Gunilla Larsson, Ann-Britt Bohlin & Marlene Stenbacka, 'Prognosis of children admitted to institutional care during infancy', *Child Abuse Negl*, Vol. 10(3), 1986, pp. 361-368.

250 Cf. Whetten (2009), *op. cit.*, p. 31.

251 Cf. Whetten (2014) *op. cit.*, p. 31.

252 Cf. Hair, *op. cit.*, p. 5; Valenkamp, *op. cit.*, p. 5. See also: Jonathan Green, Brian Jacobs, Jennifer Beecham, Graham Dunn, Leo Kroll, Catherine Tobias & Jackie Briskman, 'Inpatient treatment in child and adolescent psychiatry–a prospective study of health gain and costs', *Journal of Child Psychology and Psychiatry*, Vol. 48(12), 2007, pp. 1259-1267.

253 Cf. Indig, *op. cit.*, p. 5.

deprivation of liberty in these settings on overall health. The limited and variable nature of the literature makes it difficult to arrive at strong conclusions.

In one of the few studies to include a control group, Wilmshurst used a quasi-experimental design to compare child mental health treatment outcomes from a **Canadian** residental programme (n=27) to a community-based alternative (n=38).[254] Whilst the community-based alternative group showed a statistically significant reduction in psychiatric symptoms, children in the residential programme showed clinical deterioration and increased internalising symptoms. However, differences between groups may be have been due to differing therapeutic approaches, rather than residence in a therapeutic institution per se. One study in **Ireland** undertook a 16-year follow up of a small group of children admitted to a **Dublin** inpatient psychiatry unit.[255] Nineteen of the 24 subjects traced experienced one or more poor long-term outcomes including death, imprisonment, adult psychiatric disorder, or unemployment. In contrast, another Canadian study found both clinically and statistically significant improvements in the long-term health outcomes of children and youth with severe mental health problems following either a residential treatment or a similarly designed home-based alternative.[256]

Weiner *et al.*[257] examined the co-existence of psychiatric symptoms related to substance misuse and 'serious emotional or behavioural disturbances' among children and adolescents in 15 varied residential treatment settings in Florida and Illinois. A total of 566 young people, representing 72% of the population under study, met criteria for severe emotional or behavioural disturbances, of whom 173 (31%) were also assessed as having substance use problems. On leaving residential treatment, girls with a dual diagnosis of mental health and substance use problems were significantly less likely to be discharged to community placements such as the parental home, an adoptive home, or foster care. No such difference was identified for boys with dual diagnosis. The authors suggested that this was partially due to standardised care within such institutions, which may not be altered to fit an individual's clinical profile. Referring individuals to therapeutic institutions targeting specific conditions may restrict the availability of appropriate treatment in the context of comorbidity.

254 Linda A. Wilmshurst, 'Treatment programs for youth with emotional and behavioral disorders: An outcome study of two alternate approaches', *Mental Health Services Research,* Vol. 4(2), 2002, pp. 85-96.

255 Elaine Healy & Michael Fitzgerald, 'A 16-year follow-up of a child inpatient population', *Eur Child Adolesc Psychiatry,* Vol. 9(1), 2000, pp. 46-53.

256 Miche`le Preyde, Karen M. Frensch, Gary Cameron, Sara Nickerson-White, Randal Penney & Kelly Lazure, 'Long-term Outcomes of Children and Youth accessing Residential or Intensive Home-based Treatment: Three year follow up', *Journal of Child and Family Studies,* 20(5), 2011, pp. 660-668.

257 Dana A. Weiner, Melissa A. Abraham & John S. Lyons, 'Clinical characteristics of youths with substance use problems and implications for residential treatment', *Psychiatr Serv,* Vol. 52(6), 2001, pp. 793-799.

Another study in the **United States** highlights the importance of addressing this comorbidity; in a sample of 226 adolescents admitted to an inpatient treatment facility for substance abuse, Stowell and Estroff found that 74% had two or more psychiatric disorders including mood disorders (61%), conduct disorders (54%), and anxiety disorders (43%).[258]

Comorbid health conditions are not uncommon among children in therapeutic institutions. As part of a clinical case series, Anckarstar and colleagues[259] identified 20 young poeple (14 boys, six girls) diagnosed with autism spectrum disorder from a sample of 130 consecutive admissions to two 'specialist institutions for maladapted adolescents' in **Sweden**. Comorbidity was diagnosed in 11 of 16 cases considered, including ADHD (n=9), Tourette syndrome with OCD (n=2), depression (n=2), and 'mental retardation' (n=1). A study from **Nigeria** compared the profiles of 75 adolescent boys without criminal records, but detained on the grounds of being 'beyond parental control', to 144 matched boys from a secondary school.[260] Among a range of comparisons, the Kiddie Schedule for Affective Disorders and Schizophrenia was used to demonstrate a significantly higher lifetime prevalence of alcohol and substance abuse among those declared as 'beyond parental control' (55% *vs*. 10%).

In some settings, children are detained for therapeutic and other reasons in the same institution. For example, in **sub-Saharan countries** including **Nigeria**, the same residential institutions appear to be routinely used to house children detained due to criminal behaviour and child welfare concerns.[261] The health needs of these two populations are markedly different; for example, in a Nigerian study of children in a residential institution, children experiencing neglect had a significantly lower mean body mass index and a greater prevalence of neurological deficits and epilepsy, whereas children detained due to criminal behaviour had significantly higher rates of substance use disorders – more than 16 times greater than among those with child welfare concerns.[262] In institutions with such heterogeneity of clinical and psychosocial need, it may be difficult to provide adequately tailored care to all children.

258 R. Jeremy Stowell & Todd W. Estroff, 'Psychiatric disorders in substance-abusing adolescent inpatients: a pilot study', *J Am Acad Child Adolesc Psychiatry*, Vol. 31(6), 1992, pp. 1036-1040.

259 Henrik Anckarsater, Thomas Nilsson, Jean-Michel Saury, Maria Rastam & Christopher Gillberg, 'Autism spectrum disorders in institutionalized subjects', *Nordic Journal of Psychiatry*, Vol. 62(2), 2008, pp. 160-167.

260 Olayinka Atilola, Olayinka Imigbodun & Tolulope Bella-Awusah, 'The 'beyond parental control' label in Nigeria', *Int J Law Psychiatry*, Vol. 37(3), 2014, pp. 313-319.

261 Olayinka Atilola, 'Different points of a continuum? Cross sectional comparison of the current and pre-contact psychosocial problems among the different categories of adolescents in institutional care in Nigeria', *BMC Public Health*, Vol. 12, 2012, p. 554.

262 Ibid., p. 38.

Ramel and colleagues[263] documented a high prevalence of young unaccompanied asylum seekers in child and adolescent psychiatric services. In 2011, 56 out of 261 consecutive admissions to an adolescent psychiatric emergency unit in **Sweden** were unaccompanied asylum seekers, mainly adolescent boys from **Afghanistan**. These boys represented 3.40% of the young unaccompanied asylum seeker population in the hospital catchment area; by contrast, other admissions to the unit accounted for 0.26% of the rest of the adolescent population. Young asylum seekers were also considerably more likely than other adolescents in the catchment area to be subjected to involuntary inpatient care (0.67% *vs.* 0.02%). Clinical data suggested significantly higher rates of self-harm or suicidal behaviour among unaccompanied asylum seekers in the unit, than among other patients (76% *vs.* 58%). Similarly, within a child and adolescent inpatient psychiatric unit in **Spain**, significant differences were identified between 43 immigrant and 191 non-immigrant adolescents with regard to their main diagnoses on admission. Immigrants were significantly more likely to be diagnosed with schizophrenia (9.3% *vs.* 1.0%) and significantly less likely to be diagnosed with anorexia nervosa (9.3% *vs.* 26.2%).[264]

263 Björn Ramel, Jakob Täljemark, Anna Lindgren & Björn Axel Johansson, 'Overrepresentation of unaccompanied refugee minors in inpatient psychiatric care', *SpringerPlus,* Vol. 4(1), 2015, p. 131.

264 Ana Blazquez, Josefina Castro-Fornieles, Inmaculada Baeza, Astrid Morer, Esteban Martinez & Luisa Lazaro, 'Differences in Psychopathology Between Immigrant and Native Adolescents Admitted to a Psychiatric Inpatient Unit', *Journal of immigrant and minority health,* Vol. 17(6), 2015, pp. 1715-1722.

4. Discussion

The purpose of this review was to establish what is known about the health of children deprived of liberty in diverse settings, and to consider the evidence regarding the impact of deprivation of liberty on health outcomes. In each of the settings considered, we identified evidence of poor health, often set against a backdrop of disadvantage and inequity. Some studies reported a high prevalence of co-occurring health conditions, particularly substance dependence and mental illness, and many documented histories of trauma among children in institutional settings, highlighting the importance of providing holistic, multi-disciplinary and trauma-informed care in these settings.

Although it seems clear that many children deprived of liberty have significant healthcare needs, interpreting data on the prevalence of health problems in these settings is complicated by the fact that most studies did not include a non-institutionalised comparison group. It is thus difficult to establish whether the prevalence of health problems in these settings is higher than in the surrounding communities. At least with respect to infectious diseases, prisons and justice-related detention settings tend to reflect and amplify the prevalence in the surrounding communities,[265] such that meaningful interpretation of prevalence data in the absence of comparable community data is difficult. A more fundamental problem is that in many settings, there are no publicly available data on the health of children deprived of liberty. Despite the duty of care owed by States to children deprived of liberty, institutionalised mechanisms for routinely collecting and reporting data on their health needs appear to be rare.

We found some evidence that deprivation of liberty can be harmful to health or exacerbate pre-existing health conditions, although this evidence was mostly weak. However, we also identified evidence that, in some circumstances, deprivation of liberty can be associated with improved health outcomes, possibly due to improved access to healthcare and consistent access to shelter and food in some settings. These findings should not be interpreted as a justification for depriving children of their liberty. Rather, in order to avoid compounding health inequity, policies intended to reduce deprivation of liberty among children must simultaneously consider strategies for ensuring that their health needs are met outside of detention in a way that is equitable, sustainable, and age-appropriate.

265 Cf. Kinner (2018), *op. cit.*, p. 2. See also: Kate Dolan, Andrea Wirtz, Babak Moazen, Alison Galvani, Martial Ndeffo-mbah, Stuart A. Kinner, Ryan Courtney, Martin McKee, Joseph J. Amon, Margaret Hellard, Frederick Altice & Chris Beyrer, 'Global burden of HIV, viral hepatitis, and tuberculosis in prisoners and detainees', *The Lancet*, Vol. 388(10049), 2016, pp. 1089-1102.

Despite the consistency of our main findings, it is clear that the health needs of children deprived of liberty vary between settings. In the following sections we briefly discuss our findings with respect to each setting.

4.1 Children in Justice-related Detention

Justice-related detention can be harmful to child health, and to public health. Children who are detained under the child justice system often experience complex mental and physical health problems, with many experiencing multiple, co-occurring health conditions. When compared with their non-detained peers, they typically experience poorer health across a range of physical and mental domains. When viewed through a public health lens, the high prevalence of both communicable and non-communicable diseases presents both challenge and opportunities.[266] For many children, justice-related detention provides a unique (albeit regrettable) opportunity for diagnosis, disease management education, counselling and treatment to which they may otherwise not have access in the community.[267] Targeted, evidence-based preventive efforts are urgently needed to address the health and social correlates of child justice system involvement, and to provide timely healthcare to these highly marginalised children. Addressing the health status and needs of children in justice-related detention is an issue at the nexus of youth justice reform and healthcare reform.[268] Efforts to better understand the physical and mental health trajectories of children in justice-related detention, and how these trajectories might be altered to improve morbidity outcomes and reduce mortality risk, should be considered an urgent priority. Such opportunities exist in research, clinical care, medical education, policy, and advocacy to drive improvements in the health of children who experience justice-related detention. Preventing justice-related detention and addressing the health needs of children detained in this manner are critical goals to protect children and families from adverse health and social outcomes.[269]

266 Stuart A. Kinner & Emily A. Wang, 'The case for improving the health of ex-prisoners', *American Journal of Public Health,* Vol. 104(8), 2014, pp. 1352-1355; Seena Fazel & Jacques Baillargeon, 'The health of prisoners', *The Lancet,* Vol. 377(9769), 2011, pp. 956–965.

267 Ibid., p. 40.

268 Cf. Barnert (2016), *op. cit.*, p. 10.

269 Ibid., p. 40.

4.2 Children Living with their Mother in Prison

Globally, the female prison population is rising much faster than the male population, having risen 50% since the year 2000 (*vs.* 20% for males).[270] There are now more than 714,000 women and girls in prison around the world on any given day. The number of these women who have young children, or who give birth while incarcerated, is unknown, and there is a dearth of research about the health of children living with their mothers in prison. There is some evidence that children detained with their mothers experience poorer oral health[271] and mental health,[272] and higher rates of congenital syphilis,[273] compared with their non-detained peers, as well as below average cognitive and language development.[274] Studies have also reported high rates of HIV and hepatitis infection,[134] lice and scabies infestation,[275] and stunting and malnutrition.[276] However, other studies have found that children detained with their parents exhibited cognitive and motor development comparable to the general population of children,[277] a lower prevalence of developmental disorder on some measures compared to non-detained children,[278] and better mental health compared to children separated from their mothers during their imprisonment.[279] Furthermore, allowing babies and small children to remain with their incarcerated mother permits breastfeeding and promotes secure attachment between mother and child, which is thought to be mutually beneficial.[280] Although prison is clearly not an optimal environment for a child, in circumstances where there is no other appropriate caregiver available in the community, accommodating children with their mother in prison may be preferable to the child being moved into institutionalised care. Of the studies we reviewed, those reporting more favourable health outcomes came from high-income countries,[281] whereas the majority of studies reporting poorer outcomes came from low- and middle-income countries.[282] It seems likely that the impact of having a child living with their mother in prison depends in

270 Roy Walmsley, 'World prison population list (12th ed.)', 2018, Available at http://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf (accessed 5 August 2019)

271 Cf. Al Salami, *op. cit.*, p. 20.

272 Cf. Kutuk, *op. cit.*, p. 18.

273 Cf. Domingues, *op. cit.*, p. 19.

274 Cf. Lejarrag, *op. cit.*, p. 18.

275 Cf. Senanayake, *op. cit.*, p. 19.

276 Ibid., p. 40.

277 Cf. Jiménez, *op. cit.*, p. 18.

278 Cf. Lejarrag, *op. cit.*, p. 18.

279 Cf. Goshin, *op. cit.*, p. 19.

280 Cf. A/RES/65/229, *op. cit.*, p. 17; Byrne, *op. cit.*, p. 3; Sleed, *op. cit.*, p. 3.

281 Cf. Jiménez, *op. cit.*, p. 18; Lejarrag, *op. cit.*, p. 18; Goshin, *op. cit.*, p. 19.

282 Cf. Senanayake, *op. cit.*, p. 19; Domingues, *op. cit.*, p. 19.

part on context, with some prisons in high-income settings better able to meet the health and developmental needs of children in their care.

Some researchers have suggested that appropriate antenatal healthcare for pregnant women in prisons,[283] supportive programming for mothers and their children in prison,[284] stimulating environments for children,[285] and improved health literacy in carers[286] may have positive effects for the health of children in prison. However, it is important to recognise the significant limitations in these studies, notably including small sample sizes,[287] the use of comparison groups prone to bias,[288] poor measurement of outcomes,[289] inadequate reporting of sampling and measurement,[290] and suboptimal statistical methods.[291] As such, few firm conclusions can be drawn about the health status of children detained with their mothers, or about the impacts of deprivation of liberty on the health of children living with their mothers in prison. More and better evidence is required to inform decisions about the health status and needs of these children.

4.3 Children Detained in the Context of Armed Conflict or National Security

There are few high-quality studies of the health of children deprived of liberty through war, armed conflict or terrorism. However, the available literature – mostly pertaining to former child soldiers (FCS) – suggests often complex presentations with multifaceted negative health outcomes. In this context, deprivation of liberty typically means being abducted at a young age (before the age of criminal responsibility in most countries), and being detained and utilised by armed forces, which are often non-Government (non-State) forces. Upon release from captivity these children, who were often targeted by armed forces due to pre-existing vulnerability, may then also experience justice-related detention and/or imprisonment, which may further compound both disadvantage and trauma.

Given the complexity and chronicity of their traumatic experiences, it is difficult to isolate the impact of deprivation of liberty on the health of these children. It is apparent that the

283 Ibid, p. 41.

284 Cf. Goshin, *op. cit.*, p. 19.

285 Cf. Jiménez, *op. cit.*, p. 18.

286 Cf. Al Salami, *op. cit.*, p. 20.

287 Cf. Kutuk, *op. cit.*, p. 18; Lejarrag, *op. cit.*, p. 18; Goshin, *op. cit.*, p. 19.

288 Ibid., p. 41; Cf. Al Salami, *op. cit.*, p. 20.

289 Ibid., p. 41.

290 Cf. Jiménez, *op. cit.*, p. 18; Al Salami, *op. cit.*, p. 20; Senanayake, *op. cit.*, p. 19.

291 Cf. Al Salami, *op. cit.*, p. 20.

death of family members (e.g. killing of parents), amongst other traumatic experiences, an ecology of brutalising treatment and, on release, stigma and double disadvantage of being ostracised, all contribute to ongoing problems for this group. However, due to the limited evidence available, there are likely other health outcomes that may not yet be fully identified or understood. We noted, above, the likelihood of stress affecting brain systems. Given their traumatic experiences, it is also likely that traumatic brain injury (TBI) is common but largely overlooked in this vulnerable population.[292] A recent analysis of TBI worldwide revealed that the highest rates were reported in **Syria** – alongside other areas with ongoing conflict.[293] Children of war and conflict may be tortured, beaten, and exposed to bombs and bullets, and may have experienced losses of consciousness due to blows to the head. TBI substantially increases the chances of subsequent mental health problems.[294] Patterns of injury, and reported symptoms, suggest that it contributes to the ongoing issues of former child soldiers and other children affected by armed conflict. It is imperative that this condition, alongside all direct and indirect negative health outcomes associated with child experiences of war and armed conflict, is identified and treated.

4.4 Children in Immigration Detention

While the majority of studies examining the health of children exposed to immigration detention are not of high quality, both grey and peer reviewed literature consistently report that the mental health of this population is poor. More research is urgently needed on other health outcomes and the long-term impacts of immigration detention on children and young people. While the health of children who experience immigration detention is widely recognised as a global health problem, there is a surprisingly small number of primary research articles on this issue. Much of the peer reviewed literature is dominated

292 Andrew I. R. Maas, David K. Menon, David P. Adelson, Nada Andelic, Michael J. Bell, Antonio Belli, Peter Bragge, Alexandra Brazinova *et al.*, 'Traumatic brain injury: integrated approaches to improve prevention, clinical care, and research', *The Lancet Neurology*, Vol. 16(12), 2017, pp. 987-1048.

293 Jetan H. Badhiwala, Jefferson R. Wilson & Michael G. Fehlings, 'Global burden of traumatic brain and spinal cord injury', *The Lancet Neurology*, Vol. 18(1), 2018, pp. 24-28.

294 Cf. Fazel (2011), *op. cit.*, p. 40.

by discussion and opinion pieces,[295] participant–observer accounts,[296] case series,[297] and descriptive studies.[298] Research has been conducted on the health of adults in immigration detention[299] and child refugees who have resettled in another country but have not experienced immigration detention.[300] These studies have limited generalisability to the health of children who experience immigration detention, as these children may be more vulnerable than adults, and their health may differ from that of children who have not experienced detention.

Of particular concern is the lack of studies exploring the health of children who experience immigration detention in the **United States**. Much of the research we found from the United States focused on the impact of unauthorised parents' deportation and detention on their US-born children.[301] While this is also an important area of research, the increasingly punitive nature of US immigration policies, involving the detention and separation of children from their parents, calls for urgent research.[302] The combination of detention and separation of children can have profoundly detrimental consequences for the child's health, including

295 Cf. Hutchinson, *op. cit.*, p. 24. See also: Natasha J. Davidson, Sue Skull, David Burgner, Paul M. Kelly, Shanti Raman, Derek Silove, Zachary Steel, Rohan Vora & Mitchell Smith, 'An issue of access: delivering equitable health care for newly arrived refugee children in Australia', *J Paediatr Child Health,* Vol. 40(9-10), 2004, pp. 569-575; Michael Dudley, 'Contradictory Australian national policies on self-harm and suicide: The case of asylum seekers in mandatory detention', *Australasian Psychiatry,* Vol. 11(SUPPL. 1), 2003, pp. S102-S108; Jo Durham, Claire E. Bolan, Chi-Wai Lui & Maxine Whittaker, 'The need for a rights-based public health approach to Australian asylum seeker health', *Public Health Rev,* Vol. 37, 2016, p. 6; Mina Fazel, Unni Karunakara & Elizabeth A. Newman, 'Detention, denial, and death: migration hazards for refugee children', *Lancet Glob Health,* Vol. 2(6), 2014, pp. e313-314; Andrew Foong, David Arthur, Sancia West, Rachel Kornhaber, Loyola McLean & Michelle Cleary, 'The mental health plight of unaccompanied asylum-seeking children in detention', *J Adv Nurs,* Vol. 2, 2018, p. 2; Kajal Hirani, Donald Payne, Raewyn Mutch & Sarah Cherian, 'Health of adolescent refugees resettling in high-income countries', *Arch Dis Child,* Vol. 101(7), 2016, pp. 670-676; Matthew Hodes, 'The mental health of detained asylum seeking children', *Eur Child Adolesc Psychiatry,* Vol. 19(7), 2010, pp. 621-623; Rachel Kronick, Cecile Rousseau & Janet Cleveland, 'Mandatory detention of refugee children: A public health issue?', *Paediatr child health,* Vol. 16(8), 2011, pp. e65-67; Louise Newman & Zachary Steel, 'The child asylum seeker: psychological and developmental impact of immigration detention', *Child Adolesc Psychiatr Clin N Am,* Vol. 17(3), 2008, pp. 665-683; Louise Newman, Nicholas Proctor & Michael Dudley, 'Seeking asylum in Australia: immigration detention, human rights and mental health care', *Australasian Psychiatry,* Vol. 21(4), 2013, pp. 315-320; Derrick Silove, Patricia Austin & Zachary Steel, 'No refuge from terror: the impact of detention on the mental health of trauma-affected refugees seeking asylum in Australia', *Transcult Psychiatry,* Vol. 44(3), 2007, pp. 359-393.

296 Rachel Kronick, Cecile Rousseau & Janet Cleveland, 'Asylum-seeking children's experiences of detention in Canada: A qualitative study', *Am J Orthopsychiatry,* Vol. 85(3), 2015, pp. 287-294; Ryan Essex & Poonkulali Govintharajah, 'Mental health of children and adolescents in Australian alternate places of immigration detention', *J Paediatr Child Health,* Vol. 53(6), 2017, pp. 525-528.

297 Cf. Mares (2004), *op. cit.*, p. 26.

298 Cf. Robjant, *op. cit.*, p. 23.

299 Ibid., p. 43; von Werthern, *op. cit.*, p. 23.

300 Cf. Fazel (2012), *op. cit.*, p. 2; Reed, *op. cit.*, p. 23.

301 Kalina Brabeck & Qingwen Xu, 'The impact of detention and deportation on Latino immigrant children and families: a quantitative exploration', *Hispanic J Behav Sci,* Vol. 32, 2010, pp. 341-361. See also: Lisseth Rojas-Flores, Mari L. Clements, J. Hwang Koo & Judy London, 'Trauma and psychological distress in Latino citizen children following parental detention and deportation', *Psychol Trauma.* Vol. 9(3), 2017, pp. 352-361; Kalina M. Brabeck, M. B. Lykes & Cristina Hunter, 'The psychosocial impact of detention and deportation on US migrant children and families', *American Journal of Orthopsychiatry,* Vol. 84(5), 2014, p. 496.

302 Cf. Wood, *op. cit.*, p. 24. See also: Lauren Aratani, 'Death of Guatemalan migrant girl highlights hardline border policy', *The Guardian,* 16 December 2018, Abailable at https://www.theguardian.com/us-news/2018/dec/15/mexico-border-terrain-weapon-us-migrants (accessed 4 August 2019).

threatening their attachment bond to their parents, traumatisation, and inducing toxic stress.[303]

In contrast, the welfare of children in immigration detention has been the focus of a large number of reports, inquiries and discussion papers, often linked to human rights debates. This grey literature plays an important role in the area of immigration detention, which is a particularly difficult setting in which to conduct rigorous research because of restrictions imposed by detaining authorities and consequent restrictions on access and information. Much of the evidence relating to the health of children in immigration detention settings reflects the realities about who has access to these centres and to the children within them. It is not surprising, therefore, that much of the evidence within the grey literature is generated by clinicians who have worked in these settings and by public inquiries by institutions with mandates to enter and access the facilities, and who can require that certain information be produced. This evidence largely consists of observations, reporting and clinical assessments by clinicians, case studies of children in detention, and self-reporting by young detainees and their parents.

The lack of rigorous research may be attributed to the numerous difficulties and barriers to conducting research in this area, as noted in systematic reviews on refugee health.[304] There are many ethical considerations relating to undertaking research with children who have experienced immigration detention as they are a vulnerable population, often having experienced trauma and coming from conflict settings.[305] Many practical considerations are also noted including the challenges of undertaking research in dangerous conflict zones, appropriate use of diagnostic tools, selecting representative samples,[306] and being unable to randomise samples.[307] Furthermore, immigration detention, especially the detention of children, is a highly politicised and controversial issue. Some research has been limited by Government legislation, such as the **Australian** *Border Force Act* 2015, which made it illegal for health professionals to disclose any information on Australian immigration detention facilities (this Act has since been amended).[308]

303 Cf. Wood, *op. cit.*, p. 24.

304 Cf. Reed, *op. cit.*, p. 23; von Werthern, *op. cit.*, p. 23.

305 Cf. Reed, *op. cit.*, p. 23.

306 Ibid., p. 44.

307 Cf. von Werthern, *op. cit.*, p. 23.

308 Cf. Essex, *op. cit.*, p. 43.

4.5 Children in Institutional Care

There is a wealth of evidence regarding health and development among children raised in institutional care due to reasons of welfare. This includes multiple systematic reviews and several robust large-scale studies, undertaken in varied country contexts. Such studies typically highlight negative outcomes following institutional care. This includes evidence of significant delays in physical growth, compared to population norms or non-institutionalised control groups,[309] as well as increased risk of various physical health difficulties including infectious disease, chronic illness, and stress-related health problems.[310] The strongest and most consistent evidence of the negative impact of institutional care is apparent in relation to mental health, particularly with regard to high rates of psychiatric symptoms, and emotional and behavioural problems.[311] Systematic reviews have also frequently highlighted impaired cognitive development among young people raised in institutions.[312]

Whilst this evidence is extensive, there are notable exceptions suggesting that it is the quality of care that is of primary importance, rather than the fact of institutionalisation per se. In some low-income countries good quality institutional care appears to be a protective factor from the comparatively poor outcomes for those living in families in contexts of extreme poverty.[313] These findings highlight the importance of investing in appropriate community alternatives to institutional care, so that institutionalisation does not become 'the lesser of two evils'. Concern must also be given to the nature of the institutions in which children are raised, and to the quality of care provided, including in relation to health, emotional support, and cognitive development. Where institutional care has negatively impacted upon early development, there is evidence indicating that early removal from such institutions, including through international adoption, is associated with recovery and positive subsequent development, often to within normal ranges.[314]

309 Cf. van Ijzendoorn (2007), *op. cit.*, p. 30; McCall, *op. cit.*, p. 30; Cavalcante, *op. cit.*, p. 31; Reid, *op. cit.*, p. 32; Juffer (2005), *op. cit.*, p. 33.

310 Cf. Cavalcante, *op. cit.*, p. 31.

311 Ibid., p. 45.

312 Cf. Christoffersen, *op. cit.*, p. 35; Fensbo, *op. cit.*, p. 35; Johnson (2006), *op. cit.*, p. 35; Juffer (2014), *op. cit.*, p. 35; Sherr, *op. cit.*, p. 35; van Ijzendoorn (2008), *op. cit.*, p. 35; van Ijzendoorn (2005), *op. cit.*, p. 35.

313 Cf. Whetten (2009), *op. cit.*, p. 31; Braitstein, *op. cit.*, p. 31; Ferris, *op. cit.*, p. 32.

314 Cf. Christoffersen, *op. cit.*, p. 35; Johnson (2006), *op. cit.*, p. 35; van Ijzendoorn (2008), *op. cit.*, p. 35; van Ijzendoorn (2005), *op. cit.*, p. 35.

4.6 Children in Therapeutic Institutions

There is limited evidence regarding the long-term health impact of residence in therapeutic institutions, and few studies explore this in a methodologically robust manner. Research suggests a general trend of targeted health improvement – particularly regarding symptom reduction in mental health – during residency in both psychiatric units and residential treatment centres, although this is likely attributable to treatment approaches, as opposed to the actual institutionalisation of the child, and there is debate as to whether these improvements can be maintained in the long-term.[315] Evidence regarding the benefits of therapeuetic institutions for children is mixed[316] and not all studies report positive treatment outcomes; one study found that some forms of residential treatment in therapeutic institutions can have negative health consequences, such as increasing symptoms of depression and anxiety.[317] Overall, there is very limited research examining indirect health improvements for children detained in therapeutic institutions, and current evidence largely focuses on the outcomes of the primary treatment objective in the long-term.

Due to the variable quality of the literature and the paucity of evidence regarding the health implications of institutionalisation itself, it is difficult to arrive at any strong conclusions. However, the research identified does highlight potential limitations of residential treatment in therapeutic institutions that target specific health problems, notably including a need to address comorbidity of health conditions and other complex case presentations.[318] There is increasing awareness of factors that may facilitate successful residential treatment, such as family involvement throughout treatment,[319] the stability of the discharge placement, and appropriate aftercare.[320] Targeting these protective factors may help to mitigate any negative consequences of the child being absent from the family home and in a more restrictive setting.

315 Brady C. Bates, Diana J. English & Sophia Kouidou-Giles, 'Residential treatment and its alternatives: A review of the literature', *Child & Youth Care Forum*, Vol. 26(1), 1997, pp. 7-51. See also: Karen M. Frensch & Gary Cameron, 'Treatment of Choice or a Last Resort? A Review of Residential Mental Health Placements for Children and Youth', *Child and Youth Care Forum*, Vol. 31(5), 2002, pp. 307-339.

316 Cf. Indig, *op. cit.*, p. 5.

317 Cf. Wilmshurst, *op. cit.*, p. 37.

318 Cf. Weiner, *op. cit.*, p. 37; Stowell, *op. cit.*, p. 38; Anckarsater, *op. cit.*, p. 38.

319 Mary Y. Brinkmeyer, Sheila M. Eyberg, Mathew L. Nguyen & Robert W. Adams, 'Family engagement, consumer satisfaction and treatment outcome in the new era of child and adolescent in-patient psychiatric care', *Clinical Child Psychology and Psychiatry*, Vol. 9(4), 2004, pp. 553-566.

320 Cf. Hair, *op. cit.*, p. 5.

4.7 Policy Implications

Although each of the settings considered in our review confers unique risks and opportunities, the children who are exposed to these settings are not mutually exclusive groups. For example, children in institutional care are at increased risk of subsequent justice-related detention,[321] and these children are, in turn, at increased risk of being subjected to involuntary inpatient treatment for mental illness.[322] Children in immigration detention may be fleeing from conflict zones, and may also have experienced deprivation of liberty in that context.[323] Therefore, an integrated, multi-sectoral policy response to the health of children deprived of liberty is required.

Furthermore, the impact of deprivation of liberty on the health of children is likely to be different in different settings. For example, while justice-related detention may cause or compound trauma, particularly for those exposed to extended periods of solitary confinement,[324] involuntary in-patient psychiatric treatment may not, particularly if care in that setting is trauma-informed, multi-disciplinary, and minimises the use of restrictive practices. It is also likely that deprivation of liberty will have a greater impact on some children than on others, with those most vulnerable, particularly due to histories of trauma, at greatest risk of poor outcomes.

There is overwhelming evidence that children deprived of liberty often have significant and complex health problems, and that many come from community settings distinguished by social and structural determinants of ill health, where they may have not received adequate healthcare. As such, there is clearly a strong imperative to more adequately address their health-related needs in detention. With respect to justice-related detention, the UN Standard Minimum Rules for the Treatment of Prisoners (the 'Nelson Mandela' Rules)[325] require that healthcare in prison be at least equivalent to that available in the surrounding community (Rule 24.1). Although these rules do not apply to justice-related detention or other forms of deprivation of liberty for children, this 'principle of equivalence' is equally applicable in

321 Melissa Jonson-Reid & Richard P. Barth, 'From placement to prison: The path to adolescent incarceration from child welfare supervised foster or group care. Children and Youth Services Review', Vol. 22(7), 2000, pp. 493-516.

322 Arash Anoshiravani, Olga Saynina, Lisa Chamberlain, Benjamin A. Goldstein, Lynne C. Huffman, Ewen Wang & Paul H. Wise, 'Mental Illness Drives Hospitalizations for Detained California Youth', *Journal of Adolescent Health,* Vol. 57(5), 2015, pp. 455-461. See also: Tyler N. A. Winkelman, Inginia Genao, Christopher Wildeman & Emily A. Wang, 'Emergency Department and Hospital Use Among Adolescents With Justice System Involvement', *Pediatrics*, Vol. 140(5), 2017.

323 Dorothy Morgos, J. W. Worden & Leila Gupta, 'Psychosocial effects of war experiences among displaced children in southern Darfur', *Omega (Westport),* Vol. 56, 2007, pp. 229-253. See also: Abdel A. M. Thabet, Yehia Abed & Panos Vostanis, 'Comorbidity of PTSD and depression among refugee children during war conflict', *J Child Psychol Psychiatry,* Vol. 45, 2004, pp. 533-542.

324 Cf. Whitley, *op. cit.*, p. 5.

325 United Nations, *United Nations Standard Minimum Rules for the Treatment of Prisoners* (the Mandela Rules), E/CN.15/2015/L.6/Rev.1, 21 May January, p. 13.

these settings. Recognising the concentration of ill health in custodial settings, and that sustainably addressing the health needs of incarcerated people is important to reducing health inequalities at the population level,[326] it has been argued that per capita investment in custodial healthcare should in fact exceed that in the general community.[327]

Given that many children who experience deprivation of liberty are drawn from disadvantaged communities, there may indeed be circumstances in which the quality of healthcare in places of detention exceeds that in the surrounding communities, at least with respect to some health issues such as infectious disease. Given this unfortunate reality, efforts to reduce deprivation of liberty for children must be paralleled with genuine and proportionate investment in community alternatives, including investment in evidence-based, age-appropriate, trauma-informed and affordable healthcare. If these investments are not made, efforts to reduce deprivation of liberty may, at least in some settings, have the perverse consequence of compounding health inequity for vulnerable children and adolescents.

4.8 Limitations and Recommendations for Research

Our review had three main limitations. First, although our literature search was global and had no language restrictions, our rapid review was restricted to two key academic databases, such that we may have missed some important studies, as well as some important grey literature. Second, extreme heterogeneity in study design precluded meta-analysis, such that we were unable to produce pooled regional or global prevalence estimates in any of the settings examined. Third, it was beyond the scope of this review to undertake a formal quality assessment of the included studies (with the exception of those relating to justice-related detention), although we note that very few appeared to be of high quality.

More significant than the limitations of our review are the limitations of the literature on which it is based. For most settings we found remarkably few peer-reviewed studies, and even in settings where there was a well-developed literature (e.g., justice-related detention), the quality of most studies was poor. Most published studies were from high-

326 Stuart A. Kinner, Louise Southalan, Emilia Janca, Amanda Butler, Jesse T. Young, Sheila R. Lindner, Ruth E. Martin, Fabricio Augusto, Carlos M Neves, Walter F. Oliviera, Emily A. Wang, Christopher Wildeman, Brie Williams, Joao Breda, Carina Ferreira-Borgres, Nathan Hughes, Eamonn O'Moore, Lisa Scholin & Sunita Sturup-Toft, 'The role of prisons, jails and youth detention centres in addressing health inequalities in the Americas: Submission to the PAHO Commission on Equity and Health Inequalities in the Americas', 31 March 2018, Available at https://wephren.tghn.org/site_media/media/articles/Submission_to_the_PAHO_Commission_on_Equity_and_Health_Inequalities_-_pr....pdf (accessed 6 August 2019).

327 Rick Lines, 'From equivalence of standards to equivalence of objectives: The entitlement of prisoners to health care standards higher than those outside prisons', *International Journal of Prisoner Health*, Vol. 2(4), 2006, pp. 269-280.

income countries; there is an urgent need for more high-quality, independent research examining the health of children deprived of liberty, particularly in low- and middle-income countries. The recent *Lancet* Commission on Adolescent Health and Wellbeing[328] called for the urgent collection of more high-quality data on the health of socially and economically marginalised young people, including those who come into contact with the child justice system. Similarly, the recent *Lancet* Inclusion Health series identified imprisoned young people as a particularly vulnerable group, and called for more high-quality research on their health and wellbeing.[329] With respect to children living with their mothers in prison, a study currently under way in Australia provides one example of rigorous, population-level research that has the potential to lead to meaningful, evidence-based policy reform.[330] The health of children deprived of liberty stands to benefit measurably from greater investment in independent, high-quality research.

328 Cf. Patton (2016), *op. cit.*, p. 7.

329 Cf. Marmot (2017), *op. cit.*, p. 3. See also: Robert W. Aldridge, Alistair Story, Stephen W. Hwang, Merete Nordentoft, Serena A. Luchenski, Gred Hartwell, Emily J. Tweed, Dan Lewer, Srinivasa V. Katikireddi & Andrew C. Hayward, 'Morbidity and mortality in homeless individuals, prisoners, sex workers, and individuals with substance use disorders in high-income countries: a systematic review and meta-analysis', *The Lancet,* Vol. 391(10117), 2017, pp. 241-250.

330 Helen Myers, Leonie Segal, Derrick Lopez, Ian W. Li & David B. Preen, 'Impact of family-friendly prison policies on health, justice and child protection outcomes for incarcerated mothers and their dependent children: a cohort study protocol', *BMJ Open*, Vol. 7(8), 2017, p. e016302.

5. Conclusions

Children deprived of liberty are, by and large, distinguished by poor health profiles. Complex health needs in these children are common, and are often set against a backdrop of entrenched disadvantage. The factors associated with deprivation of liberty overlap considerably with the determinants of health, such that policies regarding deprivation of liberty are relevant to health equity at the population level.[331] Some children experience deprivation of liberty in multiple settings (e.g. institutional care, justice-related detention, and psychiatric hospital) such that policy responses should take into consideration their health needs, be coordinated across settings, and be designed to maximise continuity of care.

Not enough is known about the health of children deprived of liberty, or about the adequacy of health services in these settings. There is a pressing need for both rigorous, independent research and routine, institutionalised health surveillance in all places where children are deprived of liberty. Nevertheless, there is already **considerable evidence that deprivation of liberty can be harmful to the health of children, and often compounds trauma**. Although in some settings the quality of healthcare may be better in detention than in the surrounding community, the benefits of this healthcare may be undermined by the detention experience, such that this unfortunate reality in no way justifies depriving children of their liberty. Efforts to reduce deprivation of liberty are critical, and must be paralleled with proportionate investment in alternative ways of identifying and addressing the health needs of vulnerable children.

331 Cf. Kinner (2018), *op. cit.*, p. 47.

How to Improve the Health of Children who are at Risk of, and Deprived of Liberty?

6. Recommendations

1. **Prevention:** Recognising that poor health and the social determinants of health are also risk factors for deprivation of liberty, States should build the capability and capacity of families and communities to meet the health-related needs of children, including through coordinated, multisectoral responses. Evidence-based, upstream investments of this sort have the potential to prevent deprivation of liberty, and reduce health inequalities at the population level.
2. **Diversion:** Recognising the concentrated burden of disease among children at risk of being deprived of their liberty, States should increase their investment in diversion mechanisms that simultaneously minimise deprivation of liberty, and ensure that vulnerable children are transferred into evidence-based treatment and care that is appropriate to their health and social needs.
3. **Quality and continuity of care:** Deprivation of liberty adversely impacts the health of children. As such, States should make all reasonable efforts to minimise the use of deprivation of liberty in all settings, and to use deprivation of liberty only as a measure of last resort. Recognising that children in these settings retain the right to the highest attainable standard of health, States should ensure that health services in such settings are of a standard at least equivalent to that available in the community, and are administered in such a way as to maximise continuity of care.
4. **Transitional care:** Recognising the importance of transitional care in achieving the best health outcomes for children deprived of liberty, States should invest at scale in evidence-based, health-focused transitional support services to facilitate reintegration into the community. Given the diversity of settings in which children are deprived of liberty, and the diverse needs of subgroups defined by sex, ethnicity and other factors, no one model of transitional support will be optimal for all settings or all children. There is a pressing need for the development and rigorous evaluation of programmes and systems designed to facilitate continuity of care and optimise health outcomes for children transitioning from settings where they are deprived of liberty, back into the community.

5. **Building the evidence base:** Recognising the need for sound evidence to guide policy development, States should support high-quality, independent research on the health of children deprived of liberty, and on the impact of deprivation of liberty on health. This should include investment in prospective studies to examine health outcomes after deprivation of liberty (including using linked administrative data), rigorous evaluation of health-focused interventions (including through randomised trials), evaluation of diversion and non-custodial responses, and evaluation of programmes and systems for transitional care. To support the business case for investment, such studies should include economic evaluation of outcomes, from a whole-of-Government payer perspective. The findings of such studies should be made publicly available as a matter of course.
6. **Monitoring and reporting:** Recognising the lack of basic data to inform policy and practice in many settings where children are deprived of liberty, Member States should invest in routine monitoring and public reporting on health status and health services in all places where children are deprived of liberty. For children deprived of liberty in the administration of justice, one mechanism for achieving this may be through adaptation of the survey tool developed by the WHO (Europe) Health in Prisons Programme, and already used to collect data on health and health services in prisons throughout Europe.

CHAPTER 7

CHILDREN WITH DISABILITIES DEPRIVED OF LIBERTY

© Hoang Dinh Nam via Getty Images, Child with a Mental Disability tied to a Bed in an Orphanage, Vietnam

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1. Introduction

It is estimated that there are more than **one billion persons with disabilities** in the world today, representing approximately 15% of the world's population.[1] The number of children within this population is difficult to determine accurately, due to a lack of reliable global data. In 2005, it was estimated that there are around **150 million children with disabilities**.[2] Today, the figure is likely to be **much higher**. These children experience significant discrimination and disadvantage in all aspects of their lives, including the realisation of their right to personal liberty. This disadvantage arises not from the child's impairment, but from the cumulative effect of entrenched social barriers that serve to exclude and discriminate. For instance, some studies have shown that the highest rates of disability are reported among economically disadvantaged children.[3]

The entry into force of the Convention on the Rights of Persons with Disabilities (CRPD) in 2008 hailed a new approach to addressing this unacceptable reality. It is based on the human rights model of disability, which conceptualises disability as an evolving social construct, arising from the interaction between persons with physical, mental, intellectual or sensory impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others.[4] On this basis, the human rights based approach rejects the view that persons with disabilities[5], including children with disabilities[6], are objects of charity, treatment, welfare or protection and instead affirms that persons with disabilities are subjects of human rights. The human rights approach to disability aligns with the child rights approach, which considers children first and foremost as rights-holders, entitled to exercise their rights and to active participation in all matters that affect them, and not only objects in need of protection and welfare. Together, the two approaches provide a unified human rights based approach to children with disabilities. Children with disabilities are right-holders and are entitled to claim and realise, on an equal basis with other children, all civil, political, social, economic and cultural rights. States are obliged to respect, protect and fulfil these rights for children with disabilities.

The purpose of this cross-cutting chapter is to provide an overview of the types of deprivation of liberty endured by children with disabilities, and outline the key legal standards and policy frameworks that must guide the way forward to eradicate such practices.

1 World Health Organization (WHO) & World Bank, *World Report on Disability,* Geneva, Switzerland, 2011, Available at https://www.who.int/disabilities/world_report/2011/en/ (accessed 1 June 2019).

2 Ibid., p. 36.

3 Amy J. Houtrow, Kandyce Larson, Lynn M. Olson, Paul W. Newacheck & Neal Halfon, 'Changing trends of childhood disability, 2001-2011', *Pediatrics*, Vol. 134(3), 2014, pp. 530–538.

4 UN General Assembly, *Convention on the Rights of Persons with Disabilities,* A/RES/61/106, Preamble (e) & Article 1.

5 Article 1 CRPD provides that persons with disabilities include those with 'long-term physical, mental, intellectual, or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others'.

6 Children with disabilities are persons with disabilities who are under the age of 18 years. For statistical purposes, the Washington Group on Disability Statistics (WG), together with the United Nations Children's Fund (UNICEF), has developed a set of functional questions to capture disability of children and youth.

2. Deprivation of Liberty of Children with Disabilities

Children with disabilities are deprived of liberty at higher rates than other children. They also experience disability-specific forms of deprivation of liberty. During deprivations of liberty they are also more likely to experience adverse conditions and harmful practices. This section outlines this reality and explores the reasons for it.

2.1 Mainstream Settings of Deprivation of Liberty

Children with disabilities are significantly overrepresented in mainstream settings of deprivation of liberty, including in criminal justice and residential institutions for children. They are also often placed in immigration detention centres and other facilities where they are at a distinct disadvantage.

a. Criminal Justice

The high proportion of children with disabilities in criminal justice systems and detention facilities is well established,[7] particularly children with psychosocial and/or intellectual disabilities.[8] For example, prevalence studies in the **United States** have found that 65-70% of youth in the justice system have a mental health condition, with at least 20% meeting criteria for severe impairments.[9] A national survey in long-term child correctional facilities also found an estimated national average of 33% prevalence of intellectual and

7 See Linda A. Teplin, Karen M. Abram, Gary M. McClelland, Mina K. Dulcan & Amy A. Mericle, 'Psychiatric disorders in youth in juvenile detention', *Archives of General Psychiatry,* Vol. 59, 2002; Michael Bullis & Paul Yovanoff, 'More alike than different? Comparison of formerly incarcerated youth with and without disabilities', *Journal of Child and Family Studies,* Vol. 14, 2005; Heather. M. Baltodano, Pamela. J. Harris & Robert B. Rutherford, 'Academic achievement in juvenile corrections: examining the impact of age, ethnicity, and disability', *Education and Treatment of Children,* Vol. 28, 2005; Mary M. Quinn, Robert B. Rutherford, Peter E. Leone, David M. Osher & Jeffrey M. Poirier, 'Youth with disabilities in juvenile corrections: a national survey', *Exceptional Children,* Vol. 71, 2005. Note that the methods and the definition of disability adopted by the researchers might differ from study to study, as well as the age range of reference.

8 Cf. Quinn, *et al.* (2005), *op. cit.*; Jane Timmons-Mitchell, Christie Brown, S. Charles. Schulz, Susan. E. Webster, Lee A. Underwood & William E. Semple, 'Comparing the mental health needs of female and male incarcerated juvenile delinquents', *Behavioral Sciences and the Law,* Vol. 15, 1997; Eefjie Suk, Josine Mill, Robert Vermeiren, Vladislav Ruchkin, Mary Schwab-Stone, Theo Doreleijers & Dirk Deboutte, 'Adolescent suicidal ideation: a comparison of incarcerated and school-based samples', *European Child & Adolescent Psychiatry,* Vol. 18(6), 2009.

9 Kathleen Skowyra & Joseph J. Cocoza, *Blueprint for Change: A Comprehensive Model for the Identification and Treatment of Youth with Mental Health Needs in Contact with the Juvenile Justice System,* The National Center for Mental Health and Juvenile Justice, 2007; Linda A. Teplin, Karen M. Abram, Jason J. Washburn, Leah J. Welty, Jennifer A. Hershfield & Mina K. Dulcan, 'The Northwestern Juvenile Project: Overview', *OJJDP Juvenile Justice,* 2013.

developmental disabilities.[10] Child detention has even been described as a default solution for these children[11] who 'can become enmeshed in a web of interconnected and reinforcing difficulties produced, in part, by the justice systems that manage them [...] with criminal law agencies often being the last at the end of a line of human and social services which have failed to support them'.[12]

Two key reasons for this are a lack of inclusive education and discriminatory treatment within the justice system.[13] Studies have shown that students who do not graduate from secondary school are 3.5 times more likely to be arrested than those that graduate.[14] Children with disabilities are less likely to start school and have lower rates of staying in and completing school,[15] due to a lack of inclusive education. This results in significant educational gaps between children with and without disabilities, which increases the risk of children with disabilities coming into contact with the criminal justice system.

Studies have also shown that children with disabilities, even though engaging in the same behaviours as children without disabilities, are treated more punitively by authorities.[16] Moreover, in some countries, legislation is increasingly penalising diverse behaviours (e.g. running rampant, temper tantrums, yelling or self-injury) as well as public displays of poverty and lack of support (e.g. lack of maintenance of property).[17] Adolescents with disabilities have been also criminalised because the police take their atypical behaviour as a threat.[18]

10 Development Services Group, 'Youths with Intellectual and Developmental Disabilities in the Juvenile Justice System', *OJJDP literature review,* 2017.

11 C. Michael Nelson, 'Educating students with emotional and behavioral disabilities in the 21st Century: Looking through windows, opening doors', *Education and Treatment of Children,* Vol. 23, 2000, p. 208.

12 Eileen Baldry, 'Disability at the margins: limits of the law', *Griffith Law Review,* Vol. 23(3), 2014, pp. 370-388.

13 Peter. E. Leone, Sheri M. Meisel & Will Drakeford, 'Special Education Programs for Youth with Disabilities in Juvenile Corrections', *Journal of Correctional Education*, Vol. 53(2), 2002, p. 46; Robert B. Rutherford, Mary M. Quinn, Peter E. Leone, Lili Garfinkle & Michael C. Nelson, *Education, Disability and Juvenile Justice Recommended Practices,* Arlington, Council for Children with Behavioural Disorders, 2002.

14 U.S. Department of Education, *Mini-digest of Education Statistics,* Washington DC, National Center for Education Statistics, 1994.

15 Cf. WHO, *World Report on Disability* (2011), *op. cit.*, p. 206.

16 Kathrine A. Larson, 'A research review and alternative hypothesis explaining the link between learning disability and delinquency', *Journal of Learning Disabilities,* Vol. 21, 1988; Kimber Malmgren, Robert D. Abbott & J. David Hawkins, 'LD and delinquency: rethinking the "link"', *Journal of Learning Disabilities,* Vol. 32, 1999; Kimberley A. Morris & Richard J. Morris, 'Disability and juvenile delinquency: issues and trends', *Disability & Society*, Vol. 2(6), 2006.

17 Human *Rights Council, Rights of children with disabilities: report of the Special Rapporteur on the rights of persons with disabilities,* A/HRC/40/54, 2019, para. 34.

18 Ibid.

Even if authorities are made aware of a child's disability, it is unlikely the child will be provided with appropriate procedural accommodations and support[19] and disability-related behaviour is rather punished.[20] The failure to provide such accommodation renders it less likely that children with disabilities will be able to access justice in all legal proceedings, including in respect of allegations of criminal wrongdoing. This increases the chances of incorrect findings of guilt, and consequently detention, as well as longer sentences. Moreover, children with disabilities are also less likely to be informed of the possibility of contesting or reviewing decisions of child detention.

The structural shortcomings of the justice and education systems point to the need for systematic reform, awareness raising and disability training for those working in the field of administration of justice and education.[21] Further, a radically different approach to criminal punishment of children is needed to avoid the high ratio of children with disabilities in prisons. The approach of restorative justice, which focuses on the rehabilitation of offenders through direct amends to victims and the community at large, is a path to be further explored.

b. Mainstream Institutions

ONE IN THREE CHILDREN IN INSTITUTIONS HAS A DISABILITY.

19 Barry Holman & Jason Zeidenburg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute, 2006, p. 8; Rani A. Desai, Joseph L. Goulet & Judith. R. Robbins, *et al.*, 'Mental health care in juvenile detention facilities: A review', *Journal of the American Academy of Psychiatry and the Law*, Vol. 34(2), 2006.

20 Cf. Baldry, *op. cit.*, p. 376.

21 Cf. Article 13.2 CRPD.

There is also an overly high quotient of children with disabilities in mainstream institutions for children, such as orphanages, social and residential settings. Indeed, they are overrepresented in the care protection and care systems,[22] and within these systems, residential care has increased substantially across many States.[23] Although the global number of children with disabilities living in institutions is difficult to estimate due to methodological divergencies (e.g. various approaches in defining 'disability') as well as lack of adequate data collection tools (e.g. administrative data sets frequently lack disaggregation by disability), data collected for the purpose of the Global Study suggest that, on average, **one in three children in residential care has a disability**.[24] At the same time, as these estimates are based on the limited sample of 57 countries, further research is required to adequately assess the population of children with disabilities living in institutions.

Orphanages are framed as temporary solution for children who do not have family members to care for them while an alternative, appropriate placement is arranged. However, it is well documented that numerous children are placed in orphanages even though they still have at least one living parent.[25] Core reasons for this situation include a lack of community-based, inclusive support services, prejudicial attitudes towards disability and poverty experienced by families.

Children with disabilities are also more prone to remain longer in institutional settings than children without disabilities.[26] Studies have shown that children with disabilities are more likely to be directed to disability-specific care settings rather than being reunited with their birth family[27] or being offered kinship care or placement in a foster family.[28]

22 Sandra Dowling, Berni Kelly & Karen Winter, *Disabled Children and Young People who are Looked After: A Literature Review,* Belfast, Queen's University Belfast, 2012; Steven A. Rosenberg & Cordelia C. Robinson, 'Out-of-home placement for young children with developmental and medical conditions', *Children and Youth Services Review,* Vol. 26, 2004.

23 See *Cambodian Children's Trust Factsheet,* Available at https://cambodianchildrenstrust.org/wp-content/uploads/2017/10/Countries-Residental-Care.pdf (accessed 2 June 2019).

24 These estimates are based on the data collected under the Global Study questionnaire, UNICEF/TransMonEE Database, Opening Doors project, administrative data from the relevant ministries and, for one country, Human Rights Watch.

25 Ghazal Keshavarzian, Georgetta Mulheir & Corinna Csaky, *In Our Lifetime: How donors can end the institutionalisation of children,* Lumos, 2015, p. 23.

26 Eric Rosenthal, 'A Mandate to End Placement of Children in Institutions and Orphanages: The Duty of Governments and Donors to Prevent Segregation and Torture', *Perspectives on Human Rights,* Georgetown Law Human Rights Institute, Vol. 1(3), 2017, p. 38.

27 Viki Welch *et al.*, *Children and Youth Services Review,* Vol. 53, 2015, pp. 137–146.

28 See Jessica Schmidt, Miranda Cunningham, Lawrence Dalton, Laurie Powers, Sarah Geenen & Claudia G. Orozco, 'Assessing restrictiveness: A closer look at the foster care placements and perceptions of youth with and without disabilities aging out of care', *Journal of Public Child Welfare,* Vol. 7, 2013; National Council on Disability, *Youth with disabilities in the foster care system: Barriers to success and proposed policy solutions,* Washington, 2008; Elspeth Slayter, 'Youth with disabilities in the United States Child Welfare System', *Children and Youth Services Review,* Vol. 64, 2016.

Share of Children with Disabilities Living in Institutions in Selected Countries

ALBANIA	25.5 %
ARGENTINA	2.6 %
ARMENIA	35.7 %
AUSTRALIA	14.0 %
AZERBAIJAN	21.5 %
BELARUS	35.7 %
BELGIUM	33.8 %
BOSNIA AND HERZEGOVINA	58.1 %
BRAZIL	25.4 %
BULGARIA	10.2 %
CHILE	13.3 %
CHINA	80.0 %
CROATIA	23.8 %
CZECH REPUBLIC	50.7 %
DENMARK	16.6 %
ECUADOR	12.2 %
ESTONIA	40.3 %
ETHIOPIA	16.7 %
FRANCE	66.7 %
GAMBIA	8.7 %
GEORGIA	20.8 %
GREECE	31.6 %
HUNGARY	77.0 %
IRAN	53.2 %
IRELAND	19.0 %
ITALY	13.2 %
JAMAICA	0.1 %
JAPAN	33.6 %
KAZAKHSTAN	29.3 %
KENYA	3.0 %
KUWAIT	35.5 %
KYRGYZSTAN	16.1 %
LATVIA	26.4 %
LESOTHO	44.1 %
LITHUANIA	28.4 %
MALAYSIA	45.1 %
MOLDOVA	9.1 %
MONGOLIA	6.7 %
NETHERLANDS	59.7 %
NORTH MACEDONIA	35.4 %
NORWAY	12.6 %
OMAN	32.0 %
POLAND	46.5 %
ROMANIA	24.5 %
RUSSIAN FEDERATION	34.4 %
RWANDA	18.4 %
SERBIA	77.0 %
SLOVAKIA	15.3 %
SOUTH AFRICA	20.2 %
TAJIKISTAN	21.8 %
TIMOR-LESTE	16.6 %
TURKEY	9.1 %
TURKMENISTAN	84.5 %
UKRAINE	40.1 %
URUGUAY	16.1 %
UZBEKISTAN	45.3 %
VIETNAM	21.7 %
NO DATA	

Source: data for individual countries extracted from CRC State-party reports (2010-2019), CRPD State-party reports (2017-2019), UNICEF/TransMonEE database, UNICEF, administrative data, Opening Doors project, Global Study questionnaire, Human Rights Watch, Lumos.

c. Immigration Detention

Children with disabilities are likely to be deprived of their liberty on the basis of their or their parent's refugee, asylum seeker or **irregular** migrant status.[29] For instance, according to **Mexican** law, a medically certified physical or mental impairment that makes a person unable to travel, justifies the extension of migration-related detention beyond the base limit of 15 days.[30] The numbers of children with disabilities detained in migration related detention is difficult to ascertain, due to a lack of reliable global data, disaggregated by disability.

What is known is that there is a prevalence of persons with disabilities, including children with disabilities, in populations displaced following conflicts and humanitarian emergencies.[31] Due to their living in conflict zones, landmine accidents and unexploded cluster munitions as well as displacements and forced migration, children are at higher risk of acquiring physical or mental impairments.[32] In these contexts, persons with disabilities are likely to be overlooked in terms of humanitarian assistance and relief services, which contributes to their forced displacement.[33]

Moreover, prior to their detention in migration related facilities, exposure to trauma, conditions of displacement as well as the possible separation and/or loss of family members are factors which may lead to children acquiring and/or developing a physical, mental, intellectual or sensory impairment. Literature attests to the prevalence of psychosocial conditions among refugee and asylum-seeking children, which are strongly linked to the circumstances of their forced migration.[34] Similarly, the length and poor conditions of detention in immigration facilities, including a lack of appropriate accommodation and support, increase the occurrence of psychosocial disabilities and exacerbate earlier acquired mental health conditions.[35]

29 David Corlett, Grant Mitchell, Jeroen van Hove, Lucy Bowring & Kathrine Wright, *Captured Childhood,* Melbourne, International Detention Coalition, 2012, p. 32, Available at https://idcoalition.org/wp-content/uploads/2016/01/Captured-Childhood.pdf (accessed 2 July 2019).

30 Cf. Global Study Questionnaire, Mexico (NHRI Reply).

31 Bruce Curtis & Jennifer Geagan, *Disability Inclusion Among Refugees in the Middle East and North Africa - A Needs Assessment of Libya, Egypt, Yemen, Jordan, and Turkey,* IREX, 2016, p. 3, Available at https://www.irex.org/sites/default/files/pdf/disability-inclusion-refugees-middle-east-north-africa.pdf (accessed 2 July 2019); Cf. *World Report on Disability* (2011), *op. cit.*, p. 34.

32 UNICEF, *Children with disabilities in situations of armed conflict,* 2018, Available at https://www.unicef.org/disabilities/files/Children_with_Disabilities_in_Situations_of_Armed_Conflict-Discussion_Paper.pdf (accessed 2 July 2019).

33 UNHCR, *Need to Know Guidance on Working with Persons with Disabilities in Forced Displacement,* 2011, Available at http://www.unhcr.org/4ec3c81c9.pdf (accessed 2 July 2019).

34 Cf. Signe S. Nielsen, Marie Norredam, Karen L. Christiansen, *et al.*, 'Mental health among children seeking asylum in Denmark – the effect of length of stay and number of relocations: a cross-sectional study', *BMC Public Health,* Vol. 8, 2008; Anders Hjern, Brigitta Angel & Olle Jeppson, 'Political violence, family stress and mental health of refugee children in exile', *Scand J Soc Med,* Vol. 28, 1998; Edith Montgomery, 'Trauma, exile and mental health in young refugees', *Acta Psychiatr Scand Suppl,* Vol. 124, 2011.

35 Matthew Hodes, 'The mental health of detained asylum seeking children', *European Child & Adolescent Psychiatry,* Vol. 19(7), 2010, p. 621.

In this context, the lack of disability awareness and training of staff working in immigration and asylum-seeking processes is cause for concern, leading as it does to persons with disabilities having to face greater barriers throughout the procedure. It is especially alarming that children with disabilities are often detained without acknowledgment of their impairments, meaning they are not accommodated or supported in any way.

The existence of procedures that allow for the segregation of children (including children with disabilities), from their families within and outside migration detention centres, is also a matter of grave concern. There are reports of children who were forcibly separated from their parents needing mental health and psychosocial support, yet being placed in excessively harsh conditions, including forced medication, overmedication, restraint and threats.[36]

Finally, discrimination within migration and asylum laws and policies of States restrict or deny asylum or the issuance of a visa on the basis of disability.[37] This is contrary to the CRPD,[38] and is likely to lead to an unduly high quota of persons with disabilities in immigration detention centres.

2.2 Disability-specific Forms of Deprivation of Liberty

In addition to a higher risk of being deprived of their liberty in mainstream settings, children with disabilities experience unique, disability-specific forms of deprivation of liberty. A deprivation of liberty of a child is disability-specific if: (a) there are laws, regulations and/or practices in place that prescribe or permit such a deprivation based on a perceived or actual impairment; or (b) where specific places of detention, designed solely or primarily for children with disabilities, exist.[39] Common forms of disability-specific deprivation of liberty include involuntary hospitalisation in mental health facilities; placement in institutions on the basis of disability; detention as a result of referral from the criminal justice system; imprisonment in 'prayer camps'[40] and other community settings; and home confinement. All

36 Lea Labaki, 'Migrant kids are being traumatized, not treated for mental health needs', *The Sacramento Bee,* 24 July 2018.

37 See for example: Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of the Republic of Korea,* CRPD/C/KOR/CO/1, 29 October 2014; Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Mexico*, CRPD/C/MEX/CO/1, 27 October 2014; Committee on the Rights of Persons with Disabilities, *List of issues prior to the submission of the combined second and third periodic reports of Australia*, CRPD/C/AUS/QPR/2-3, 21 September 2017.

38 Cf. Articles 5 & 18 CRPD.

39 Cf. A/HRC/40/54, *op. cit.*, para. 14.

40 In many African countries children with disabilities are, for instance, at particular risk of witchcraft accusations and detention in so-called prayer camps or spiritual healing centres (e.g. Ghana, Kenya, Nigeria, Democratic Republic of Congo). For Nigeria see: Emilie Secker, 'Witchcraft stigmatization in Nigeria: Challenges and successes in the implementation of child rights', *International Social Work,* Vol. 56(1), 2012, pp. 22–36. See also: Joseph Karisa Gona, V. Mung'ala–Odera, Charles Newton & Sally D. Hartley, 'Caring for children with disabilities', Kilifi, *Kenya: what is the carer's experience?*, Available at https://onlinelibrary.wiley.com/doi/full/10.1111/j.1365-2214.2010.01124.x (accessed 05 July). In some countries, witchcraft is punishable by law often resulting in children being convicted for practicing witchcraft. In the report submitted to the CRC-Committee in 2017, Mauritania notably indicated that 15 children have been convicted for 'witchcraft and charlatanism'. See: CRC-Committee, *Report submitted by Mauritania,* CRC/C/MRT/3-5, 2017, para. 22.

these practices occur across the globe, regardless of the economic and social status or legal tradition of a country, and share common characteristics, rationalities and justification that stem from an outdated medical model of disability.[41]

The existence and prevalence of disability-specific forms of deprivation of liberty requires urgent attention. Unfortunately, data on disability-specific forms of deprivation of liberty is limited, both generally and specifically in respect of children with disabilities. The lack of data has led to a significant gap in knowledge of the forms of disability-specific deprivation of liberty and how many children with disabilities are affected. It is hoped that this Global Study can begin to rectify this situation and draw attention to the existence and prevalence of disability-specific forms of deprivation of liberty experienced by children. Under the Global Study questionnaire only **El Salvador** provided data disaggregated by disability indicating that, of the total number of children in foster care, 21% (152 children) have some form of disability, including 55 children (7%) with 'severe disability'.[42]

a. Institutionalisation on the Basis of Disability

The placement of a child in an institution usually amounts to deprivation of liberty.[43] In addition, institutionalisation on the basis of disability is a discriminatory and widespread practice to which children are particularly vulnerable. According to UNICEF for instance, in **Central and Eastern Europe** and **Central Asia**, a child with disabilities living in one of these regions is almost 17 times as likely to be institutionalised as one who is not disabled.[44] Rooms and buildings where children with disabilities live within institutions are routinely locked. Children are not allowed to leave or move freely, while physical and/or chemical restraints may be used. Caretakers thus exercise complete control over the lives of children.

Although settings and practices of institutions differ in size, name and set-up, they share certain defining elements. Among these relevant to children are:

- **isolation and segregation from families and the wider community;**
- **lack of control over or participation in day-to-day decisions;**
- **lack of participation in decisions regarding whom to live with;**

41 Some countries establish separate centres for children with 'mild' and 'severe' disabilities, e.g. UN Global Study Questionnaire, El Salvador (State reply). Some countries allow for transferring a child to a specialised institution for children with disabilities only with the consent of a parent/caregiver, e.g. UN Global Study Questionnaire, Finland (State reply) and Uzbekistan (State reply).

42 UN Global Study Questionnaire, El Salvador (State reply).

43 According to the Human Rights Committee, placement of a child in institutional care amounts to deprivation of liberty, see International Covenant on Civil and Political Rights, *General Comment No 35: Article 9 (Liberty and Security of Person*, Human Rights Committee, CCPR/C/GC/35, 16 December 2014, paras. 5 & 62.

44 UNICEF, *Children under the age of three in formal care in Eastern Europe and Central Asia: a rights-based regional situation analysis*, 2012, p. 45.

- **rigidity of routine for daily sleep, eating, hygiene and recreation activities, irrespective of personal will and preferences;**
- **identical, depersonalised activities for a group of persons under a certain authority;**
- **usually a disproportion in the number of children with disabilities living in the same environment;**
- **lowered expectations and overprotection; and**
- **obligatory sharing of supporters with others and no or limited influence over whom one has to accept support from.**[45]

There is consensus on the detrimental effects on the development of a child arising from their placement in any institution, even in small residential homes or 'family-like' institutions.[46]

Many jurisdictions permit the forced removal of children from their families and their placement in an institution on the basis of the children's disability and/or that of their parents or guardians.[47] As a result, millions of children with disabilities are confined to institutions, isolated and segregated from their communities.[48] Moreover, large numbers of children are removed from their parents based on real or perceived impairment(s) of the parent(s), without provision of the support they may need to care for their children. In **France** and the **Russian Federation**, for example, if counted together more than a third of a million children reside in a broad range of institutionalised settings, namely roughly 100,000 children with disabilities in **France**[49] and 272,381 in the **Russian Federation**.[50]

45 CRPD-Committee, *General Comment No.5 (2017) on living independently and being included in the community,* CRPD/C/GC/5, 27, October 2017, para. 16(c).

46 Mary Dozier *et al.*, 'Consensus statement on group care for children and adolescents: A statement of policy of the American Orthopsychiatric Association', *American Journal of Orthopsychiatry,* Vol. 84(3), 2014, pp. 219-225; Anne Berens & Charles A. Nelson, 'The science of early adversity: is there a role for large institutions in the care of vulnerable children?', *The Lancet,* Vol. 386(9991), 2015, pp. 388-398; Kim Maclean, 'The impact of institutionalization on child development', *Development and Psychopathology,* Vol. 15(4), 2003, pp. 853–884; Eric Rosenthal, 'A Mandate to End Placement of Children in Institutions and Orphanages: The duty of governments and donors to prevent segregation and torture', *Protecting Children against torture in detention,* American University: Washington Collage of Law, 2017, p. 303.

47 See for example CRPD-Committee, *Concluding observations on the initial report of Guatemala*, CRPD/C/GTM/CO/1, 30 September 2014, paras. 53-54; CRPD-Committee, *Concluding observations on the initial report of Lithuania*, CRPD/C/LTU/CO/1, 11 May 2016, paras. 39-40; CRPD-Committee, *Concluding observations on the initial report of Mauritius*, CRPD/C/MUS/CO/1, 30 September 2015, paras. 31-32; CRPD-Committee, *Concluding observations on the initial report of the Czech Republic*, CRPD/C/CZE/CO/1, 15 May 2015, paras. 38-39; CRPD-Committee, *Concluding observations on the initial report of the Dominican Republic*, CRPD/C/DOM/CO/1, 8 May 2015, paras. 38-39; CRPD-Committee, *Concluding observations on the initial report of El Salvador, adopted by the Committee at its tenth session (2–13 September 2013),* CRPD/C/SLV/CO/1, 8 October 2013, paras. 41-42.

48 UNICEF, *The State of the World's Children 2013*, Children with Disabilities, 2013.

49 UN General Assembly, *Visit to France: Report of the Special Rapporteur on the rights of persons with disabilities,* Human Rights Council, A/HRC/40/54/Add.1, 8 January 2019, para. 51.

50 CRPD-Committee, *Replies of the Russian Federation to the list of issues,* CRPD/C/RUS/Q/1/Add.1, 23 November 2017, para. 65

In addition to expressly permitting institutionalisation, laws and regulations may indirectly condone or encourage placement of children with disabilities into an institution. For example, some States allow for exceptions within eligibility rules for foster care based on a child's additional support needs.[51] They may also link the provision of social protection benefits and other services, including education, to placement in an institution. For instance, in some States deaf and blind children are institutionalised for no other reason than access to education.[52]

Practices that result in *de facto* forced institutionalisation of children with disabilities on the basis of impairments are also common. Parents are often pressured to place their children with disabilities in institutions by medical and child protection officers under false claims that they will receive better care. Alarming practices have been documented in **Eastern Europe** and **Central Asia**, for example, where medical professionals encourage parents of newborns with a disability to leave their child at the maternity ward to then be placed in an orphanage for children with disabilities. This is coerced through denying parents an opportunity to see or hold their newborn.[53] Girls with psychosocial or intellectual disabilities are also often institutionalised for unique gender-specific reasons, such as fear of sexual violence.[54] The root causes of these practices are negative and stereotyped perceptions of children with disabilities, who are often wrongly perceived as being abnormal or unhealthy, and a burden on their family, and the lack of accessible and inclusive community supports and services. Families may lack the social and financial support to provide the care needed by their child, or be unable to cope with the stress and pressure of providing around-the-clock support.

The continuance and persistence of institutions run, funded, supported or condoned by States solely or predominantly for persons with disabilities, is also noticeable.[55] These may be in the form of orphanages, baby homes, 'special' education boarding schools, faith-

51 See for example: 'Ministry sets stricter rules on foster care', *China.org*, 29 September 2014, Available at http://www.china.org.cn/china/2014-09/29/content_33643718.htm (accessed 6 July 2019).

52 Cf. CRPD-Committee, *Concluding observations on the initial report of Turkmenistan*, CRPD/C/TKM/CO/1, 13 May 2015, para. 43 and CRPD-Committee, *Concluding observations on the initial report of Azerbaijan*, CRPD/C/AZE/CO/1, 12 May 2014, para. 40.

53 Human Rights Watch, *Children with disabilities: Deprivation of liberty in the name of care and treatment*, 7 March 2017, Available at https://www.hrw.org/news/2017/03/07/children-disabilities-deprivation-liberty-name-care-and-treatment (accessed 5 July 2019); UN Human Rights Council, *Report of the Special Rapporteur on the rights of persons with disabilities on country visit to Kazakhstan*, A/HRC/37/56/Add.2, 19 January 2018, para. 41, Available at https://www.ohchr.org/EN/Issues/Disability/SRDisabilities/Pages/Countryvisits.aspx (accessed 24 July 2019).

54 Cf. HRW, *Children with disabilities* (2017), *op. cit.*

55 Several countries indicated in reply to the UN Global Study questionnaire that they have disability-specific institutions. These countries for example include: Chad (State Reply), France (NHRI Reply), State of Palestine (State Reply), Uruguay (State Reply) and Yemen (NGO Reply). See also: Reports of the Special Rapporteur on the rights of persons with disabilities on her country visits to France (A/HRC/40/54/Add.1), Moldova (A/HRC/31/62/Add.2), Paraguay (A/HRC/34/58/Add.1), Democratic People's Republic of Korea (A/HRC/37/56/Add.1), Kazakhstan (A/HRC/347/56/Add.2).

based institutions, prayer camps, small group homes, and residential or social care settings. They may be generally for children with disabilities, on the basis of specific impairments, or for specific groups. They may also be more broadly for persons with disabilities, combining children and adults in the same settings.[56] In these types of settings, children with disabilities are at extremely high risk of long-term institutionalisation.

Disability-specific institutions continue to be permitted, and even promoted by States, despite efforts to concurrently adopt and promote deinstitutionalisation strategies. There is a concerning trend of trans-institutionalisation, whereby States are investing in building smaller institutions to transfer children with disabilities from large institutions to smaller facilities, including small group homes.[57]

b. Involuntary Commitment to Mental Health Regimes

Involuntary commitment to a mental health facility–sometimes referred to as involuntary hospitalisation or compulsory admission – is a common form of disability-specific deprivation of liberty. It refers to any admission of a person into a mental health facility or regime without the person's consent. As such, it is widely accepted as a form of deprivation of liberty,[58] as the hospitalisation is without the free and informed consent of the individual, and the individual is not free to leave at will.

Most countries permit the commitment of children to psychiatric hospitals/wards or other mental health or social care facilities or regimes, without free and informed consent (understood and applied from a child-rights perspective). This is done on the grounds of actual or perceived impairment(s) of a child, by itself or in conjunction with other grounds such as medical necessity, dangerousness and/or risk to oneself or others.[59] These practices

56 UN Global Study Questionnaire, Slovenia (Ombudsperson Reply). In some countries, the decision to place children in the same setting as adults depends on the form of disability. For instance, in Croatia children with developmental difficulties are placed together with adults with physical, sensory and intellectual disabilities. There are, however, separate institutions for adults with mental disabilities. See: UN Global Study Questionnaire, Croatia (State Reply).

57 Cf. A/HRC/347/56/Add.2, *op. cit.*, para. 70; Neil Crowther, Gerald Quinn & Alexandra Hillen-Moore, *Opening up communities, closing down institutions: Harnessing the European Structural and Investment Funds*, Community Living for Europe – Structural Funds Watch, November 2017, Available at https://eustructuralfundswatchdotcom.files.wordpress.com/2017/11/cle-sfw_opening-up-communities-november-2017_final.pdf (accessed 6 July 2019).

58 Cf. CCPR/C/GC/35, *op. cit.*, para. 5.

59 See: CRPD-Committee, *Concluding observations on the initial report of Montenegro*, CRPD/C/MNE/CO/1, 22 September 2017, paras. 38-39; CRPD-Committee, *Concluding observations on the initial report of Morocco*, CRPD/C/MAR/CO/, 25 September 2017, paras. 30-31; CRPD-Committee, *Concluding observations on the initial report of Bosnia and Herzegovina*, CRPD/C/BIH/CO/1, 2 May 2017, para. 26; CRPD/C/SRB/CO/1, *op. cit.*, paras. 25-26; CRPD/C/MUS/CO/1, *op. cit.*, para. 25; CRPD-Committee, *Concluding observations on the initial report of Turkmenistan*, CRPD/C/TKM/CO/, 13 May 2015, paras. 29-30; CRPD-Committee, *Concluding observations on the initial report of Azerbaijan,* CRPD/C/AZE/CO/1, 12 May 2014, paras. 28-29; and CRPD-Committee, *Concluding observations on the initial report of Paraguay*, CRPD/C/PRY/CO/1, 15 May 2013, para. 35.

are usually regulated through mental health laws or civil detention procedures. A wide range of persons can initiate non-consensual admissions of children, including family members, guardians, doctors or directors of mental health facilities, police or other third parties. Further, in most cases involuntary hospitalisation entails forced medical interventions.

Compulsory admission rates in mental health facilities are rising across regions, particularly in high-income countries.[60] Despite that, medical literature has not been able to provide strong evidence that involuntary commitment reduces the occurrence of self-harm or suicide or that it facilitates access to services.[61] Moreover, the negative subjective experiences with compulsory admission can further lead to lower rates of seeking or using services from the mental health system.[62]

c. Detention as a Result of Referral by the Criminal Justice System

States have an obligation to ensure that judicial guarantees and safeguards protecting the rights of children accused of a crime apply to all children with disabilities and that this includes the provision of procedural as well as age and gender appropriate accommodation. International human rights law clearly provides that, as far as possible and wherever appropriate, children should be diverted away from the formal criminal justice system. This is true for all children, including children with disabilities. Any diversions used must fully respect human rights and legal safeguards and must not be applied in a manner that discriminates against children with disabilities.

However, children with disabilities who come into contact with the criminal justice system, particularly those with intellectual and/or psychosocial disabilities, are often at risk of being referred to institutions or mental health commitment facilities where they will be deprived of their liberty on the basis of their actual or perceived impairment and/or an alleged risk to self or to others.[63] This may happen where a declaration of unfitness to plead or stand trial is made, or the individual is deemed not criminally responsible based on disability or alleged incapacity e.g. an 'insanity' defence.[64] If these measures involve a transfer to an institution or mental health commitment regime, they represent disability specific forms of

60 Cf. A/HRC/40/54, *op. cit.*, paras. 32, 35, 61 & 62.

61 See Piers Gooding, *A new era for mental health law and policy*, Cambridge, Cambridge University Press, 2017.

62 Cf. A/HRC/40/54, *op. cit.*, para. 35.

63 Jessica Jacobson, Bina Bhardwa, Tracey Gyateng, Gillian Hunter & Mike Hough (eds.), *Punishing Disadvantage: A Profile of Children in Custody*, Prison Reform Trust, 2010.

64 See Arlie Loughnan, *Manifest Madness: Mental Incapacity in the Criminal Law*, Oxford, Oxford University Press, 2012; Emily S. Pollock, 'Those crazy kids: Providing the insanity defence in Juvenile courts', *Minnesota Law Review*, Vol. 85(6), 2001, pp. 2041-2078.

deprivation of liberty.[65] In the facilities children with disabilities may be referred to, they are not only deprived of their liberty, but also have less access to procedural guarantees than other children in the criminal justice system. Additionally, they are at risk of being subjected to forced interventions, solitary confinement, the use of restraints, stricter regimes, and they have less access to recreational, educational and therapeutic services.[66]

d. Deprivation of Liberty within Home Settings

Finally, although not covered by the definition of deprivation of liberty used for the purpose of this Global Study, the high number of reported incidents about children with disabilities deprived of liberty in home settings is of concern.[67] Many children with disabilities are deprived of liberty in the home permanently or for an extended period of time, often confined to a particular space. This may occur through seclusion or concealment of a child with a disability in a room, and/or through the use of continuous or long-lasting restraints, such as the practice of shackling or the use of cages.

Home settings differ from other areas where there may be deprivation of liberty, as the home has traditionally been conceived as a space where the State must refrain from intervening. However, this idea has been already challenged, as domestic violence is in fact an issue of public relevance[68] – an approach reflected in Article 16 CRPD. The Human Rights Committee has also confirmed that 'States parties have the duty to take appropriate measures to protect the right to liberty of person against deprivation by third parties'.[69] As such, States must take immediate action to end all forms of home-based deprivation of

65 UN General Assembly, *Report of the Special Rapporteur on the rights of persons with disabilities*, A/HRC/40/54, 11 January 2019, paras. 20 & 46.

66 Marc Hert, Nele Dirix, Hella Demunter & Christoph U. Correll, 'Prevalence and correlates of seclusion and restraint use in children and adolescents: a systematic review', *European Child Adolescent Psychiatry*, Vol. 20(5), 2011, pp. 221-230.

67 See for example, *P (by his litigation friend the Official Solicitor) v Cheshire West and Chester Council & Anor*, [2014] UKSC 19, 19 March 2014; Philippine Coalition on the UN Convention on the Rights of Persons with Disabilities, *Parallel Report 2013: A Parallel Report submitted to the Committee on the Rights of Persons with Disabilities on the implementation of the Convention in the Republic of the Philippines from 2008–2013*, December 2013, paras. 90 ff.; Human Rights Watch, *Living in Hell: Abuses against People with Psychosocial Disabilities in Indonesia,* 2016, Available at https://www.hrw.org/report/2016/03/20/living-hell/abuses-against-people-psychosocial-disabilities-indonesia (accessed 7 July 2019); Human Rights Watch, *Indonesia: Shackling reduced but still persists*, October 2018, Available at https://www.hrw.org/news/2018/10/02/indonesia-shackling-reduced-persists(accessed 7 July 2019); The African Child Policy Forum, *Children with disabilities in Senegal: The hidden reality*, Addis Ababa, 2011, Available at http://www.africanchildforum.org/en/index.php/en/resource-centre.html?pid=2&sid=143:children-with-disabilities-in-senegal-the-hidden-reality (accessed 7 July 2019).

68 Kate Millett, *Sexual politics*, Urbana, University of Illinois Press, 2000; Kathya Araujo Virginia Guzmán & Amalia Mauro, 'How Domestic Violence came to be viewed as a Public Issue and Policy Object', *CEPAL Review,* Vol.70, April 2000; Dolors Comas-d'Argemir, 'News of partner femicides: The shift from private issue to public problem', *European Journal of Communication*, Vol.30(2), 2015, pp. 121-136.

69 Cf. CCPR/C/GC/35, *op. cit.*, para. 7.

liberty, including home confinement, shackling and pasung.[70] States parties should also do their utmost to take appropriate measures to protect children with albinism from abduction from individual criminals operating within their territory.

The existence of home-based deprivation of liberty highlights the devastating consequences of negative and stereotyped perceptions of children with disabilities, as well as the urgent need for States to ensure the provision of community-based inclusive support to families, so that they can in turn support their child or relative to live in the community. This support should include respite care services, childcare services and other supportive parenting services.[71] For instance, in Ireland the respite care services are assessed on an individual basis (depending on special needs of the individual user as well as the family, available resources, length of time) and can be provided in a number of ways, e.g. centre-based, in-home, home-to-home, home sharing or family support.[72] Public authorities should also invest in assertive public awareness campaigns that advance a human rights-based approach to disability.

2.3 Conditions of Deprivation of Liberty, Harmful Practices and Impact

Adverse and harmful conditions within settings and circumstances of deprivation of liberty disproportionately affect children with disabilities. Without appropriate support, assistance and reasonable accommodation, children with disabilities are invariably placed into extremely vulnerable positions if deprived of their liberty. Settings of deprivation of liberty are often overcrowded, unsanitary, poorly resourced, not heated and lack appropriately trained staff.[73] In these conditions, children with disabilities often experience profound neglect, malnutrition, and poor hygiene.[74] There are a number of reports of children with disabilities being tied to their chairs for extended periods of time, left in their beds and cribs or placed in cages, cells and pits, and provided with almost no stimulation, human contact or any contact with the outside world.[75]

70 Pasung involves confinement and neglect in addition to shackling. See Nenden H. Laila *et al.*, 'Perceptions about pasung (physical restraint and confinement) of schizophrenia patients: a qualitative study among family members and other key stakeholders in Bogor Regency, West Java Province, Indonesia 2017', *International Journal of Mental Health Systems*, Vol. 12(35), 2018.

71 Cf. CRPD/C/GC/5, *op. cit.*, para. 67.

72 UN Global Study Questionnaire, Ireland (State Reply).

73 See: United Nations Secretary-General's Study on Violence against Children Thematic Group on Violence against Disabled Children, *Summary Report: Violence against Disabled Children - Findings and Recommendations*, New York, UNICEF, 28 July 2005, pp. 11-14 (hereafter *Summary Report Violence against Disabled Children*).

74 Ibid., p. 12.

75 General Assembly, *Rights of the Child*, A/61/299, 29 August 2006, para. 58; General Assembly, *Report of the Special Rapporteur on the rights of persons with disabilities on her mission to the Republic of Moldova*, Human Rights Council, A/HRC/31/62/Add. 2, 2 February 2016, para. 48; *Summary Report Violence against Disabled Children* (2005), *op. cit.*, pp. 11-12.

Risk of Violence for Children with Disabilities

Source: UNICEF, The State of the World's Children 2013: Children with Disabilities.

Children with disabilities are also at a heightened risk of widespread and intense violence, abuse and exploitation, which may amount to torture or other forms of ill-treatment.[76] This include being restrained, shackled, secluded and/or beaten by staff as a form of control and/or punishment.[77] Children with disabilities are also at risk of being subjected to particular forms of physical violence in the guise of treatment, such as electroconvulsive treatment (ECT) and electric shocks used as 'aversion treatment'.[78] Girls with disabilities face an increased risk of violence, abuse and exploitation, particularly of a sexual and gender-

76 Cf. A/61/299, *op. cit.*, paras. 31 & 62.

77 African Child Policy Forum (ACPF), *The African Report on Violence Against Children,* Addis Ababa, The African Child Policy Forum, 2014, pp. 45-46; See also: A/61/299, *op. cit.*, para. 62.

78 A/61/299, *op. cit.*, para. 57; CRC-Committee, *General comment No. 13 (2011): The right of the child to freedom from all forms of violence,* CRC/C/GC/13, 18 April 2011, para. 23.

based nature, including trafficking for forced labour or the sex industry, forced sterilisation, forced interventions and denial of sexual and reproductive rights.[79]

Common practices of detention in the criminal justice system, already considered contentious for children without disabilities, put children with disabilities at a heightened risk of experiencing harm. For example, secluding children with disabilities has been proven to affect them disproportionately, leading to the deterioration of their mental health and the development and/or increase of self-harm and/or suicidal thoughts and behaviour.[80] The lack of knowledge and appropriate training of staff in the justice system, leads to the use of other unsuitable and endangering practices such as isolation, when a risk of suicide is identified.[81] Harmful practices are not exclusive to the criminal system. There are reports on the use of chemical and physical restraints and solitary confinement as a form of control over children with disabilities in institutions and migration centres.[82] Children with disabilities are often subjected to these practices to 'make them more "compliant", leaving them less able to defend themselves against violence'.[83]

The long-lasting negative physical and psychological impact of these conditions and practices whilst deprived of liberty is undeniable.[84] They result in disease, suffering, long-term harm and even premature death of children with disabilities.[85] Of urgent concern is the high mortality rate of children with disabilities in institutions, which in some States is up to twice as high compared to children in the general population.[86]

79 CRPD-Committee, *General Comment No. 4 (2016) on the right to inclusive education,* CRPD/C/GC/4, 25 November 2016, para. 53; UN General Assembly, *Rights of persons with disabilities,* A/73/161, 16 July 2018, para. 45; A/72/133, *op. cit.*, para. 29; A/HRC/31/62/Add. 2 *op. cit.*, para. 48; See also: Eric Mathews *et al.*, *No Way Home: The Exploitation and Abuse of Children in Ukraine's Orphanages,* Disability Rights International, 2015; Priscila Rodriguez *et al.*, *No Justice: Torture, Trafficking, and Segregation in Mexico*, Disability Rights International, 2015.

80 Lindsay M. Hayes, *Suicide Prevention in Juvenile Correction and Detention Facilities*, Washington D.C., U.S. Department of Justice, Office of Juvenile Justice and Delinquency, Vol. 13, 1999, pp. 16 & 19.

81 Ibid.; Barry Holman & Jason Zeidenburg, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities*, Justice Policy Institute, p. 9.

82 Cf. A/HRC/31/62/Add. 2, *op. cit.*, para. 48.

83 Cf. A/61/299, *op. cit.*, para. 57.

84 Cf. A/61/299, *op. cit.*; See also: *Summary Report Violence against Disabled Children* (2005), *op. cit.*

85 Ibid., p. 12; UN General Assembly, *Report of the Special Rapporteur on the rights of persons with disabilities on her visit to Paraguay,* Human Rights Council, A/HRC/34/58/Add.1, 21 December 2016, para. 55; Human Rights Watch, *Easy Targets: Violence against Children Worldwide,* New York, 2001.

86 Ibid.

3. The Right to Personal Liberty of Children with Disabilities

3.1 International Human Rights Framework

Together the CRC and the CRPD provide the international legal standards applicable to children with disabilities, including in respect of their right to personal liberty. The two conventions dovetail and reinforce each other. They must be read together, in order to gain a comprehensive understanding of the human rights of children with disabilities, and the associated obligations on States.

The CRC and CRPD provide four overarching general principles that guide the interpretation and realisation of all rights of children with disabilities, including their right to personal liberty.

- **Non-discrimination:** children with disabilities are entitled to equal protection and equal benefit of the law, without any discrimination, and have a right to equal and effective legal protection against discrimination on all grounds, including on the basis of disability.[87] Any distinction, exclusion or restriction on the basis of disability, which has the purpose or effect of impairing or nullifying the enjoyment of any human right and fundamental freedom, is considered discriminatory.

  The CRPD specifies that a failure to provide reasonable accommodation is also a form of discrimination.[88] Reasonable accommodation is any 'necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure to persons with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms'.[89]

- **Best interests of the child:** in all actions concerning children with disabilities, the best interests of the child shall be a primary consideration.[90] The concept of best interests is dedicated to 'ensuring both the full and effective enjoyment of all the rights [...] and the holistic development of the child'.[91] The holistic development of the child refers to the 'holistic physical, psychological, moral and spiritual integrity of the child and [...] [promotion of their] human dignity.'[92] The concept of best interests of the child

87 Article 5 CRPD; Article 2 CRC

88 Article 2 CRPD; ibid.

89 Article 2 CRPD.

90 Article 7 CRPD; Article 3 CRC.

91 UN Committee on the Rights of the Child, *Committee, General comment No.14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1),* CRC/C/GC/14, 29 May 2013, para. 4.

92 Ibid., para. 5.

must be fully applied to children with disabilities, with careful consideration of their circumstances and used to ensure that children with disabilities are informed, consulted and have a say in every decision-making process related to their situation.[93]

- **Participation of the child:** children with disabilities have the right to express their views freely on all matters affecting them, for these views to be given due weight in accordance with their age and maturity, on an equal basis with other children, and to be provided with disability and age-appropriate assistance to realise that right.[94] The presence of an actual or perceived impairment is not a relevant factor in determining the weight to be given to a child's views. States must design and organise a comprehensive system that ensures the provision of a full range of disability and age-appropriate assistance and support measures, including supported decision-making, to children with disabilities.[95]
- **Inclusion:** children with disabilities have the right to full and effective inclusion in society and their communities.[96] The principle of inclusion moves beyond the principle of social integration. Integration asks persons with disabilities to adapt to the existing social arrangements and assimilate into the established social norms. Inclusion instead requires that social arrangements and norms transform to fully embrace persons with disabilities. All children with disabilities, regardless of their support needs, have a right to be fully and effectively included in society and their communities, and to fully and equally enjoy all human rights and fundamental freedoms, including their right to personal liberty.

Both the CRC and the CRPD affirm that no child shall be unlawfully or arbitrarily deprived of liberty, complementing each other to provide the highest level of protection to children with disabilities.

93 Cf. CRPD/C/GC/4, *op. cit.*, para. 47; CRPD, *General comment No. 6 (2018) on equality and non-discrimination*, CRPD/C/GC/6, 26 April 2018, para. 38.

94 Article 7 CRPD; Article 12.1 CRC.

95 See: UN Committee on the Rights of Persons with Disabilities, *General comment No. 21 (2017) on children in street situations*, CRC/C/GC/21, 21 June 2017; UN Committee on the Rights of Persons with Disabilities, *General comment No. 1 (2014) Article 12: Equal recognition before the law*, CRPD/C/GC/1, 19 May 2014, para. 36; General Assembly, *Report of the Special Rapporteur on the rights of persons with disabilities*, A/HRC/34/58, 20 December 2016, paras. 15 & 44.

96 Articles 3(c) & 19 CRPD.

Convention on the Rights of the Child (CRC)	Convention on the Rights of Persons with Disabilities (CRPD)
Article 37(b) provides that no child shall be deprived of his or her liberty unlawfully or arbitrarily and any arrest, detention or imprisonment of a child shall be in conformity with the law and must be used only as a measure of last resort and for the shortest appropriate period of time.	**Article 14.1** provides that States shall ensure that persons with disabilities, on an equal basis with others: a. enjoy the right to liberty and security of person; and b. are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty. **Article 14.2** provides that if persons with disabilities are deprived of their liberty, they must be, on an equal basis with others entitled to guarantees in accordance with international human rights law, including by provision of reasonable accommodation.

The CRC provides that deprivation of liberty of children must only be used as a measure of last resort and for the shortest appropriate period of time.[97] In addition, it has to comply with the principle of the best interests of the child.[98]

Building on the CRC, the CRPD further clarifies and strengthens the right to liberty of children with disabilities. Article 14.1(a) reaffirms the fundamental human right to liberty and requires States to ensure that persons with disabilities, including children with disabilities, enjoy this right on an equal basis with others. This means that all substantive and procedural guarantees established in international human rights law must apply fully to all children with disabilities.

97 Article 37(b) CRC. See also Chapter 4 on the Right to Personal Liberty.

98 Article 3 CRC.

Article 14.1(b) of the CRPD clarifies that 'the existence of a disability shall in no case justify a deprivation of liberty'. As such, the article establishes an absolute ban on deprivation of liberty on the basis of an actual or perceived impairment.[99] In this respect, the CRPD-Committee has recalled that, during the drafting process of the CRPD, there were extensive discussions on the need to include a qualifier ('solely' or 'exclusively') in Article 14. States opposed these proposals, arguing that it could lead to misinterpretation and allow cases of deprivation of liberty based on disability if other factors were present. As such, based on this preparatory work, the CRPD-Committee confirmed that article 14.1(b) prohibits the deprivation of liberty on the basis of actual or perceived impairment even if additional factors or criteria are also used to justify the deprivation of liberty, such as an alleged danger or risk to self or others or an alleged need for treatment or care.[100]

Finally, Article 14.2 of the CRPD reaffirms that, if persons with a disability are deprived of their liberty, they are entitled, on an equal basis with others, to all the procedural and substantive guarantees established in international law and shall be treated in compliance with the objectives and principles of the CRPD, including by provision of reasonable accommodation. This includes the right to be informed promptly of the reasons for arrest, the right to judicial control of the lawfulness of detention, and the right to immediate release and compensation for unlawful or arbitrary arrest or detention.[101] All these guarantees apply to children with disabilities if they are deprived of their liberty 'through any process', that is, under any type of criminal, civil or administrative arrest or detention.

Children with disabilities should have access to justice on an equal basis with others to challenge any deprivation of liberty. For that purpose, States must ensure that children with disabilities have access to procedural, age and gender appropriate accommodations, in all legal proceedings before, during and after trial. States must guarantee that children with disabilities who have experienced any form of arbitrary and/or unlawful deprivation of liberty and/or exploitation, violence or abuse in the context of such practices, have access to adequate redress and reparations, including restoration of their liberty, restitution, compensation and guarantees of non-repetition as appropriate. Measures designed to ensure non-repetition should include a wide range of institutional reforms to prevent future violations, including law reform, education and provision of community-based support.

99 Where Article 14 uses the term 'disability', it is referring to 'impairment' rather than the interaction between impairment and attitudinal and environmental barriers.

100 CRPD-Committee, *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities: The right to liberty and security of persons with disabilities*, adopted during the Committee's 14th session, held in September 2015, paras. 6 & 7.

101 Article 9 ICCPR.

3.2 Standards Related to Specific Settings of Deprivation of Liberty

This section will summarise how various settings of deprivation of liberty, considered by this Global Study, may violate Article 14 of the CRPD, along with other interrelated rights. As this will be considered in more depth in the individual chapters dedicated to each type of setting, the purpose of this section is to provide an overview of the legal standards that specifically apply to children with disabilities.

a. Institutionalisation

Placement of a child outside a family into an institution or residential home on the basis of an actual or perceived impairment of the child and/or of his or her parent(s) or legal guardian(s) is discriminatory and arbitrary, and thus contradicts the absolute ban of deprivation of liberty on the basis of impairment, provided by Article 14. If the placement is based on additional factors, such as an alleged risk/danger to self or others or an alleged need for treatment or care, this does not override the absolute ban on deprivation of liberty on the basis of impairment.[102]

The institutionalisation of children with disabilities also contravenes their right to live in the community. Article 19 CRPD recognises that all persons with disabilities have a right to live in the community, with choices equal to others. Article 19(a) CRPD provides that States must ensure that children with disabilities have the opportunity to choose their place of residence and where and with whom they live, on an equal basis with other children.[103] Article 19(b) and (c) supplement Article 19(a), by requiring States to ensure that: children with disabilities and their families have access to support services in the community, which support inclusion in the community and prevent segregation from the community; and community services and facilities for the general child population are available on an equal basis to children with disabilities and are responsive to their needs.

The CRC recognises that parents[104] have the primary responsibility for the care, upbringing and development of the child, and that the best interests of the child will be their basic concern.[105] It also provides that the State has a role in determining the living arrangements of a child in three circumstances, where: (i) children are separated from their family by

102 Cf. *Guidelines on article 14 of the Convention on the Rights of Persons with Disabilities* (2015), *op. cit.*, paras. 6 & 7.

103 Article 19(a) CRPD read in light of the cross-cutting Article 7 on children with disabilities.

104 Or where appropriate, members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child.

105 Articles 7, 8 & 18(1) CRC.

the State, subject to judicial review;[106] (ii) where the parents are living separately and a decision must be made as to the child's place of residence;[107] and (iii) children are unable to live with, or be cared for by, their family.[108] Under these circumstances, in all actions[109] concerning the living arrangements of the child, the best interests of the child shall be the primary consideration. In determining the best interests of the child, States must ensure their right to participation. In this respect, children with disabilities must have the right and the opportunity to express their views, will and preferences[110] freely as to where and with whom they live (with the provision of assistance appropriate to disability and age), and for these views to be given due weight in accordance with their age and maturity. In the case of adolescents, particularly those in late adolescence, significant weight should be given to their views, will and preferences as to their living arrangements.

Placement of children with disabilities outside a family in institutions or residential homes for the purpose of care also contravenes the right to home and family. The CRPD-Committee has stated that for children with disabilities, the core of their right to live in the community entails a right to grow up in a family, consistent with Article 23 CRPD that highlights the need to respect home and family life.[111] This applies to all children with disabilities without exception, no matter the level of their support needs.

Article 23 provides that States must eliminate discrimination against children with disabilities in all matters relating to family and that States must ensure that children with disabilities have equal rights with respect to family. Article 23.4 CRPD specifies that the separation of a child from their parents on the basis of a disability of the child, or one or both of the parents, is not permissible. In circumstances where the immediate family is unable to care for a child with disabilities, Article 23.5 CRPD clarifies that States must 'undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting.' It is always in the best interests of all children with disabilities – no matter the level or severity of their impairment(s) – to live and grow up in a family. The CRPD-Committee has stated that institutions, regardless of their size, are especially dangerous for children, as they cannot substitute for their need to grow up with a family.[112]

106 Article 23.4 CRPD; Article 9.1 CRC.

107 Article 9.1 CRC.

108 Article 23.5 CRPD; Article 20 CRC.

109 This means all decisions, acts, conduct, proposals, services, procedures and other measures that are taken or not taken – see CRC/C/GC/14, *op. cit.*

110 Article 7 & 12 CRPD.

111 Cf. CRPD/C/GC/5 *op. cit.*, para. 37.

112 Ibid., para. 16.

Accordingly, smaller institutions, group homes, or 'family-like' institutions are no substitute for the right and the need of all children to live and grow up with a family.[113] In accordance with Article 23.5 CRPD, alternative care arrangements for children with disabilities can never be in the form of institutions; they must comprise only family-based care arrangements that meet the best interests of the children.

As both Articles 19 and 23 CRPD inform the interpretation and application of one other, in instances where the State is required to find family-based alternative care options for a child with disabilities under Article 23 CRPD, the child has a right to participate in the decision-making processes regarding the place of residence and where and with whom to live. In the case of late adolescents with a disability, they may be able to directly exercise their right to live independently in the community, for example, by accessing supported housing programmes. The presence of an actual or perceived impairment is not a relevant factor in determining their ability to make independent, autonomous decisions regarding their living arrangements.

There is international consensus that institutionalisation must end. Both the Office of the High Commissioner for Human Rights and UNICEF have called for governments to end the institutionalisation of all children, with and without disabilities.[114] While in some circumstances it may be appropriate for children to be temporarily placed in residential care settings for emergency shelter or short-term crisis care, until more suitable solutions are arranged, institutions are never an appropriate alternative care solution.

b. Involuntary Commitment to Mental Health Regimes

Involuntary commitment constitutes an unlawful and arbitrary deprivation of liberty, as it is based on the actual or perceived impairment of the person (an alleged 'mental illness' or 'mental disorder'), and therefore discriminatory. In addition, involuntary commitment violates the principle of free and informed consent.[115] Everyone has the right to be provided with mental health services and/or other supports based on their free and informed consent, and to refuse any unwanted services without penalty, including those experiencing severe distress or extreme mental states.

In the case of children, the matter of consent to placement in a mental health facility needs close consideration. In all actions concerning children with disabilities, including admission to a mental health facility, the best interests of the child shall be a primary consideration.[116]

113 Ibid., para. 16(c).

114 UN General Assembly, Report of the United Nations High Commissioner for Human Rights, *Mental health and human rights*, Human Rights Council, A/HRC/34/32, 31 January 2017, para. 58; UNICEF, *The State of the World's Children*, 2013.

115 Article 25(d) CRPD.

116 Articles 3 & 18.1 CRC.

States must also ensure that the participation rights of children with disabilities – to express their views, will and preferences[117] freely in respect of all health-related matters affecting them (with the provision of disability and age-appropriate assistance), and for these views to be given due weight in accordance with their age and maturity – are realised.[118]

Furthermore, the CRC-Committee has advised that children's evolving capacities have a bearing on the scope for independent, autonomous decision-making concerning health-related issues.[119] It has called on States to recognise that all children, of any age, have a right to demonstrate sufficient understanding to be entitled to give or refuse consent.[120] In respect of adolescents, the CRC-Committee has called on States to recognise the right of adolescents to take increasing responsibility for decisions, affecting their lives, including health-related decisions.[121] Adolescents over a set minimum age[122] should be allowed to make autonomous decisions in respect of health care and the voluntary and informed consent of the adolescent should be obtained whether or not the consent of a parent or guardian is required for any admission.[123] Children and adolescents with disabilities must be provided with disability and age appropriate assistance to consent or refuse treatment in line with the principle of evolving capacities.

When admission to a mental health facility is followed by interventions without free and informed consent, including involuntary administration of psychotropic drugs, involuntary commitment also may violate the rights to personal integrity (Article 17) and freedom from torture and other forms of ill-treatment (Article 15).

c. Administration of Justice System and National Security

In the enforcing of criminal laws and for national security purposes, children with disabilities may be deprived of liberty only as a measure of last resort and for the shortest appropriate period of time – as stipulated in Article 37(b) CRC. In addition, the principle of the best interest of the child in Article 3 CRC applies to all children with disabilities. Pursuant to Article 14 CPRD, the substantive and procedural guarantees established by international law, including Article 40 CRC and the United Nations Standard Minimum Rules for the

117 Articles 7 & 12 CRPD.

118 Article 7.3 CRPD.

119 CRC-Committee, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20, 6 December 2016.

120 Ibid., para. 39.

121 As explained in CRC/C/GC/20, generally understood to be between 10 and 18 years of age.

122 As defined by States consistent with the right to protection, the best interests principle and respect for the evolving capacities of adolescents.

123 Cf. CRC/C/GC/20, *op. cit.*

Administration of Juvenile Justice (the 'Beijing Rules'), must apply fully to all children with disabilities, on an equal basis with other children, without discrimination.

Further, States are required to ensure that children with disabilities have a right to access justice on an equal basis with other children, including through the provision of procedural and age-appropriate accommodations.[124] The obligation to provide procedural and age-appropriate accommodations aims to 'facilitate the effective role of persons with disabilities as direct and indirect participants, including as witnesses, in all legal proceedings, including at the investigative and other preliminary stages'.[125] This fully extends to child justice systems and other alternatives to traditional criminal proceedings and punishments. The CRPD-Committee has also clarified that procedural accommodations must be gender appropriate.[126] Examples of procedural accommodations include the provision of sign language interpretation, legal and judicial information in accessible formats, multiple means of communication, easy read versions of documents, Braille and video link testimony, among others.[127] Age appropriate procedural accommodation may involve procedural flexibility, modified courtroom procedures and practices, and the use of age-appropriate and plain language.[128] The CRPD also specifies that 'States shall promote appropriate training for those working in the field of administration of justice, including police and prison staff'.[129] This requires States to design and deliver mandatory regular training programmes, which should be properly funded and involve persons with disabilities, including children with disabilities, at all stages.[130]

If a child with a disability is deprived of his/her liberty in the context of the criminal justice systems or on national security grounds, reasonable accommodations must be provided to the child in respect of the detention. A failure to do so is discrimination. In addition, States must take all relevant measures, including the identification and removal of obstacles and barriers to access, so that children with disabilities may live independently and participate fully in all aspects of daily life in their place of detention.[131]

124 Articles 9 & 13 CRPD; CRPD/C/GC/5 *op. cit.*

125 Article 13(1) CRPD.

126 See CRPD-Committee, *Concluding observations on the initial report of Haiti*, CRPD/C/HTI/CO/1, 13 April 2018, para. 24; CRPD-Committee, *Concluding observations on the initial report of Seychelles*, CRPD/C/SYC/CO/1, 1 March 2018, para. 21; CRPD-Committee, *Concluding observations on the initial report of Slovenia,* CRPD/C/SVN/CO/1, 5 March 2018, para. 21; CRPD-Committee, *Concluding observations on the initial report of Luxembourg* CRPD/C/LUX/CO/1, 10 October 2017, para 27.

127 UN General Assembly, *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities,* Human Rights Council, A/HRC/37/25, 27 December 2017, para. 24.

128 Ibid., para. 27.

129 Article 13(2) CRPD.

130 OHCHR, *Right to access to justice under article 13 of the Convention on the Rights of Persons with Disabilities*, A/HRC/37/25, 27 December 2017, para. 59; See also: CRPD-Committee, *Concluding observations on the initial report of Ethiopia,* CRPD/C/ETH/CO/1, 4 November 2016, para. 30; CRPD-Committee, *Concluding observations on the initial report of the Republic of Korea,* CRPD/C/KOR/CO/1, 29 October 2014, para. 24; CRPD-Committee, *Concluding observations on the initial report of Portugal* CRPD/C/PRT/CO/1, 20 May 2016, para. 31; and CRPD-Committee, *Concluding observations on the initial report of Uganda* CRPD/C/UGA/CO/1, 12 May 2016, para. 25 (c).

131 CRPD-Committee, *Views adopted in X v Argentina,* CRPD/C/11/D/8/2012, 18 June 2014, para. 8.5.

d. Migration

The detention of children for purely migration-related reasons can never meet the high standards of a measure of last resort and the best interests of the child in Articles 37(b) and 3 CRC.[132] The CRC-Committee has called on States to 'expeditiously and completely cease the detention of children on the basis of their immigration status'[133] and to adopt alternatives to detention.[134] These measures should fully extend to and benefit children with disabilities, without discrimination, including by provision of reasonable accommodation. Alternatives to detention must take into account the specific needs of refugee or migrant children with disabilities and their families.[135]

Article 14 CRPD[136] prohibits that persons with disabilities, including children with disabilities, be detained in migration or asylum seeker related detention centres on the basis (solely or in conjunction with other reasons) of their perceived or actual impairment, or that of their parent(s). More generally, the United Nations High Commissioner for Refugees (UNHCR) has recommended a presumption against detaining refugees with long-term physical, mental, intellectual and sensory impairment.[137] States must also ensure that their migration policies do not discriminate against children with disabilities or parents with disabilities, and that States refrain from considering disability as grounds for the denial of an immigration application.[138]

Children with disabilities have the right to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others.[139] For children with disabilities, this includes the right to be registered immediately after birth, to a name from birth and to acquire a nationality.[140]

In all migration and asylum-seeking decision-making procedures, procedural accommodations, that are age- and gender-appropriate, must be provided to children

132 See Chapter 11 on Children Deprived of Liberty for Migration Related Reasons.

133 CRC-Committee, *Report of the 2012 Day of General Discussion the Rights of All Children in the Context of International Migration*, 28 September 2012, para. 78.

134 Ibid. para. 79.

135 UNHCR, *Detention Guidelines: Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, Geneva, UNHCR, 2012, guideline 9.1; UNHCR Executive Committee, Conclusion on refugees with disabilities and other persons with disabilities protected and assisted by UNHCR: Conclusion No.110 (LXI), A/AC.96/1095, 12 October 2010, paras. (c), (f), (h) & (j).

136 Note that the CRPD applies to every person on the territory of a ratifying State. This includes refugees and other non-citizens.

137 Cf. *Detention Guidelines* (UNHCR), *op. cit.*, guideline 9.5.

138 Cf. *Report of the 2012 Day of General Discussion* (CRC), *op. cit.*, para. 71.

139 Article 18 CRPD.

140 Article 18.2 CRPD.

with disabilities.[141] These procedures must be designed to be accessible to children with disabilities, which includes ensuring that information and communications are provided in accessible and age-appropriate formats.[142]

e. Armed Conflict and Other Situations of Risk

In situations of risk, including situations of armed conflict, humanitarian emergencies and the occurrence of natural disasters, Article 11 CRPD provides that States parties shall take all necessary measures to ensure the protection and safety of persons with disabilities. The CRPD-Committee has urged that the safety of all children with disabilities in conflict affected areas be prioritised, in particular those placed in institutions.[143] Any measures undertaken by States to ensure the protection and safety of children with disabilities, must respect their right to personal liberty. As such, States cannot deprive children with disabilities of their liberty on the basis of impairment in the name of protection and/or safety.

3.3 Conditions of Deprivation of Liberty and Harmful Practices

In circumstances of deprivation of liberty, children with disabilities are at a heightened risk of being subject to exploitation, violence and abuse. The CRC provides that States are obliged to protect children 'from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse'.[144] This obligation gives rise to a corresponding or 'correlative' right of children, including children with disabilities, to be free from violence in all its forms.[145] Article 16 CRPD affirms that children with disabilities hold a right to be free from exploitation, violence and abuse. It provides that, to realise this right, States have a range of specific protection, prevention and monitoring obligations, including ensuring that all prevention services are age, gender and disability sensitive.[146]

Children deprived of their liberty are also at a heightened risk of being subjected to torture or cruel, inhuman or degrading treatment or punishment. This includes:

141 Articles 13 & 18 CRPD; CRPD-Committee, *Concluding observations on the initial report of Slovakia,* CRPD/C/SVK/CO/1,17 May 2016, para. 53.

142 Articles 9 & 13 CRPD.

143 UN General Assembly, *Thematic study on the rights of persons with disabilities under article 11 of the Convention on the Rights of Persons with Disabilities, on situations of risk and humanitarian emergencies*, A/HRC/31/30, 30 November 2015, para. 6, referencing CRPD-Committee, *Concluding observations on the initial report of Ukraine* CRPD/C/UKR/CO/1, 2 October 2015, para. 14.

144 Article 19 CRC.

145 Cf. CRC/C/GC/13 *op. cit.*

146 Article 16(2) CRPD.

- the use of chemical, physical or mechanical restraints;
- prolonged isolation or seclusion;
- any medical procedure or intervention performed without free and informed consent;
- coerced or otherwise involuntary abortion;
- forced sterilisation;
- invasive and irreversible surgical practices such as psychosurgery;
- genital mutilation and surgery or treatment performed on intersex children without their informed consent; and
- the forced administration of psychotropic drugs or electroshock treatment.[147]

The CRC, drawing on the ICCPR and the Convention against Torture (CAT), restates the obligation of States to ensure that no child is subjected to torture or other forms of ill-treatment.[148] The CRPD reinforces and clarifies this obligation in respect of children with disabilities. Article 15 requires States to take all effective legislative, administrative, judicial or other measures to prevent children with disabilities, on an equal basis with other children, from being subjected to torture or other forms of ill-treatment.

Finally, children with disabilities deprived of their liberty, particularly in institutions and mental health regimes, are at risk of their physical and mental integrity[149] being violated. This right interlinks with the right of all children with disabilities to privacy, autonomy and individual self-determination over their own bodies.[150] Forced interventions in hospitals and institutions,[151] irreversible surgical alterations on intersex children,[152] and forced sexual and reproductive health procedures on girls violates the right to physical and mental integrity.[153] The principle of best interests should not be misused to prevent children with disabilities from exercising their right to bodily integrity.[154]

147 CRPD-Committee, *General Comment No. 3 (2016) on women and girls with disabilities,* CRPD/C/GC/3, 25 November 2016, para. 32.

148 Article 37(a) CRC.

149 Articles 7 & 17 CRPD.

150 Child Rights International Network, *Bodily Integrity,* Available at https://archive.crin.org/en/home/what-we-do/policy/bodily-integrity.html (accessed 7 July 2019).

151 Cf. CRPD/C/MUS/CO/1, *op. cit.*, paras. 29 & 30; CRPD-Committee, *Concluding observations on the initial report of Serbia,* CRPD/C/SRB/1, 23 May 2016, para. 35.

152 CRPD-Committee, *Concluding observations on the initial report of United Kingdom of Great Britain and Northern Ireland,* CRPD/C/GBR/CO/1, 3 October 2017, paras. 40 & 41; CRPD-Committee, *Consideration of the reports submitted by States parties under article 35 of the Convention: Initial reports of States parties due in 2011 – Italy,* CRPD/C/ITA/1, 6 March 2015 paras. 45-46; CRPD-Committee, *Concluding observation on the initial report of Uruguay*, CRPD/C/URY/1 paras. 43-44; CRPD-Committee, *Concluding observation on the initial report of Chile*, CRPD/C/CHL/1, 13 April 2016, paras. 41-42; CRPD-Committee, *Concluding observation on the initial report of Germany*, CRPD/C/DEU/1, 13 May 2015, paras. 37-38.

153 CPRD, *Concluding observation on the initial report of Cooks Islands*, CRPD/C/COK/CO/1, 15 May 2015, paras. 35-36.

154 Cf. CRPD/C/GC/6, *op. cit.*, para. 38.

4. Ending Deprivation of Liberty of Children with Disabilities

In light of the overrepresentation of children with disabilities in mainstream settings of deprivation of liberty and the high occurrence of disability-specific forms of deprivation of liberty, a holistic approach must be taken to ending unlawful and/or arbitrary deprivations of liberty of children with disabilities. This involves working to fully realise all human rights of children with disabilities, alongside eliminating disability-based deprivation of liberty. Accordingly, States must mainstream the rights and needs of children with disabilities in all areas of law and policy which are directly or indirectly relevant to preventing and eliminating unlawful and/or arbitrary deprivation of liberty (including monitoring and enabling challenge of all deprivations of liberty). This includes, but is not limited to: child protection, social protection, social services, housing, health (including mental health), education, justice (including child justice), migration, national security and emergency and crisis responses. These mainstreaming efforts must be based on the foundational principles of non-discrimination, inclusion and participation.

State Obligations Towards Ending the Deprivation of Liberty of Children with Disabilities

4.1 Non-discrimination

States have an obligation to ensure the right to liberty is enjoyed by all children with disabilities, without discrimination. States must therefore eliminate discrimination against children with disabilities in all laws, policies and practices that relate to the right to personal liberty.[155] This would include repealing laws that allow for children, on the basis of an actual or perceived impairment, being deprived of their liberty, including via being: separated from their families and placed in an institution; involuntarily committed to a mental health facility without free and informed consent; transferred from the criminal justice system to institutions or mental health commitment regimes; and being confined at home.

States must also more broadly prohibit all discrimination on the basis of disability, and guarantee equal and effective legal protection for children with disabilities against discrimination. They must also take all appropriate steps to ensure that reasonable accommodation is provided to children with disabilities, in all areas of life.[156] States must also recognise and address multiple and intersectional discrimination.[157] Multiple discrimination refers to discrimination that is additive or compounded, whereas intersectional discrimination refers to a singular, inseparable form of discrimination experienced by children with disabilities as a result of being at the intersection of two forms of subordination.[158]

States must eradicate all forms of institutionalisation of persons with disabilities and set up clear deinstitutionalisation processes, which should include all kinds of institutions in order to avoid trans-institutionalisation. Strategies to end the institutionalisation of children with disabilities should include building up family support, the provision of child services within the community, child protection strategies, inclusive education and the development of disability-inclusive family-based alternative care, including extended kinship care, foster care and adoption.[159] All these forms of alternative care should be provided with appropriate training, support and monitoring to ensure the sustainability of such placements.

155 Article 5(1) CRPD.

156 Article 5 CRPD.

157 Cf. CRPD/C/GC/6, *op. cit.*

158 Kimberley Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics', *University of Chicago Legal Forum*, Vol. 1989(1),1989, Available at http://chicagounbound.uchicago.edu/uclf/vol1989/iss1/8 (accessed 7 July 2019).

159 Cf. A/HRC/40/54, *op. cit.*, para. 68. Among the States that responded to the UN Global Study Questionnaire, especially countries from Central and Eastern Europe emphasised their efforts aiming at deinstitutionalisation. Deinstitutionalisation is one of the guiding principles in the *Austrian National Action Plan on Disability 2012-2020* (UN Global Study Questionnaire, Austria [State reply]). Similarly, the *Strategy for Improving the Social Position of Persons with Disabilities of the Republika Srpska* (2017-2026) focuses on deinstitutionalisation by aiming to improve the process of adoption of children, developing foster care, strengthening family capacities and developing community-based services for children with disabilities (Bosnia and Herzegovina, [State reply]). Deinstitutionalisation initiatives were also reported via the UN Global Study Questionnaire by Croatia (State reply) and Slovenia (State reply).

States have an obligation under the CRC to ensure to all children 'prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of their liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.' This must fully extend to children with disabilities, without discrimination.[160] This requires States to ensure the provision of reasonable accommodation and procedural age and gender appropriate accommodation, as well as taking appropriate measures to ensure that the process for challenging deprivation of liberty is fully accessible to children with disabilities.[161]

4.2 Inclusion

All policies and programs related to preventing and ending unlawful and/or arbitrary deprivation of liberty must be based on a disability-inclusive approach.[162] This approach embraces the principle of full and effective inclusion and recognises that social arrangements, norms and practices must transform to fully and effectively include children with disabilities.[163] The provision of reasonable accommodation, procedural accommodation and access to adequate assistance and support is a precondition for children with disabilities to effectively exercise their right to personal liberty and therefore should be included as core elements of all policies and programs relating to preventing and ending unlawful and arbitrary deprivations of liberty, to ensure they are disability inclusive.

The notion of support in particular can play a role in deterring deprivation of liberty of children with disabilities. The lack of many forms of support, particularly support for living in the community, has a direct correlation to the underlying causes of disability-specific forms of deprivation of liberty. Support is a cross-cutting obligation under the CRPD. States must ensure access to a wide range of support services to children with disabilities and their families, including information, early intervention, day care and social services. For example, families may need assistance to understand disability in a positive way and to know how to support their children in accordance with their age and maturity.

With access to these forms of support, along with inclusive and accessible general community services and programmes such as education and health care, all children with disability, including those with multiple and severe impairments, can live in the community with their

160 Article 2 CRC; Article 14.2 CRPD.

161 CRPD Article 9, 13 & 14.2; CRPD-Committee, *General Comment No. 2 (2014) – Article 9: Accessibility,* CRPD/C/GC/2, 22 May 2014.

162 Cf. UN General Assembly, *Rights of persons with disabilities,* A/71/314, 9 August 2016, para 60.

163 For further discussion on disability inclusive policy see A/71/314, *op. cit.*

families or family-based alternative care. Hence, States can advance their obligations related to the right to personal liberty, by ensuring a range of support schemes and programmes that are available, accessible, adequate and affordable.[164] Foster care systems must also be designed so that necessary support is provided to foster care families to enable them to foster children with disabilities, especially children with disabilities who need emergency care.

However, it must be underscored that States must fulfil their obligation to provide support alongside their obligation to eliminate disability-based deprivation of liberty. The failure of the States to provide children with disabilities and their families with the appropriate services and support in the community, including accessible and inclusive health-care and education, cannot constitute a legitimate ground for the deprivation of a child's liberty.

States must also ensure rights-based services for children experiencing emotional crises. The existence of community-based services that do not resort to the use of force or coercion has proven to be effective and is critical to ensure a rights-based response. Non-coercive and non-medical community programmes for crisis situation have been established in several places in the world as alternatives to hospitalisations (e.g. crisis or respite houses, crisis respite services, host families and emergency foster care for children).[165]

Disability inclusive social protection systems can also contribute significantly to reducing deprivation of liberty of children with disabilities by ensuring income security and access to social services.[166] Article 28 CRPD requires States to implement comprehensive and inclusive social protection systems that mainstream disability in all programmes and interventions, and ensure access to specific programmes and services for disability-related needs. Disability benefits, in particular, can help to promote the independence and social inclusion of children with disabilities.

National preventive mechanisms, national human rights institutions, and independent mechanisms for the promotion, protection and monitoring of the implementation of the CRPD,[167] must be expressly mandated to carry out inquiries and investigations in relation to children with disabilities. Monitoring mechanisms in respect of potential settings of deprivation of liberty of children, must extend to disability specific settings, such as institutions, care settings and medical, rehabilitation and psychiatric facilities for children with disabilities.[168] These

164 Cf. A/HRC/34/58 *op. cit.*

165 A/HRC/40/54, *op. cit.*, para. 71.

166 Ibid., para. 78.

167 As required by the CRPD Article 33.

168 UN General Assembly, *Torture and cruel, inhuman or degrading treatment or punishment,* A/63/175, 28 July 2008, para. 75.

mechanisms must broadly review the practices and conditions of such settings, with a view to preventing human rights violations, including the unlawful and/or arbitrary deprivation of children with disabilities on the basis of impairment. The CRPD explicitly provides for the independent monitoring by States of all facilities and programmes that serve persons with disabilities in order to prevent all forms of violence, exploitation and abuse.[169] States must take appropriate steps to prevent, investigate, punish and redress deprivation of liberty by private actors and any abuse committed by them during such detention.

4.3 Participation

Children with disabilities are themselves best placed to express their own experiences and requirements. As such, children with disabilities and their representative organisations must systematically be involved in all law and policy reform efforts by States to fully realise the right to liberty of children with disabilities.[170] That includes any policy or programme, whether disability specific or mainstream, that may have direct or indirect impact on the full enjoyment of the right to personal liberty.

For this to be achieved, States must adopt all appropriate legislative, administrative and other measures to ensure the full and effective participation of children with disabilities in all phases of policy development. This includes creating and providing an enabling environment for children with disabilities, and their representative organisations, to express their opinions and develop inputs for the decision making processes, including the provision of disability and age appropriate assistance and support.[171] States should establish outreach programmes and flexible mechanisms to enable the effective participation of groups of children with disabilities disproportionately targeted by deprivation of liberty on the basis of impairment.

169 Article 16.3 CRPD.

170 CRPD Article 4(3) & 33; UN General Assembly, *Report of the Special Rapporteur on the rights of persons with disabilities*, A/HRC/31/62, 12 January 2016.

171 Article 7(3) CRPD; CRPD-Committee, *General Comment No. 7 (2018) on the participation of persons with disabilities, including children with disabilities, through their representative organisations, in the implementation and monitoring of the Convention (Advanced Unedited Version)*, 21 September 2018, para. 24.

5. Conclusion

Children with disabilities across the world face multiple intersecting barriers that prevent them from fully realising and enjoying their right to liberty. They are **overrepresented in mainstream settings of deprivation of liberty** and **experience disability specific forms of deprivation of liberty**, including institutionalisation on the basis of their disability, involuntary commitment to mental health regimes, compulsory referral from criminal justice systems to mental health facilities and deprivation of liberty within home settings. While deprived of their liberty, **children with disabilities are more likely to be subject to exploitation, violence, abuse, torture and other forms of ill-treatment**.

Together, the CRPD and CRC provide a clear legal framework with which to address this unacceptable reality:

Right to Personal Liberty	Children with disabilities have a **right to personal liberty** on an **equal basis** with other children.
CRC	Deprivation of liberty of children shall only be used as a **measure of last resort** and for the **shortest appropriate period of time** (Article 37(b)). It shall only be allowed if it is in the **best interests** of the child.
CRPD	The **existence of a disability** shall in no case justify a **deprivation of liberty** (Article 14 CRPD).

In circumstances relating to a) alternative care, b) criminal justice, c) national security, d) migration, and e) situations of risk including armed conflicts, – additional standards within the CRPD and CRC supplement the above deprivation of liberty legal standard. These standards are unified by their grounding within the human rights based approach to children with disabilities. This approach requires States to recognise that children with disabilities are first and foremost right holders. As such, all children with a disability hold a right to personal liberty and are entitled to fully enjoy that right and to participate in all

matters directly or indirectly affecting their enjoyment of their right to liberty. This means that in all areas of law and policy, which may directly or indirectly affect the right to liberty of children with disabilities, **States must mainstream a disability inclusive perspective that is based on the principles of non-discrimination, inclusion and participation**.

As recognised by the UN General Assembly in calling for this Global Study, children deprived of liberty remain an invisible and forgotten group in society. For children with disabilities, the depth of this invisibility is immense, due to multiple and intersectional discrimination and disadvantage. To end this invisibility and shine a much needed light on the situation of children with disabilities deprived of liberty, the international community should embrace a human rights approach and its core values of non-discrimination, participation and inclusion. **Liberty is one of the most fundamental human rights and all efforts must be dedicated to upholding it for all children, including children with disabilities**.

6. Recommendations

The following recommendations aim at assisting States to develop and implement reforms towards the **full implementation of the right to personal liberty of children with disabilities**:

1. **Eliminate discrimination** against children with disabilities in all laws, policies and practices that relate to the right to personal liberty. This includes repealing laws that allow depriving children of their liberty on the basis of an actual or perceived impairment;

2. **Mainstream the rights and needs** of children with disabilities in all areas of law and policy which are directly or indirectly relevant to preventing and eliminating unlawful and/or arbitrary deprivation of liberty;

3. Implement a policy for the **deinstitutionalisation** of children with disabilities from all kinds of institutions, including the adoption of a plan of action with clear timelines and concrete benchmarks to close all institutions, a moratorium on new admissions and the development of adequate community support;

4. Guarantee **effective access to justice** for all children with disabilities on an equal basis with others, including through the provision of procedural, gender age appropriate accommodation, in order to facilitate their effective participation in all legal proceedings;

5. Guarantee **access to effective remedies** to all children with disabilities arbitrarily deprived of their liberty and take immediate action to restore their liberty;

6. Adopt all appropriate legislative, administrative and other measures to ensure the **full and effective participation** of children with disabilities in all decision-making processes, including all phases of policy development towards ending deprivation of liberty of children; and

7. Design **awareness raising campaigns** and **training programmes** particularly for policy makers, public officers, service providers and media, about the right to liberty and security of children with disabilities, including combating stereotypes, prejudices and harmful practices.

CHAPTER 8
GENDER DIMENSION

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1. Introduction

This chapter shines a spotlight on the fact that **boys often face discriminatory treatment** and are **over represented in all situations of deprivation of liberty** due to stereotypical views on the propensity of boys towards violent behaviour. The significant male-female gender gap that exists within the child justice system thus forms a particular focus of this chapter. This chapter also highlights that the **needs of girls** are often forgotten in a system that is designed for men. The penal system is indeed one of the most gendered spaces in society where, on the one hand, **discrimination against boys and girls** is rife and, on the other hand, the **rights of LGBTI children** are often left by the wayside.

2. Discrimination against Boys

The data collected for the Global Study indicate significant gender disparities in the different situations of deprivation of liberty. Altogether, there are far more boys deprived of liberty worldwide than girls. In the administration of justice (pre-trial and post-trial detention and imprisonment) and in the context of armed conflicts and national security, **94% of all detained children are boys**. Roughly, two thirds of all children in migration related detention (67%) are boys, which can be explained primarily by the fact that most unaccompanied children on the move are boys.[1] Over half of children deprived of liberty in institutions are boys (56%)[2], often due to drug, alcohol or other addictions.[3]

1 The share of boys within the population of asylum applicants, who are considered unaccompanied minors in the EU Member States is 85.8% in 2018. See: Eurostat, *Asylum applicants considered to be unaccompanied minors by citizenship, age and sex Annual data (rounded),* last update: 18 June 2019. Approximately 71% of unaccompanied minors arriving to the United States in 2018 were boys. See: Office of Refugee Resettlement, *Unaccompanied Alien Children (UAC) Program Fact Sheet,* Available at https://www.hhs.gov/programs/social-services/unaccompanied-alien-children/program-fact-sheet/index.html (accessed 20 August 2019). See also: Lianne Fuino Estefan *et al.* 'Unaccompanied Children Migrating from Central America: Public Health Implications for Violence Prevention and Intervention', *Current trauma reports,* Vol. 3(2), 2017, pp. 97-103.

2 The gender ratio is based on data submitted under the UN Global Study Questionnaires, while additional data are based on the following source: UN General Assembly, *Children and armed conflict: Report of the Secretary-General,* A/72/865–S/2018/465,16 May 2018.

3 For institutions for children with drug, alcohol or other addictions see replies to the UN Global Study Questionnaire replies received from Portugal (Ombudsman Reply), Sri Lanka (State Reply) and Uruguay (State Reply). The prevalence of boys may be partly explained by their higher involvement in drug abuse. See: Josine Junger-Tas, Ineke H. Marshall, Dirk Enzmann, Martin Killias, Manjone Steketee & Beata Gruszczynska (eds.), *Juvenile Delinquency in Europe and Beyond: Results of the Second International Self-Report Delinquency Study*, Springer, 2010. For correctional institutions see replies to the UN Global Study questionnaire replies received from Croatia (State Reply) and Lithuania (State Reply).

Share of Boys and Girls in all Situations of Deprivation of Liberty

Source: responses to the Global Study questionnaire, TransMonEE/UNICEF database, official statistics, literature review.

2.1 Boys in the Administration of Justice

With respect to detention of children in the context of the administration of justice, the data collected for the Global Study also show a significant discrepancy between the countries and regions. For instance, one of the highest percentage of girls deprived of liberty can be found in the **United States** (15%)[4] whilst in **Thailand** the share of girls is close to 7%.[5] In some States, the percentage of boys detained in the context of the administration of justice is close to 98% (**England and Wales**[6], **Argentina**[7]) or even 99% (**South Africa**[8], **Georgia**[9]), which means that only 1 out of 100 detained children is a girl. Although our estimates are based on a small sample due to the limited submission of disaggregated data, they still confirm the existence of the same phenomenon as observed in the adult population (approx. 6,9% of prison population worldwide is female).[10]

2.2 Penal System is the Most Gendered Institution in Society

The reasons why the overwhelming majority of children deprived of liberty are boys is more difficult to explain, since there is comparably little research available. Most research on the gender dimension of deprivation of liberty relates to the administration of criminal justice and primarily addresses cases of discrimination against girls, not against boys. Yet in 2006, Paulo Sérgio Pinheiro noted that 'millions of children, particularly boys, spend substantial periods of their lives under the control and supervision of care authorities or justice's system, in institutions such as [...] juvenile detention facilities and reform schools'.[11]

According to research conducted by Bruce Abramson in the same year, the 'penal system, adult and juvenile, is the most heavily gendered institution in society, even more so than the military, given current trends'.[12] He adds that the human rights movement, and the

4 Data for year 2017. See Melissa Sickmund, T. J. Sladky, Wei Kang & Charles Puzzanchera, 'Easy Access to the Census of Juveniles in Residential Placement', 2019, Available at https://www.ojjdp.gov/ojstatbb/ezacjrp/ (accessed 20 August 2019).

5 UN Global Study Questionnaire, Thailand (State reply).

6 UK Prison and Probation Service, 'Youth custody data', 10 May 2013 (last updated 9 August 2019), Available at https://www.gov.uk/government/statistics/youth-custody-data (accessed 19 August 2019).

7 UN Global Study Questionnaire, Argentina (State reply).

8 Cf. Lukas Muntingh & Clare Ballard, *Report on Children in Prison in South Africa*, 2012, p. 15.

9 UN Global Study Questionnaire, Georgia (State reply).

10 Roy Walmsley, *World Female Imprisonment List*, 4th ed., the Institute for Criminal Policy Research at Birkbeck, University of London, 2017, Available at http://www.prisonstudies.org/site-section/icps-only (accessed 19 August 2019).

11 UN General Assembly, *Report of the independent expert for the United Nations study on violence against children*, A/61/299, 29 August 2006, para. 53.

12 Bruce Abramson, 'Juvenile Justice: The "Unwanted Child": Why the potential of the Convention on the Rights of the Child is not being realized, and what we can do about it', Eric L. Jensen & Jørgen Jepson (eds.), *Juvenile Law Violators, Human Rights, and Development of New Juvenile Justice Systems*, Oxford, Hart Publisher, 2006.

children's rights movement in particular, is contributing to this male-female gender gap by discriminating against boys:

> 'Whether we look at the CRC movement, or at the broader human rights movement, or at the specialized juvenile justice advocacy, we find the same pattern of avoiding the gender dimension of juvenile justice. Some adults are in deep denial of the gender issue when boys are at the losing end of the disparities. But most people recognise that there is a gender issue. The problem is that no one has found an effective, positive way to address it. I think that juvenile justice professionals and CRC activists are paying a dear price in credibility for their failure to address gender: the public knows – at some level of awareness – that the advocates for reform are not addressing the problem when they duck the gender dimension of delinquency [...] Sad to say, there is outright sex discrimination against boys in the CRC movement.'[13]

Although girls are less likely to commit serious criminal offences than boys, the detention rate does not reflect the crime rate. More than one third (35-40%) of all criminal offences worldwide are attributed to girls.[14] However, only one fourth of all children (25%) who come in formal contact with the criminal justice system, are girls. Finally, only 11,6% of all convicted children are girls,[15] and only 6% of all children who end up in detention are girls.[16] These statistics show that:

- girls tend to receive more lenient (usually non-custodial) sentences;
- girls, compared to boys, tend to benefit much more from diversion and non-custodial solutions during the different phases of the criminal justice system.

13 Bruce Abramson, 'Juvenile Justice: The "Unwanted Child": Why the potential of the Convention on the Rights of the Child is not being realized, and what we can do about it', Eric L. Jensen & Jørgen Jepson (eds.), *Juvenile Law Violators, Human Rights, and Development of New Juvenile Justice Systems*, Oxford, Hart Publisher, 2006, pp. 15f.

14 For delinquency in Europe and South America see:Josine Junger-Tas et al. (2010), *op. cit.;* Rosemary Barberet, Benjamin Bowling, Josine Junger-Tas, Cristina Rechea-Alberola, John van Kesteren, Andrew Zurawan, *Self-Reported Juvenile Delinquency in England, Wales, The Netherlands and Spain*, Helsinki 2004. For case studies on delinquency in Asia see: Donald J. Shoemaker, 'Male-Female Delinquency in the Philippines', *Youth & Society,* Vol. 25(3), 1994, pp. 299–329; Ken-ichi Ohbuchi & Hideo Kondo, 'Psychological Analysis of Serious Juvenile Violence in Japan', *Asian Journal of Criminology*, Vol. 10(2), 2014, pp. 149–162; Yi-Fen Lu, Yi-Chung Yu, Ling Ren & Ineke H. Marshall, 'Exploring the Utility of Self-Control Theory for Risky Behavior and Minor Delinquency Among Chinese Adolescents', *Journal of Contemporary Criminal Justice,* Vol. 29(1), 2012, pp. 32–52. For delinquency in the United States see: Samantha Ehrmann, Nina Hyland & Charles Puzzanchera, *Girls in the Juvenile Justice System*, National Center for Juvenile Justice, April 2019, Available at https://www.ojjdp.gov/pubs/251486.pdf (accessed 18 August 2019).

15 The UN Global Study Questionnaires. See also UNODC, *United Nations Surveys on Crime Trends and the Operations of Criminal Justice Systems (UN-CTS),* Available at https://www.unodc.org/unodc/en/data-and-analysis/United-Nations-Surveys-on-Crime-Trends-and-the-Operations-of-Criminal-Justice-Systems.html (accessed 15 August 2019).

16 The high percentage of boys deprived of liberty in the administration of criminal justice (94%) is consistent with the population of adult detainees. Cf. Roy Walmsley, *World Female Imprisonment List*, 4th ed., the Institute for Criminal Policy Research at Birkbeck, University of London, 2017, Available at http://www.prisonstudies.org/site-section/icps-only (accessed 15 August 2019).

There may be various reasons for this phenomenon. Most importantly, girls usually commit less violent offences and are more often accused of status offences.[17] Less serious offences are less likely to be reported to the police and girls appear to be underrepresented in police records.[18] Girls are generally first-time offenders and are more receptive to the deterrent effect of incarceration.[19] Another explanation is the 'chivalrous and paternalistic' attitude of many male judges and prosecutors in the child justice system, who assume, according to traditional gender stereotypes, that girls are more in need of protection than boys.[20]

Share of Boys and Girls at Different Stages of the Child Justice System

Source: responses to the Global study questionnaire, UNODC (United Nations Surveys on Crime Trends and the Operations of Criminal Justice Systems (UN-CTS), International Self-Report Delinquency Study project, literature review.

17 Jennifer Thibodeau, 'Sugar and Spice and Everything Nice: Female Juvenile Delinquency and Gender Bias in Punishment and Behavior in the Juvenile Courts', *William & Mary Journal of Women and the Law*, Vol. 8(3), 2002, p. 489; Arnaud Philippe, *Gender disparities in criminal justice*, Institute for Advanced Studies in Toulouse, Toulouse School of Economics, January 2017.

18 Barry C. Feld, 'Violent Girls or Relabeled Status Offenders? An alternative interpretation of the data', *Crime & Delinquency,* Vol. 55(2), 2009, pp. 241–265; Catharine Kaukinen, 'The help-seeking of women violent crime victims: findings from the Canadian violence against women survey', *International Journal of Sociology and Social Policy*, Vol. 22(7/8), 2002, pp. 5-44; Timothy C. Hart & Callie Rennison, *Reporting Crime to the Police 1992-2000*, U.S. Department of Justice, March 2003.

19 For instance, reoffending rate by gender in England and Wales for the year March 2006 to March 2016 show that males, who made up 82% of all children and young people in the aggregated cohorts, had a higher reoffending rate than females; the reoffending rate for males for the year ending March 2016 was 44.7% compared to 31.0% for females. See also Karen Gelb, *Gender Differences in Sentencing Outcomes,* Sentencing Advisory Council, July 2010.

20 It is necessary to underline the paternalistic treatment is a relevant explanation mostly in countries where judges and other courts officials are predominantly men. Lori Guevara, Denise Herz & Cassia Spohn, 'Gender and Juvenile Justice Decision Making', *Feminist Criminology,* Vol. 1(4), October 2006; See also Jennifer Thibodeau (2002), *op. cit.*, p. 489; Karen Gelb (2010), *op. cit.* See also Arnaud Philippe (2017), *op. cit.*

Studies on crimes committed by children in patriarchal societies suggest that the imposition of strict social norms, an increased parental control as well as patriarchal treatment by public authorities are potential factors, which prevent girls from committing criminal offences.[21] Comparative studies conducted in 27 countries suggest that the gender gap in the child justice system is wider in patriarchal societies.[22] On one hand, chivalry and paternalism are the most common explanations of the gender effect on criminal processing. On the other hand, a social control explanation, which is usually put forward in describing the gender differences in offending for juveniles, is also plausible. It has further been suggested that boys and girls are not equally exposed to those risk factors that can ultimately lead to a criminal offence. In other words, the degree of supervision, monitoring and indirect control has a real impact on whether a child may offend and/or reoffend.[23] Recent studies show that the imprisonment rate of girls, as compared to boys, increases with the share of female judges.[24] This does not imply that female judges tend to sentence girls more harshly, but it rather means that boys receive a fair and more equal judicial treatment.

21 Jukka Savolainen, Samantha Applin, Steven F. Messner, Lorine A. Hughes, Robert Lytle & JanneKiviuori, 'Does the gender gap in delinquency vary by level of patriarchy? A cross-national comparative analysis', *Criminology*, Vol. 55(4), 2017, pp. 726–753.

22 Ibid.

23 Elizabeth Cauffman, 'Understanding the female offender', *Future Child,* Vol. 18(2), pp. 119-142. See also Karen Heimer & Stacy De Coster, 'Crime and Gender', Neil J. Smelser & Paul B. Baltes (eds.), *International Encyclopedia of the Behavioral and Social Sciences,* Oxford, Elsevier Science, 2001.

24 Cf. Arnaud Philippe (2017), *op. cit.*

3. Discrimination against Girls

A recent study indicates that the number of women and girls in prison worldwide has increased by 53% between 2000 and 2017. This increase may result in significant challenges for girls in prisons. The following section will highlight some of the main areas where the Study has found these challenges most evident.

MOST COMMON REASONS WHY GIRLS ARE DETAINED
Status offences (runaway, truancy, disorderly conduct)
Trafficked as a migrant girl
Abortion
Behavioural problems brought on by abuse at home
Violations of loitering and public safety laws
Not carrying proper identification
Unlawful gatherings for purposes of intelligence
Sexual exploitation during armed conflict
Sexual orientation (LGBTI)
Disability *Girls are easily abandoned and placed indefinitely in institutions. They often remain in institutions, while boys are more often part of deinstitutionalisation processes.*

3.1 Status Offenses

Although the incarceration rate of boys is much higher, girls also experience discrimination within the justice system – albeit in different ways. Since girls interact less with the criminal justice system, their special needs tend to be over-looked during policy making processes.[25] In several instances, girls face double discrimination: a) on the grounds of age and b) on the grounds of their gender.[26] Studies pertaining to the arrests of girls show that, unlike boys,

25 For more information about interventions and programming for girls in criminal justice systems see Penal Reform International, *Neglected Needs: Girls in the criminal justice system*, 2014, Available at https://www.penalreform.org/resource/neglected-girls-criminal-justice-system/ (accessed 18 August 2019). See also Office of the Special Representative on Violence against Children, *Safeguarding the rights of girls in the criminal justice system: Preventing violence, stigmatization and deprivation of liberty,* New York, 2015, p. 5.

26 CRIN, *Discrimination and Disenfranchisement: a global report on status offences,* 3rd ed., Child Rights International Network 2016; CRC-Committee, *General Comment No. 10 (2007): Children's rights in juvenile justice,* CRC/C/GC/10, 25 April 2007, para. 8.

they are far more likely to be arrested for status offences – based on behaviour rather than actual criminal activity such as delinquency and serious/violent offences.[27] In 2015, among status offences in the **United States** for instance, girls had the largest relative share of runaway cases (56%) followed by truancy cases (46%), and for disorderly conduct offenses (37%).[28] Status offences fail to respect the best interests of children and therefore also fail to respect their rights. Additionally, status offences are decidedly detrimental to the wellbeing of any child. In order to prevent criminal behaviour of children therefore, developing non-custodial solutions (such as community-based services), is of vital importance.

3.2 Trafficking in Migrant Girls

Girls have a high rate of interaction with police authorities. They are often purposely targeted for specific offences and subsequently prosecuted and detained. These specific offences include for example violations of loitering and public safety laws, not carrying proper identification as well as migration-related infractions.[29] Although less apparent, there are also gender disparities within migration-related detention. Migrant girls are more likely than migrant boys to become victims of trafficking. What is more, rather than being placed in non-custodial community-based contexts, girls are mostly placed in facilities that do not implement programs that cater for the special needs of girls. It is also often the case that girls find themselves detained with female adults or with boys. This leads girls to be potentially exposed to various forms of abuses as well as to the worst forms of sexual violence.[30] In some countries, regular reports indicate that migrant girls in transit may be forced to engage in transactional sex so as to facilitate their border crossing.[31] Girls who are severely exploited due to forced prostitution and trafficking, are frequently arrested

27 Meda Chesney-Lind & Randall G. Shelden, *Girls, Delinquency, and Juvenile Justice,* 8th ed., 2013, pp. 3, 233 & 252.

28 See Samantha Ehrmann *et al.* (2019), *op. cit.*

29 U.N. High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention,* 2012. See also: CRC-Committee, *Report of the 2012 Day of General Discussion: The Rights of All Children in the Context of International Migration,* 28 September 2012.

30 Care, *Far From Home: The 13 worst refugee crises for girls,* 8 October 2018. See also: Paul Farrel, Nick Evershed & Helen Davidson, 'The Nauru files: cache of 2,000 leaked reports reveal scale of abuse of children in Australian offshore detention', *The Guardian,* 10 August 2015, Available at https://www.theguardian.com/australia-news/2016/aug/10/the-nauru-files-2000-leaked-reports-reveal-scale-of-abuse-of-children-in-australian-offshore-detention (accessed 18 August 2019). See also Select Committee on the Recent Allegations relating to Conditions and Circumstances at the Regional Processing Centre in Nauru, *Taking responsibility: conditions and circumstances at Australia's Regional Processing Centre in Nauru,* Canberra, ACT, 31 August 2015, p. 120.

31 UN General Assembly, *The impact of migration on migrant women and girls: a gender perspective: Report of the Special Rapporteur on the human rights of migrants,* A/HRC/41/38, 15 April 2019.

and deprived of their liberty.[32] In these situations, girls living on the street are particularly vulnerable as they are often arrested and detained on charges related to prostitution.[33]

3.3 Abortion

In countries where abortion is criminalised, women and girls risk detention simply for their decision to terminate a pregnancy. No consideration is paid to the fact that a termination may be due to the fact that the girl's own health is at risk or that the foetus is no longer viable. In some cases, child mothers are arrested, detained and penalised for no fault of their own and simply because they were unable to carry their baby to term and thus miscarried.[34] In places where gender norms and abortion laws are more restrictive, girls may be charged with an offence and detained for having (or simply seeking) an abortion. The fact that some girls fall pregnant due to rape and subsequently seek out abortion options does not deter some States from detaining and penalising such girls.[35] Moreover, the 'UN Working Group on the issue of discrimination against women in law and in practice' reported on the existence of hospitals and other State institutions for detaining girls to prevent them terminating a pregnancy.[36] UN treaty monitoring bodies, including the CRC-Committee, the CESCR-Committee and the CEDAW-Committee, consequently urge States to decriminalise abortion and provide access to safe abortion and post-abortion services instead.[37]

32 Office of the Special Representative on Violence against Children, *Safeguarding the rights of girls in the criminal justice system: Preventing violence, stigmatization and deprivation of liberty,* New York, 2015, p. 5.

33 Cf. Chapter 9 on Children Deprived of Liberty in the Administration of Justice. See also: Center for Human Rights & Humanitarian Law, *Protecting children against torture in detention: Global Solutions for a Global Problem,* 2017.

34 UN Human Rights Council, *Women deprived of liberty, Report of the UN Working Group on discrimination against women*, A/HRC/41/33, 15 May 2019.

35 Ibid.; See also: Amnesty International, *Bolivia: Briefing to the UN Committee on the Elimination of Discrimination Against Women,* July 2015, pp. 10-13; Human Rights Watch, *Ecuador: Adopt UN Recommendations on Abortion Law,* 22 April 2015; Amnesty International, *On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador,* London, Amnesty International, 2014; Human Rights Watch, *The Second Assault: Obstructing Access to Legal Abortion After Rape in Mexico,* New York, 2006; Center for Reproductive Rights, *Facts on Abortion in the Philippines: Criminalization and a General Ban on Abortion,* 28 January 2010; Tara Culp-Ressler, 'Abortion Bans Are Putting Women Behind Bars', *Think Progress,* 9 March 2015.

36 UN Human Rights Council (2019), *op. cit.*

37 CRC-Committee, *General comment No. 20 (2016) on the implementation of the rights of the child during adolescence,* CRC/C/GC/20, para. 60, CESCR-Committee, *General comment No. 22 (2016) on the right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights),* E/C.12/GC/22, para. 40. CEDAW-Committee, *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19,* CEDAW/C/GC/35, 14 July 2017, para. 18.

3.4 Abuse

Extensive studies reveal that girls who end up in detention have usually experienced higher rates of victimisation in their lives. Victimisation during childhood or adolescence is a significant risk factor that causes both boys and girls to offend. However, it is important to underline that girls constitute a particularly vulnerable group, because compelling evidence suggests that an overwhelming majority of girls have experienced abuse before their first offense. Experiences of violence and abuse in the lives of girls significantly shape their behaviour and maximise the chances for their institutionalisation or detention. Many girls may be removed from parental care and placed in institutions because of family violence, including psychological, physical and sexual violence.[38] Very often these girls are entering diversion programs that are not always efficiently designed and do not provide adequate rehabilitation measures for girls who are themselves victims of prior abuse before coming in contact with the criminal justice system.[39]

In some countries, certain behaviours of girls are perceived as violent – a perception that is then also used as a justification for their institutionalisation. The same behaviours of boys, however, would be considered as minor or as legitimate self-defence.[40] Poverty and lack of family support often negatively impact the ability of girls to obtain favourable outcomes in the court system.[41] Frequently, girls from poor families run the risk of institutionalisation in care, educational or custodial facilities since they lack access to supportive systems and services. Sometimes, forms of protective custody designed to protect girls from violence and abuse become highly ineffective, since they are often arbitrarily employed as methods to dissuade girls from disruptive behaviour. For instance, reports suggest that protective custody, which is a form of arbitrary detention that is contrary to international human rights law, is often used to solely punish girls for acting outside of societal norms and expectations.[42]

38 Cf. A/HRC/41/33, *op. cit.*, para 66.

39 CRC-Committee, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003; Elizabeth Cauffman *et al.*, 'Posttraumatic Stress Disorder among Female Juvenile Offenders', *Journal of the American Academy of Child and Adolescent Psychiatry,* Vol. 37(11), 1998, pp. 1209–1216. See also: Julia Sloth-Nielsen & Jaqui Gallinetti, 'Child justice in Africa: a guide to good practice', *Community Law Centre,* University of the Western Cape, January 2004.

40 Meda Chesney-Lind & Randall G. Shelden (2013), *op. cit.*, pp. 3, 233 & 252.

41 See for example: United Nations Work Group on Discrimination against Women, *Submissions of INQUEST,* Cameroon National Association for Promotion and Protection of Human Rights, 2018.

42 UN Human Rights Council, *Report of the Working Group on Arbitrary Detention,* A/HRC/27/48, 30 June 2014, paras. 78-79.

3.5 Armed Conflict and National Security

In the **Democratic Republic of Congo, Libya, Nigeria, Myanmar, Iraq, Syria** and **South Sudan,** according to the 2018 report of the UN Secretary General, the clear majority of girls has been detained for the purposes of either intelligence extraction, sexual exploitation, torture or enforced disappearance on the basis of alleged reasons ranging from charges on national security, counter terrorism, association of family members with insurgent groups to unlawful gatherings.[43]

According to the United Nations, '4 out of 10 child soldiers are girls'.[44] On many occasions the former Prosecutor of the International Criminal Court (ICC) has criticised the fact that the special needs of girl child soldiers have been persistently denied. They are 'poorly served by existent programming that under-appreciates the specific gender-based reintegrative challenges they face, such as recovery from abhorrent sexual violence'.[45] Girl child soldiers who are directly participating in hostilities have a double status, one as victim and another as perpetrator. During the Lubanga trial at the ICC, the Special Representative for Children and Armed Conflict testified that even though girls are often depicted as passive victims of armed conflict they also 'play multiple roles, sometimes involving conflict–combat, scouting and portering, but also including being forced into sexual slavery or bush wives.'[46] As sex slaves, they are also deprived of their liberty, since someone within the same group is exercising rights of ownership over them.

In the **Democratic Republic of Congo (DRC)** girls account for 30 to 40% of all children recruited by armed groups.[47] Child Soldiers International further reports that 'although a third of all children associated with armed groups in DRC are thought to be girls, they make up only about 7 percent of children released to date.'[48] Since 2013, more than 19,000 child soldiers have been involved in the conflict in **South Sudan**. The exact number of girl

43 UN Security Council, *Children and armed conflict: Report of the Secretary-General*, S/2018/465, 16 May 2018. See also Chapters 13 & 14 on Armed Conflict and National Security.

44 Office of the Secretary General's Envoy on Youth, *4 out of 10 child soldiers are girls*, 12 February 2015, Available at https://www.un.org/youthenvoy/2015/02/4-10-child-soldiers-girls/ (accessed 18 August 2019).

45 Rosemary Grey, 'Sexual violence against child soldiers, the limits and potential of international criminal law', *International Feminist Journal of Politics*, Vol. 16(4), 2014, pp. 601–621.

46 Ibid.

47 IRIN, *Hear the voices of Congo's girl child soldiers*, 19 June 2017, Available at https://www.refworld.org/docid/5948eec64.html (accessed 18 August 2019).

48 Child Soldiers International, *Democratic Republic of the Congo*, Available at https://theirworld.org/news/10-countries-where-child-soldiers-are-still-recruited-in-armed-conflicts (accessed 18 August 2019).

soldiers who participate in this conflict is unknown, but recent data show that among 934 children officially released in 2018, almost 30% were girls.[49]

Admittedly, policy makers have prioritised the needs of boy child soldiers in disarmament, demobilisation and reintegration programmes (DDR) as well as programmes designed for their rehabilitation back into society. This prioritisation of boys over girls is simply because in addition to factual data, boys are culturally and socially acknowledged to participate more heavily and violently in armed conflict activities than girls. Such gendered understanding of child participation in armed conflict is biased and, consequently, tends to exclude girls from most demobilisation and reintegration initiatives, as is the case in **South Sudan**.[50]

3.6 The Institutionalisation of Girls with Disabilities

The plight of girls with disabilities placed in institutions can be simultaneously tragic and desperate. Often referred to as 'inmates', they live in isolation – deprived of liberty. Reports indicate that girls with disabilities (particularly psychosocial or intellectual disabilities) are at a heightened risk of violence, including sexual violence. Such abuse is usually aggravated because closed institutions sometimes operate without being subjected to thorough scrutiny. Therefore, investigating abuse can be very laborious, leaving human rights violations of girls with disabilities often unreported.[51] In some countries, the gender gap is most evident when it comes to deinstitutionalisation. For instance, in **Azerbaijan**, a report indicates that the gender distribution of deinstitutionalised children varies significantly based on two factors: disability and sex. It has been reported that 'of children without disabilities who were deinstitutionalised, 55% were boys and 45% were girls, compared to children with disabilities, of whom 82% were boys and 18% were girls'.[52] Such disparity is explained by existing gender roles, stigma and biases within society, where girls with disability are easily abandoned and indefinitely placed in institutions, while boys have 'better chances of being reunited with their families'.[53]

49 Child Soldiers International, *Recruited but not 'child soldiers': Girls in South Sudan risk being left without support,* 10 October 2018, Available at https://www.child-soldiers.org/news/recruited-but-not-child-soldiers-returning-girls-in-south-sudan-risk-being-left-without-support (accessed 18 August 2019).

50 Ibid. p. 59.

51 Shantha Rau Barriga, Jane Buchanan, Emina Ćerimović & Kriti Sharma, *Children with disabilities: Deprivation of liberty in the name of care and treatment,* Human Rights Watch, 7 March 2017. See also: Human Rights Watch, *Breaking the Silence: Child Sex Abuse in India,* February 2013, p. 4.

52 The European Network on Independent Living, *A Study on deinstitutionalization of children and adults with disabilities in Europe and Eurasia final report,* United States Agency for International Development, December 2013.

53 Ibid.

3.7 Places of Detention are Made for Men

Women and girls constitute a minority of the prison population and thus places of detention are designed for men with very little consideration for the needs of women and girls. Detention facilities and correction institutions are usually modelled based on the needs of male inmates with very little attention given to gender-specific issues.[54] For instance, lack of special meals for pregnant or nursing girls, lack of feminine hygienic or sanitary conditions represent challenges for prison authorities to adapt to the specific needs of female detainees. Exposure to unsanitary conditions in detention may increase the risk of infection for girls. Inadequate quantities and the poor nutritional value of food will have disproportionate impact on pregnant or nursing girls who may significantly suffer from starvation and malnourishment.[55] Studies show that girls who experience youth detention constitute a large, marginalised and medically vulnerable population that is largely hidden from public view.[56]

54 UN General Assembly, *Pathways to conditions and consequences of incarceration for women, Report of the Special Rapporteur on violence against women, its causes and consequences*, A/68/340, 21 August 2013, p.16.

55 Ibid.

56 See Chapter 6 on Impacts on Health of Children Deprived of Liberty.

4. Gender Stereotyping: The Lack of 'Father-Child Units' in Most Countries

Only for infants and small children, who live with their primary caregivers in prison, the number of boys and girls is about the same.[57] However, research conducted and data collected for the Global Study show that primary caregivers, who are detained in the context of the administration of justice and who are allowed to keep their infants and small children with them in prison, are almost exclusively mothers. Only eight, mostly European States (**Belgium**, **Bolivia**, **Denmark**, **Finland**, **Germany**, **Italy**, **Spain** and **Sweden**), allow children to co-reside with their fathers in prison.[58] Since appropriate 'Father-Child Units' are missing in most countries, only **Finland** provided information that between 2012 and 2017, three imprisoned fathers (as compared to 114 imprisoned mothers) co-resided with their children (73 girls and 54 boys) in **Finnish** prisons.[59]

The fact that more than 99,9% of primary caregivers who are allowed to co-reside with their dependent children in prison are mothers can be explained, at least to a certain extent, by the breastfeeding needs of mothers and the stronger bond that may exist between infants and mothers. In addition, many children who live with their mothers in prison, were born while their mothers were already detained. Research also reveals that among sentenced prisoners, mothers are much more frequently the primary caregivers for their children.[60] Nevertheless, the high rate of mothers among primary caregivers in prison also reflects a certain gender stereotype. Even States, which allow co-residing of children with their fathers, seem to find it not necessary or desirable to provide for proper 'Father-Child units' in male prisons. The only provision in international and regional human rights treaty law, which explicitly addresses this question (namely Article 30 of the African Charter on the Rights and Welfare of the Child of 1990), exclusively speaks of 'Children of Imprisoned Mothers'. However, the African Committee on the Rights and Welfare of the Child has interpreted the word 'mother' in this provision as to also include fathers and other primary caretakers.[61]

57 There is only little disaggregated data available from the UN Global Study Questionnaire replies. In Finland (State reply), between 2012 and 2017, 73 girls and 54 boys co-resided with their imprisoned parents in special family units. As of June 2018, 42 boys and 45 girls were co-residing with their parents in Spanish prisons (Spain, State reply). In Portugal (State reply), boys accounted for 52% of children who were living with imprisoned parents between 2008 and 2017.

58 See also Chapter 10 on Children living in Prisons with their Primary Caregivers.

59 UN Global Study Questionnaire, Finland (State Reply); see also Chapter 10 on children living in prisons with their primary caregivers.

60 Marlene Alejos, *Babies and small children residing in prisons,* Geneva, Switzerland, Quaker United Nations Office, 2005; See also: TarjaPösö *et al.*, *op. cit.*, p. 519.

61 Cf. African Committee on the Rights and Welfare of the Child, *General Comment No. 1 on Article 30 of the ACRWC,* 8 November 2013, para. 10 & 13.1.

5. Sexual Orientation and Gender Identity in the Context of Deprivation of Liberty

National laws often contain provisions which punish or discriminate against young people based on their sexual orientation, gender identity or gender expression. Almost half of the world population live in the 70 countries in which existing laws criminalise conducts based on sexual orientation,[62] and in at least seven countries the death penalty may be imposed for consensual same-sex sexual activities.[63]

In several countries, lesbian, gay, bisexual, transgender, and intersex (LGBTI) young people are more likely to be arrested and detained for status offences and other non-violent offences. They are at heightened risk of being subjected to arbitrary arrest or institutionalisation. LGBTI young persons may also likely experience forced medical incarceration or involuntary treatments with the intent of their sexuality or gender expressions to be 'fixed'.[64] Furthermore, reports indicate that an overwhelming majority of LGBTI young people have experiences of past victimisation.[65] In these situations, the non-existence of legal identification constitutes an additional factor leading to the denial of their human rights. They can encounter enormous difficulties to access appropriate and safe health services. They are frequently placed in gender-inappropriate detention facilities with many of them facing bias in adjudication as well as mistreatment and abuse in confinement facilities.[66] Detainees from sexual minorities face a greater risk of violence – including rape, physical assault and other forms of sexual abuse. Furthermore, their exposure to social isolation is further exacerbated in detention.

Capital punishment is still prevalent in some regions of the world – at times imposing the death penalty on persons under the age of 18.[67] LGBTI young people are not only exposed to extreme vulnerability because of discriminatory laws which eventually contribute to their deprivation of liberty, but they are also often denied legal protection and access to

62 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)/Lucas Ramon Mendos, State-Sponsored Homophobia 2019, Geneva; March 2019.

63 Cf. United Nations Population Division, *World Population Prospects 2017,* Available at https://esa.un.org/unpd/wpp/Download/Standard/Population/ (accessed 18 August 2019). See also: UN Human Rights Council, *Report of the United Nations High Commissioner for Human Rights: Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity,* A/HRC/19/41, 17 November 2011; UN Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Discrimination and violence against individuals based on their sexual orientation and gender identity,* A/HRC/29/23, 4 May 2015.

64 UN General Assembly, *Protection against violence and discrimination based on sexual orientation and gender identity, Report of the Independent Expert on Sexual Orientation and Gender Identity*, A/73/152, 12 July 2018; See also A/HRC/41/33, op. cit, para. 35.

65 Bianca D. M. Wilson, Sid P. Jordan, Ian H. Meyer, Andrew R. Flores, Lara Stemple & Jody L. Herman, 'Disproportionality and Disparities among Sexual Minority Youth in Custody', *Journal of Youth and Adolescence,* Vol. 46(7),2017, p. 1547.

66 International Detention Coalition, *LGBTI Persons in Immigration Detention,* June 2016. See also: Penal Reform International & The Thailand Institute of Justice, *Global Prison Trends 2018,* 2018.

67 UN Human Rights Council, *Report of the UN Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity,* A/HRC/35/36, April 2017, and UN General Assembly, *Protection against violence and discrimination based on sexual orientation and gender identity,* A/72/172, July 2017.

remedies when they suffer acts of violence within detention facilities. The lack of data on LGBTI young people is a great challenge for documenting their experiences and designing appropriate responses within the justice system, institutions of care, support frameworks and other settings of deprivation of liberty.[68]

Homosexuality constitutes a criminal offence in **Tunisia**, where Article 230 of the Penal Code punishes consensual same-sex conduct with up to three years in prison. According to Shams, a Tunisian LGBTI association, at least 10 men (including a male under 18) were prosecuted in various parts of Tunisia in 2017. Two of these were sentenced to two years in prison.[69] **Benin** is one of many countries with discriminatory consent laws, which impose a higher age of consent for homosexuals, potentially increasing their vulnerability. The age of consent is lower for heterosexuals – for instance 16 years old for heterosexual girls. There is however a higher age restriction on homosexual acts, notably 21 years old.[70] Such major limitation can result in deprivation of liberty and, to a certain extent, create barriers for LGBTI young people to access sexual health services.

Nigeria is one of many countries that rejected the 2008 UN Declaration in support of LGBTI rights. The Declaration was adopted by 66 countries.[71] Nigeria introduced its new anti-gay legislation in 2012, which 'increases the severity of existing anti-homosexuality laws'.[72] In 2017, Nigerian authorities arrested and detained 12 boys accused of homosexual activities. They were later put on trial in closed-session.[73] In **North America**, recent data show that LGBTI young people are overrepresented in child justice facilities. While they account for 7-9% of all youth nationwide, they average 20% of all youth within child justice facilities.[74] In **Afghanistan**, a UNODC report indicates that in 2008, 14% of Afghan boys sent to detention were found guilty of charges related to homosexuality. One of them was only 11 years old, thus still under the minimum age of criminal responsibility.[75]

68 UN Human Rights Council, *Report of the UN Independent Expert on Protection against Violence and Discrimination based on Sexual Orientation and Gender Identity,* A/HRC/35/36, April 2017, and UN General Assembly, *Protection against violence and discrimination based on sexual orientation and gender identity,* A/72/172, July 2017.

69 Human Rights Watch, *Report 2018: Events of 2017,* Human Rights Watch, 2019, Available at https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf (accessed 18 August 2019).

70 Cf. EQUALDEX, *LGBTI Rights in Benin,* Available at https://www.equaldex.com/region/benin (accessed 18 August 2019). See also: OECD Development Centre, Social Institutions & Gender Index, *Country: Benin,* Available at https://www.genderindex.org/wp-content/uploads/files/datasheets/2019/BJ.pdf (accessed 19 August 2019).

71 Human Rights Watch, 'UN: General Assembly Statement Affirms Rights for All', 18 December 2008, Available at https://www.hrw.org/news/2008/12/18/un-general-assembly-statement-affirms-rights-all (accessed 15 October 2019).

72 Philip P. Rodenbough, *Being LGBT in West Africa,* USAID, 2014.

73 Reuters, 'Nigeria charges 43 people for homosexuality', 4 August 2017, Available at https://www.reuters.com/article/us-nigeria-lgbt/nigeria-charges-43-people-for-homosexuality-idUSKBN1AK20J (accessed 18 August 2019). See also: Federal Republic of Nigeria, *Criminal Code Act (1916) (Chapter 77): Laws of the Federal Republic of Nigeria,* 1990, Chapter 21: Offences against Morality.

74 Bianca D.M. Wilson *et al.* (2017), *op. cit.*

75 UNODC, *Manuel des principes fondamentaux et pratiques prometteuses sur les alternatives à l'emprisonment,* 2008, p. 37.

LGBTI children are thus often rejected and excluded from their homes, schools and communities due to their sexual orientation. In States where certain forms of sexual orientation are criminalised, many children find themselves isolated from any support system resulting in highly vulnerable scenarios. LGBTI children are particularly at risk of falling into dangerous situations in their attempts to survive the enforced social isolation imposed upon them. Some children turn to prostitution as a means of survival, while others need to develop skills that allow them to survive life on the street. These realities can in turn have severe implications for the child's mental and physical wellbeing (depression, drug abuse, suicide), while also paving a clear path towards entering the justice system and/or state institutions.

All of these factors may in turn also be significant motivating factors for LGBTI children to flee a country in search of a better and safer future elsewhere. However, this may result in their further detention as migrant and/or unaccompanied children. LGBTI children are therefore not only at risk of being criminalised for their sexual orientation, but they are also at risk of being detained elsewhere when they seek refuge in a different country.[76]

Contexts leading LGBTI Children into Detention

76 Susan Hazeldean, 'Confounding Identities: The Paradox of LGBT Children under Asylum Law', *University of California Davis Law Review*, Vol. 45(2), pp. 2011-2012. Edward J. Alessi, Sarilee Kahn & Sangeeta Chatterji, 'The darkest times of my life: Recollections of child abuse among forced migrants persecuted because of their sexual orientation and gender identity', *Child Abuse & Neglect*, Vol. 51, 2016, pp. 93–105. Amnesty International, *No Safe Place: Salvadorans, Guatemalans and Hondurans seeking asylum in Mexico based on their sexual orientation and/or gender identity*, 2017. See Chapter 11 on Children Deprived of Liberty for Migration Related Reasons.

6. Conclusions

This chapter shows that the gender dimension needs particular attention when considering the deprivation of children in all the core situations focused on in this Study. Data for instance reveal that within the administration of justice particularly boys face harsher treatment, while the specific needs of girls are often not catered for in detention. While it has already been documented extensively that girls face a great deal of discrimination and unequal treatment within situations of detention, the fact that boys are disproportionately represented within the justice system warrants serious attention in order to equally protect boys in vulnerable situations detrimental to their development and physical wellbeing.

Where children are detained for national security reasons or for their association with non-State armed groups, policies and support structures tend to cater more for boys because factual data show that boys participate more heavily and violently in armed conflict activities than girls. This however leaves girls unsupported despite also finding themselves detained – not as active participants in hostilities, but as victims of sexual violence. In most instances of deprivation of liberty concerning children, violations of their rights often go unreported – as the discussion on the placement of girls with disabilities in institutions illustrates.

Additionally, the chapter points out that the discrimination against LGBTI children within the justice system remains a significant issue that needs to be addressed with urgency by the international community. Deprivation of liberty of children as a punishment for the crime of homosexuality can *never* meet the high standard of a measure of last resort in Article 37(b) CRC and is never in the best interest of the child. In addition, LGBTI children in detention are particularly vulnerable to discrimination, violence and sexual abuse.

7. Recommendations

The following recommendations aim to assist States to eliminate gender gaps and discrimination on the basis of sex, sexual orientation and gender identity with respect to children deprived of liberty.

1. **Repeal all laws criminalising child-specific and 'immoral' behaviours** on grounds of gendered societal norms and stereotypes as well as **all laws discriminating against children on the basis of their sexual orientation and gender identity**. In no case shall children be deprived of liberty as a punishment for such offences, e.g. abortion or consensual and non-exploitative sexual activities amongst adolescents of similar ages, regardless of their sexual orientation.
2. **Address the overrepresentation of boys** in detention by various means, above all by promoting diversion at all stages in the criminal justice system and by **proportionally applying non-custodial solutions to boys**, as it is more widely practised with girls.
3. **Incorporate a gender dimension into service delivery of child justice systems** and address disparities in accessing child justice services.
4. Promote **a gender-sensitive approach to management strategies of places of detention**.
5. Promote **equal access to reintegration and rehabilitation assistance for boys and girls** formerly associated with armed forces and armed groups and ensure **reunification with their families**.
6. **Provide proper care and protection for LGBTI children in detention** and end all forms of discrimination, violence and sexual exploitation and abuse.
7. **Systematically collect disaggregated data** to better understand the pathways of **boys and girls** leading to detention in all situations of deprivation of liberty of children.

CHILDREN IN VARIOUS SITUATIONS OF DEPRIVATION OF LIBERTY

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CHAPTER 9

CHILDREN DEPRIVED OF LIBERTY IN THE ADMINISTRATION OF JUSTICE

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Juan's Story
Colombia

'That's what they do with guys who do not have other possibilities, because they did not give them another chance,' Juan believes. The State simply places young people in detention without trying to help them change their lives.

Juan lived in institutions and on the streets in Colombia **since the age of 6**. 'People are ugly', he concluded early on. 'If you are not dressed well, people simply close the door on you. So, you understand, there is no other option than to steal.' It is a reality that drives many children towards crime. 'Tell me who cares about a 9-year old boy who lives on the street and does not own anything? Nobody!'

Juan was eventually arrested for drug dealing and subsequently sentenced to four years in **a young offender's institution**. It makes children 'victims of an impressive suffering, of an impressive resentment.' According to Juan, detention makes children victims of emotions and realities they simply do not understand.

He felt completely abandoned in detention and rarely had enough to eat. He did not go to school for 6 years and each day was immersed in an atmosphere of violence. Life in detention, Juan notes, is marked by noises – a cacophony of 'knocks of doors, chains, screams.'

Juan recalls however that on 25 May his life was directed onto a more constructive path. A piano teacher visited the centre and introduced him to the arts. 'I fell in love with music.' Through music and the guidance of the piano teacher, Juan realised that he can put things behind him – that he can change his life around. Practicing music became 'a tool, a great chance.'

Today, Juan raps. 'The basis of rap is to create, not only music, but also I could say everything I had in my heart. Today I am very grateful for the people who made me go forward [...] We all deserve another chance.'

For data protection and confidentiality reasons, the names were altered.

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1. Introduction

Although it is difficult to retrieve comprehensive accurate data, the Global Study reveals that at least **410,000 children are deprived of liberty in pre-trial detention facilities and prisons per year**.[1] This is often in direct contrast to the far-reaching international and national standards and principles in the field of criminal justice and children's rights. So-called 'status offences' specifically target conduct of young people and contribute to their criminalisation, while children from ethnic or racial minorities as well as from disadvantaged socio-economic groups are often disproportionately represented in detention. Once detained, these groups face further risks of discrimination and violence. At the same time, serious offences committed by young people (sometimes linked to gang violence and organised crime or terrorism)[2], present significant challenges on how to preserve public safety and respond appropriately to child offending.

While there may be situations where young people create particular safety risks for themselves or others, research shows that, on the whole, rates of arrest and the number of people in detention do not necessarily reflect levels of crime. Instead, history suggests that the extent to which child imprisonment is applied at any given time and place is best explained rather by the decisions of politicians and policymakers than the volume or gravity of the crimes themselves. What is more, reliable evidence demonstrates that the detention of children as a punishment is often widely ineffective in relation to its stated objectives, namely the preservation of safety of societies and preventing crime.

Research and practice clearly demonstrate the serious negative impact of detention on children's health and personal development.[3] Children face a high risk of violence from the moment of arrest as well as poor treatment and unsatisfactory conditions while in detention, directly violating their right to protection. This fundamentally undermines the aims of a child justice system of ensuring reintegration and supporting children to re-assume a constructive role in society.

1 This figure is a highly conservative estimate and does not include police custody. See *3.1 Data Collection.*

2 See also: Chapter 14 on Children Deprived of Liberty on National Security Grounds.

3 See Chapter 6 on the Impacts on Health of Children Deprived of Liberty (sections 3.1 and 4.1) as well as Chapter 5 which deals with the views of children themselves.

Findings from the Global Study document the detrimental personal impact of detention on children's wellbeing as well as the ineffectiveness of detention as an instrument for enhancing longer-term public safety of communities. Consequently, **the Study advocates for radically reducing the number of children deprived of liberty in the administration of justice**. In view of that, the key questions underlying this chapter are:

1. What is the situation of children deprived of liberty in the administration of justice?
2. What are the factors leading to deprivation of liberty?
3. How can deprivation of liberty be prevented?

Importantly, the topic of this chapter inter-relates closely with other Study areas.[4] As such, this chapter should be read together with all other chapters of the Study – including the cross-cutting dimensions of gender, disability, health and the results from the consultation with children.

4 E.g. migration, institutionalisation, aspects of criminalisation of children in the context of national security and armed conflict, as well as concerns related to children in prison with their parents.

At least **410,000** children are detained throughout the year*

*In pre-trial detention and prisons. Due to the lack of data, police custody is not included. Source: UN Global Study questionnaire responses, World Prison Brief, UNODC.

Source: UN Global Study questionnaire, World Prison Brief, UNODC

2. International Legal Framework

Every child who comes into contact with the criminal justice system, including when deprived of liberty, is entitled to the full rights set out in international human rights law. These rights are interdependent, interrelated and indivisible. At the core of this legal framework is the UN Convention on the Rights of the Child (CRC), which sets out the rights to which every child is entitled. Beyond the CRC, the legal framework also includes rights and safeguards established in other international and regional instruments.[5] The broad spectrum of international standards collectively referred to as the UN Minimum Standards and Norms on Juvenile Justice form the third pillar of the international legal framework concerning children.[6] These rights must be read and interpreted together to ensure children are fully protected when deprived of liberty in the administration of justice.[7]

2.1 The Right of the Child to Personal Liberty

Under the International Covenant on Civil and Political Rights (ICCPR), everyone has the **right to liberty** and security. No one may be subjected to arbitrary arrest or detention or deprived of liberty except in accordance with the law.[8] The CRC reiterates these rights for all children, further requiring that the arrest, detention or imprisonment of a child must be used only as a **measure of last resort** and for the **shortest appropriate period of time**.[9]

5 Cf. UN General Assembly, *The Universal Declaration of Human Rights,* 10 December 1948; UN General Assembly, *International Covenant on Civil and Political Rights,* 16 December 1966; UN General Assembly, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,* 10 December 1984; UN General Assembly, *Convention on the Rights of Persons with Disabilities,* 26 January 2007; see also regional treaties, such as African, Inter-American, Asian-Pacific and European regional instruments.

6 Cf. UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('Beijing Rules'),* A/RES/40/33, 29 November 1985; UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency ('Riyadh Guidelines'),* A/RES/45/112, 14 December 1990; UN General Assembly, *United Nations Standard Minimum Rules for Non-custodial Measures ('Tokyo Rules'),* A/RES/45/110, 2 April 1991; UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty ('Havana Rules'),* A/RES/45/113, 2 April 1991; UN Economic and Social Council, *UN Guidelines for Action on Children in the Criminal Justice System ('Vienna Guidelines'),* 21 July 1997; UNODC, *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime,* 22 July 2005; UN General Assembly, *United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('Bangkok Rules'),* A/C.3/65/L.5, 6 October 2010; UNODC, *Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice,* February 2015.

7 Barry Goldson & John Muncie, 'Towards a global "child friendly" juvenile justice?', *International Journal of Law, Crime and Justice,* Vol. 40(1), 2012, pp. 47-64; Barry Goldson & Ursula Kilkelly, 'International human rights standards and child imprisonment: Potentialities and limitations', *International Journal of Children's Rights,* Vol. 2(2), 2013, pp. 345-371. Ton Liefaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards,* Antwerp, 2008; Ton Liefaard, 'Deprivation of Liberty of Children', in Ursula Kilkelly & Ton Liefaard (eds.), *International Human Rights of Children,* Singapore, Springer, 2019, pp. 321-357.

8 Cf. ICCPR, *op. cit.*, Article 9.

9 Article 37(b) CRC; see also the previous chapter on the Right to Personal Liberty (Chapter 4). These principles also found their way to the UN Human Rights Committee's *General Comment No. 35* on Article 9 ICCPR, and the ECtHR's case law regarding Article 5(1)(c) jo. (3) ECHR. See *inter alia:* ECtHR, *Nart v. Turkey,* No. 20817/04, 6 May 2008, paras. 31 & 33; ECtHR, *Korneykova v. Ukraine,* No. 39884/05, 19 January 2012, para. 44; ECtHR, *Agit Demir v. Turkey,* No. 36475/10, 27 February 2018, para. 32.

Consequently, States must establish **non-custodial solutions** to ensure that deprivation of liberty is in fact a measure of last resort.[10]

The **best interests of the child** must be a primary consideration in all decisions concerning a child, including whether to deprive a child of personal liberty.[11] The best interests principle requires that when dealing with children who have committed a criminal offence, an approach that promotes the reintegration of children takes centre stage. That means, children should be supported, not punished, in order to assume a 'constructive role in society'.[12] In each case, the best interests of the child must be assessed by competent authorities, taking into account the full circumstances of the child and the offence, while also weighing the interests of all parties involved with priority to the interests of the child.[13]

The **arrest and police custody** of a child must be used only for the shortest time possible.[14] International standards strongly recommend that it should last no longer than 24 hours.[15] For the arrest of a child specific legal safeguards apply,[16] including non-discrimination (e.g. in relation to racial profiling), non-stigmatisation (e.g. no arrest in front of peers, protection of privacy) and the prohibition of cruel, inhuman or degrading treatment and punishment (e.g. particularly during violent night-time raids and arrests). In addition, children must have access to legal review by a competent authority to examine the legality of the deprivation of liberty.[17] **Pre-trial detention of children** – after having appeared before a judicial officer but prior to sentencing[18] – shall be used with utmost restraint. States have the responsibility to develop adequate legislation, policies and practices to limit the use of pre-trial detention

10 Article 40(4) CRC.

11 Ibid., Article 3(1). The best interests principle forms part of the four General Principles of the CRC, guiding the interpretation of the entire Convention. The other three principles are: the child right to non-discrimination (Article 2), the child right to life and development (Article 6), and the child right to participation (Article 12). For more on a 'personal liberty' see: Helmut Sax & William Schabas, 'Deprivation of Liberty of Children (Article 37(b), (c), (d))', André Alen, Johan van de Lanotte, Eugeen Verhellen, Fiona Ang, Eva Berghmans & Mieke Verheyde (eds.), *Commentary on the Convention on the Rights of the Child*, Brill Academic Publishers, Martinus Nijhoff Publishers, 2006, p. 70.

12 Article 40(1) CRC; UN Committee on the Rights of the Child, *General Comment No. 24 replacing General Comment No. 10 (2007) on children's rights in juvenile justice*, CRC/C/GC/24, para. 12.

13 'A larger weight must be attached to what serves the child best', UN Committee on the Rights of the Child, *General Comment No. 14(2013) on the right of the child to have his or her best interests taken as a primary consideration*, 29 May 2013, CRC/C/GC/14, para. 39.

14 Cf. Article 37(b) CRC; see also: UN General Assembly, 'Beijing Rules', *op. cit.*, Rule 17.

15 Cf. CRC/C/GC/24, *op. cit.*, para. 83.

16 Cf. Article 2, 37 & 40 CRC; Cf. CRC/C/GC/24, *op. cit.*, paras 6-9.

17 Cf. Article 37(d) CRC; CRC/C/GC/24, *op. cit.*, para. 100.

18 UN Human Rights Committee, *General Comment No. 35 (2014) - Article 9: Liberty and Security of person*, para. 38; see also: Open Society Justice Initiative, *Presumption of Guilt: The Global Overuse of Pretrial Detention*, New York, Open Society Foundation, 2014, p. 12, Available at https://www.justiceinitiative.org/uploads/de4c18f8-ccc1-4eba-9374-e5c850a07efd/presumption-guilt-09032014.pdf (accessed 8 June 2019).

of children to a minimum.[19] Pre-trial detention can only be justified on the basis of limited and narrowly defined grounds with a clear basis in domestic law, e.g. the serious risk that the child suspect reoffends or fails to appear in court. Decisions for pre-trial detention should be taken only when all other available non-custodial solutions have been assessed as inappropriate to address specific issues that could justify detention. Moreover, it shall not be used as punishment or to anticipate a custodial sentence, as this would violate the presumption of innocence.[20] The responsible judge has to seriously consider alternatives to deprivation of liberty and specify the reasons for deciding against handing down a non-custodial solution. States should provide strict time limits for pre-trial detention of children. A judge or other competent authority should periodically review the legality of the pre-trial detention order, preferably every two weeks. Child suspects in pre-trial detention should be released as soon as possible, if necessary with conditions. Otherwise the child should be brought for adjudication as speedily as possible. States are recommended to do this preferably within 30 days resulting in a final decision on the charges within six months.[21]

Regarding **detention after trial/sentencing**, Article 40 para. 4 of the CRC declares the general rule that a 'variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their wellbeing and proportionate both to their circumstances and the offence.'[22] The Beijing Rule 17(c) states in this regard that deprivation of liberty shall not be imposed unless the child 'is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there

19 Cf. CRC/C/GC/24, *op. cit.*, para. 97. On the regional level, see: Council of Europe, *European Rules for juvenile offenders subject to sanctions or measures,* 2008, Rule 10; Council of Europe, *Guidelines on Child-Friendly Justice,* 2010, Rule 19; European Union, *Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspects or accused persons in criminal proceedings,* Articles 10 & 11.

20 Cf. CRC/C/GC/24, *op. cit.*, paras. 80; UN Human Rights Committee, *General Comment No. 35 - Article 9: Liberty and Security of person,* 16 December 2014, para. 38; see also: ECtHR, *J.M. v. Denmark,* Appl. No. 34421/09, 13 November 2012, para. 54. Research findings on sentencing practice in The Netherlands and the United States have shown a strong correlation between pre-trial detention and ensuing custodial sentencing: Yannick van den Brink & Bart Lubow, 'Pre-trial detention of children as a last resort? Strategies and challenges for reform in the Netherlands and the United States', Wendy O'Brien & Cedric Foussard (eds.), *Violence Against Children in the Criminal Justice System: Global perspectives on prevention,* London, Routledge, 2019 (forthcoming).

21 Cf. CRC/C/GC/24, *op. cit.*, para. 83; UN Human Rights Committee, *General Comment No. 35,* 2014, para. 37; Beijing Rule 13; Article 10 ICCPR; see also: Yannick van den Brink, 'Young, Accused and Detained; Awful, But Lawful? Juvenile Pre-Trial Detention and Children's Rights Protection in Contemporary Western Societies', *Youth Justice,* 2019 (forthcoming).

22 See the 2009 landmark case against a certain minimum sentencing regime in South Africa, Constitutional Court, *Centre for Child Law v Minister for Justice and Constitutional Development and Others,* CCT98/08, ZACC, 2009, para. 18. On proportionality and incompatibility of mandatory sentencing, see also: Helmut Sax, 'Deprivation of Liberty of Children', André Alen *et al.* (2006), *op. cit.*, p. 82.

is no other appropriate response.'[23] Detention after trial must serve the reintegration of the child.[24] Detention – when applied as a measure of last resort – should be used only as long as the justification of its use continues. The key consideration is that the scope of the system is to effectively reintegrate the child into his/her community as soon as possible.[25] This is essential, since the best interests of the child must be a primary consideration in every decision on initiating or continuing the deprivation of liberty.[26] Life imprisonment without the possibility of release or parole is explicitly prohibited by the CRC.[27] Moreover, interpretation in light of the objectives of child justice (e.g. reintegration and a constructive role for the child in society) has led to the conclusion that all forms of life imprisonment, regardless of the possibility of release, should be abolished for offences committed before a child reached the age of 18 years.[28] Life sentencing, sentences of extreme length and mandatory sentences for children have been considered grossly disproportionate and constitute cruel, inhuman or degrading punishment.[29]

2.2 Effective Procedural Safeguards

In order to avoid arbitrary detention, children need to be guaranteed basic procedural safeguards throughout the proceedings as well as during detention and any diversion/non-custodial solutions.[30] These protections include *inter alia* the presumption of innocence; the right to remain silent; the prohibition of retroactive criminalisation; the right to be tried by a competent, independent and impartial authority; the right to effective participation and information; the right to have access to a fair and due process without undue delays; the right to legal and/or other appropriate assistance; the right to the presence of a parent

23 Cf. Nessa Lynch, 'Human Rights for "Hard Cases": Alternatives to Imprisonment for Serious Offending by Children and Youth', Elizabeth Stanley (ed.), *Human Rights and Incarceration: Critical Explorations,* Palgrave MacMillan, 2018, pp. 153-179; Nessa Lynch, 'Towards a Principled Legal Response to Children Who Kill', *Youth Justice,* Vol. 18(3), 2018, pp. 211-229.

24 Cf. Article 40(1) CRC; see also: CRC/C/GC/24, *op. cit.*, paras. 29 & 92.

25 Leo Ratledge (2017), 'End Detention of Children as Punishment', *Protecting children against torture in detention: Global solutions for a global problem, op. cit.*, p. 184.

26 UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* A/HRC/28/68, 5 March 2015, para. 25 (emphasis added). Cf. Admark Moyo, 'Balancing the best interests of the child and the interests of society when sentencing youth offenders and primary caregivers in South Africa', *South African Journal on Human Rights,* Vol. 29(2), 2013, pp. 314-350.

27 Cf. Article 37(a) CRC.

28 Cf. CRC/C/GC/24, *op. cit.*, para. 92.

29 Cf. A/HRC/28/68, *op. cit.*, paras 74 & 85; IACtHR, *Mendoza et al v. Argentina,* Judgment 14 May 2013. Cf. Leo Ratledge (2015) *op. cit.*, p. 183; see also: Bernardine Dohrn, 'United States', Ton Liefaard & Jaap E. Doek (eds.), *Litigating the Rights of the Child*, London, Springer, 2015, pp. 71-88; US Supreme Court case law, *Graham v. Florida* (560 U. S. (2010)); *Miller v. Alabama* (567 U. S. (2012)); *Montgomery v Louisiana* (577 U.S. (2016)).

30 Cf. Right to liberty: Article 9 ICCPR & Article 37(b)-(d) CRC; Right to fair trial: Article 40 CRC & Article 14 ICCPR.

or, in cases where a parent is not available or suitable, an alternative 'appropriate adult'; the right to privacy.[31] Evidence has shown that procedural safeguards are also the most effective way to prevent torture.[32] Moreover, legal assistance and legal aid are vital to ensure that children have access to non-custodial solutions[33] and should therefore be prioritised. Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.[34] Additionally, all children have the right to a regular review of their ongoing placement.[35]

2.3 The Duty to Establish a Specialised Child Justice System

Every child should have the opportunity to be treated through child-friendly justice mechanisms and to interact with a system characterised by a body of laws, procedures and professionals different from those provided for adults. These mechanisms should respect children's specific vulnerabilities and competences. Therefore, the mechanisms in place must offer a specialised approach embracing children's rights and needs.[36] The child has the **right to an individualised response** to be tailored to his/her needs. Further, non-custodial solutions should be built into the system, from the moment of arrest. During the pre-trial and trial phases, opportunities for the release of detained children into the care of parents or caregivers should also be provided at the earliest possible moment. In all cases where children are ultimately convicted (except those involving minor offences), a

31 Article 40 CRC; 'Beijing Rules', *op. cit.*, Rules 7, 8, 14, 20 & 21; Articles 14 & 15 ICCPR; see also: regional equivalents to these human rights provisions, e.g. ECHR and ACHR as well as case law around the children's right to effective participation as part of their right to a fair trial; see also Ursula Kilkelly, 'CRC in Litigation Under the ECHR', Ton Liefaard & Jaap E. Doek (eds.), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence,* London, Springer, 2015; Ton Liefaard, & Ursula Kilkelly, 'Child-Friendly Justice: Past, Present and Future', Barry Goldson (ed.), *Juvenile Justice in Europe: Past, Present and Future,* New York/London, Routledge, 2018; see also Stephanie Rap & Ton Liefaard, 'Right to Information: Towards an Effective Legal Position for Children Deprived of Liberty', *Today's Children are Tomorrow's Parents,* Vol. 45-46, pp. 49-61.

32 Richard Carver & Lisa Handley, *Does Torture Prevention Work,* Liverpool University Press, 2016.

33 Article 37(d) & Articles 40(2)(b)(ii), (iii) CRC. Cf. Article 6 *EU Directive 2016/800* and ECtHR, *Panovits v. Cyprus,* No. 4268/04, 11 December 2008,; see also: Ton Liefaard & Yannick van den Brink, 'Juveniles' Right to Counsel during Police Interrogations: An Interdisciplinary Analysis of a Youth-Specific Approach, with a Particular Focus on the Netherlands', *Erasmus Law Review,* Vol. 4, 2014, pp. 206-2018; Stephanie E. Rap & Daniella Zlotnik,'The Right to Legal and Other Appropriate Assistance for Child Suspects and Accused: Reflections on the directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings', *European Journal of Crime, Criminal Law and Criminal Justice,* Vol. 26(2), 2018, pp. 110-131.

34 Article 37(d) CRC.

35 Article 25 CRC.

36 Article. 40(3) CRC; see also: CRC/C/GC/24; 'Beijing Rules', Rule 23; Cf. Ian M. Kysel, 'Reflections on a new tool for protecting the rights of the child', *Protecting Children Deprived of Liberty from Torture: Reflections on the Special Rapporteur on Torture's 2015 Thematic Report,* 2017, pp. 33-38; Ton Liefaard, 'Juvenile justice from a children's rights perspective', Wouter Vandenhole *et al.* (eds.), *Routledge International Handbook of Children's Rights Studies,* Routledge, 2015, pp. 234-256.

social inquiry report should be prepared by social/probation services before a sentence is actually passed on a child. The purpose is to assist the court in determining the most effective sentence with a view to promote the reintegration of the child into the community.[37]

2.4 Conditions and Treatment of Children in Detention

In the rare instances when it can be demonstrated that detention cannot be avoided, deprivation of liberty, whether at the pre-trial, trial or sentencing phase, should be in conditions and circumstances that ensure respect for the human rights of children.[38] Children shall be **protected from all forms of violence** and never be subjected to torture or other forms of ill-treatment. This prohibition includes corporal punishment, closed or solitary confinement or any other punishment that may compromise their physical or mental health (e.g. the reduction of diet and restriction or denial of contact with the family).[39] Recourse to force and instruments of restraint should be prohibited – bar exceptional circumstances when children pose an imminent threat of injury to themselves or others, and only when all other means of control have been exhausted.[40]

Children in the justice system, and particularly those subject to detention measures, are not only in a condition of particular vulnerability to violence (from staff, peers and themselves),[41] but detention itself may constitute a form of structural violence.[42] Therefore, they need to be provided with **protection, care and all necessary assistance** – on the individual, social, educational, vocational, psychological, medical and physical levels. They should be guaranteed meaningful activities and programmes, that serve to promote and sustain their health and self-respect, to foster their sense of responsibility and encourage those attitudes and skills that will assist them. Children should always be held separately from adults, unless in exceptional circumstances this is not in their best interest.[43] Facilities and services should respect high standards of hygiene, while the quality of sleeping accommodation

37 Articles 40(1) & (4) CRC; 'Beijing Rules', *op. cit.*, Rules 5.1, 16.1 & 17; 'Tokyo Rules', *op. cit.*, Rule 7.1; CRC/C/GC/24, *op. cit.*, para. 85.

38 Helmut Sax, 'Deprivation of Liberty of Children', André Alen *et al.* (2006), *op. cit.*, p. 89.

39 Article 37(a) & (c) CRC; Article 7 ICCPR; Articles 3 & 5 UDHR; 'Beijing Rule', *op. cit.*, Rule 17; 'Havana Rule', *op. cit.*, Rule 67.

40 Cf. CRC/C/GC/24, *op. cit.*, para.108.

41 Cf. Ton Liefaard, Joni Reef & Maryse Hazelzet, *Report on Violence in Institutions for Juvenile Offenders,* Council of Europe, November 2014; various authors in *Protecting Children against Torture in Detention: Global Solutions for a Global Problem,* American University, Washington College of Law & Center for Human Rights & Humanitarian Law, Anti-Torture Initiative, 2017.

42 Barry Goldson, 'Child Incarceration: Institutional Abuse, the Violent State and the Politics of Impunity', Phil Scraton & Jude McCulloch (eds.) *The Violence of Incarceration,* London, Routledge, 2009, pp. 86-106.

43 Article 37(c) CRC.

should equally ensure children's dignity and wellbeing.[44] Contact of children with their parents/guardians and the external world shall be guaranteed, while non-discriminatory access to medical care and education shall always be provided. Opportunities to attend training and receive access to remunerated work, exercise and recreational activities should also be available to children. Additionally, the religious and cultural rights of children should be guaranteed.[45]

Appropriate **active participation** of children should be promoted in a programme tailored to their needs. Preparation for reintegration requires that children are properly informed at admission about the rules that govern the facility and about all their rights and obligations. This entails offering the information in a language that children can understand and communicating at a level appropriate to his/her age and stage of development. Every child in detention also needs to be taken care of by adequately trained staff.[46] In order to comply with the obligation to prepare the child for **reintegration**, all detained children 'should benefit from arrangements designed to assist them in returning to society, family life, education or employment after release'.[47] These arrangements include early release programmes and access of the child to agencies offering support services preparing a child for release.

44 Poor conditions were established in IACtHR, *Instituto de Reeducación del Menor vs. Paraguay,* 2 September 2004.; see also: the CRC-Committee's reference to 'institutional and systems violations of child rights' due to failure to implement effective protection from violence also at the structural level, *General Comment No. 13,* CRC/C/GC/13, 18 April 2011, para. 32.

45 Article 37(c) CRC; Article 10 ICCPR; 'Beijing Rules', Rules 13 & 26; see also CRC/C/GC/24, *op. cit.*, para. 104. The 'Havana Rules' extensively provide standards for treatment of children in detention, which has also influenced the development of other standards e.g. in Europe. See for an overview of all standards: chapter two of Ton Liefaard, *Deprivation of Liberty of Children in Light of International Human Rights Law and Standards,* Antwerp, Intersentia, 2008; see also Defence for Children International – Belgium, *Practical Guide - Monitoring places where children are deprived of liberty,* 2016, Available at https://defenceforchildren.org/wp-content/uploads/2016/02/DCI-Practical-GuideEN.pdf. (accessed 8 June 2019); see also: ECtHR, *Güveç v. Turkey,* No. 70337/01, 20 April 2009.

46 Cf. 'Havana Rules', *op. cit.*, Section V.

47 Ibid., Rules 79 & 80.

2.5 Monitoring, Reporting and Complaints

Access to justice is necessary to guarantee these rights and is a fundamental right in itself.[48] At the core of this right is the ability to obtain just and timely remedies for violations of rights as protected by national and international law. Complaint procedures are a key means to guarantee this right.[49] Children detained in the criminal justice system face particular barriers in accessing justice. States must therefore adopt mechanisms and ensure that there are effective, child-sensitive procedures available to children and their representatives. All children deprived of liberty have the right to make **requests or complaints** to the competent authorities without censorship as to substance. They also have the prerogative to be informed of the response of their request/complaint without delay. An independent complaints mechanism should be established to receive the complaints of children deprived of their liberty. This mechanism shall **promptly and impartially investigate** the complaints, while working to secure effective remedies for breaches of children's rights. Additionally, to ensure that violations of children's rights are identified and addressed, regular and **independent monitoring of detention facilities** within the criminal justice system shall be carried out by trained, independent personnel. Crucially, they shall be provided with unrestricted access to all children and other persons, records and facilities in a detention centre and have the possibility to conduct interviews in private. Qualified medical officers attached to the inspecting authority or public health service should participate in inspections evaluating compliance with standards. In cases where monitors produce reports, the same reports should be published and made publicly available in the interests of transparency, accountability and the common good. [50]

48 UN High Commissioner for Human Rights, *Access to justice for children*, A/HRC/25/35, 16 December 2013, para. 3. See more specifically on deprivation of liberty of children: Ton Liefaard, 'Access to justice for children deprived of their liberty', *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem* (2017), *op. cit.*, pp. 57-80.

49 Barry Goldson & John Muncie, 'Towards a global 'child friendly' juvenile justice?', *International Journal of Law, Crime and Justice,* Vol. 40(1), 2012, pp. 47-64; Barry Goldson & Ursula Kilkelly (2013), *op. cit.*, pp. 345-371.

50 Cf. 'Havana Rules', *op. cit.*, Rules 72-73 & 76-77; CRC/C/GC/2, *op. cit.*, para. 13; CRC/C/GC/5, para. 24; Cf. CRC/C/GC/24, *op. cit.*, para. 108; see also: Defence for Children International – Belgium, *Practical Guide - Monitoring places where children are deprived of liberty,* 2016.

3. Situation of Children Deprived of Liberty in the Administration of Justice

International legal instruments have elaborated and repeated clear standards to protect children deprived of liberty in the justice system. Despite this indication of consensus around child justice standards a **gap between the law and practice** is still prevalent around the globe in that standards are overlooked, insufficiently known, or poorly implemented.[51]

The **extent of deprivation of liberty** in the administration of justice is extremely difficult to determine. In fact, one of the greatest challenges that surfaced during the previous *UN Global Study on Violence against Children* (2006) was the lack of data collection and awareness about the actual extent of the phenomenon. This includes the number of children deprived of their liberty in the administration of justice as well as the conditions and treatment of children in custodial settings. Many States keep only inaccurate or incomplete records. Even when complete documentation is available, the methods with which data are collected are not uniform. Their reliability for comparative analysis and the development of a clear global picture is thereby significantly impaired.[52] Moreover, determining the number of children deprived of liberty is rendered difficult as States hold children in different kinds of detention facilities at different stages (from arrest, police custody, pre-trial detention and imprisonment, including prisons for adults).[53] Detention facilities at different stages can therefore vary according to numerous variables such as legal regimes, policies, objectives, infrastructure and oversight.[54] Institutions for the deprivation of liberty of children in the administration of justice also vary from closed, semi-open to open institutions. Some Asian countries, for example, even refer to their facilities as child rehabilitation and educational centres.[55]

51 Ursula Kilkelly, 'Translating Children's Rights Standards into Practice: the Challenge of Youth Detention', *Protecting children against torture in detention. Global solutions for a global problem, Anti-torture initiative,* 2015; Office of the Special Representative of the Secretary General on Violence against Children, *Toward a World Free from Violence: Global Survey on Violence against Children,* New York, 2013; Barry Goldson & Ursula Kilkelly (2013), *op. cit.*, pp. 345–371. In an effort to fill this gap, the UN adopted *the Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice* (2014), with the aim to give countries concrete suggestions on how to translate the international standards into practice, Available at https://digitallibrary.un.org/record/773226/files/E_CN.15_2014_L.12_Rev.1-EN.pdf (accessed 8 June 2019).

52 For further discussion see: Barry Goldson & John Muncie, 'Rethinking Youth Justice: Comparative Analysis, International Human Rights and Research Evidence', *Youth Justice,* Vol. 6(2), 2006, pp. 91-106; Barry Goldson & John Muncie (eds.), *Comparative Youth Justice: Critical issues,* London, Sage, 2006; Barry Goldson & John Muncie (eds.), *Youth Crime and Juvenile Justice Volume 2: Juvenile Corrections,* London, Sage, 2009. By way of further illustration, this applies in both China and India, each with a population in excess of a billion people. See for example: Weijian Gao, 'The Development and Prospect of Juvenile Justice in the People's Republic of China' and Ved Kumari, 'Juvenile Justice in India', both published in Franklin E. Zimring, Máximo Langer & David S. Tanenhaus, (eds.) *Juvenile Justice in Global Perspective,* New York, New York University Press, 2015.

53 Filling this data gap is one of the major objectives of this Study - the questionnaire sent to Governments and other stakeholders at international, regional and local levels being one of the methods used.

54 Pre-trial and post-trial detention can take very different forms, depending on which type of institution or residential placement is decided upon. It can for example also entail a) house arrest, b) administrative detention in drug rehabilitation centres, and c) placement in educational or health institutions (all of which implies deprivation of liberty).

55 Cf. Franklin E. Zimring, & Máximo Langer, 'One Theme or Many? The Search for a Deep Structure in Global Juvenile Justice', Franklin E. Zimring, Máximo Langer & David S. Tanenhaus, (eds.), *Juvenile Justice in Global Perspective,* New York: New York University Press, 2015; see also, *Global Study Questionnaire* responses related to: Cambodia (UNICEF), India (NHRI Reply), Lao (State Reply & UNICEF), Malaysia (UNICEF), Philippines (UNICEF), Vietnam (UNICEF).

3.1 Data Collection

The Study ultimately managed to collect detailed data from 124 countries in total. The number of children deprived of liberty in the remaining States was estimated by applying various regression-based models. This methodology consequently resulted in a calculated range between **160,000 and 250,000** children deprived of liberty either in prison or in pre-trial detention facilities on any given day in 2018. This means the annual number of children deprived of liberty amounts to **at least 410,000 children annually**.[56] This does not include an estimated **1 million children held in police custody**.[57]

Situations of Deprivation of Liberty	Number of Children Detained
Prisons	112,750
Pre-Trial Detention	297,250
Police Custody	1,000,000
Total	**1,410,000**

It is important to note, however, that the available annual figures do not reflect the full scope and are very likely an underestimation. Each number was, to the extent possible, verified and or clarified *inter alia* by requesting States. Nevertheless, annual figures for the individual countries were sometimes not much higher than the daily ones. This is due to the fact that the dominant practice worldwide is to record daily data as it allows better control respecting the number of guards needed for oversight, tracking prison overcrowding or managing the placement of new detainees. As a result, some of the figures used in the annual estimates may actually have been daily data. In this context, the yearly figures should be treated as a global minimum.

A clearer picture is revealed regarding the psychological **impact of deprivation of liberty** in the administration of justice. According to research conducted for the Global Study, impact on children has been described as inherently distressing, potentially traumatic and having adverse impact on mental health, often exacerbated by poor treatment and unsatisfactory conditions.[58]

56 Almost three quarters (72,5%) are held in pre-trial detention (see Chapter 9, 3.3).

57 Due to limited data submitted under the Global Study questionnaire as well as incomplete police records in many States, it is not possible to provide a hard figure for the number of children held in police custody. Nevertheless, considering available data, the figure of 1 million children held in police custody is a rather conservative estimate. Chapter 3 on Data Collection and Analysis.

58 See Chapter 6 on the Impacts on Health of Children Deprived of Liberty.

Regional Imprisonment Rate of Children

Canada	14.49
United States	60.05

Antigua and Barbuda	9.03
Bahamas	*
Barbados	17.85
Belize	27.46
Costa Rica	22.57
Cuba	*
Dominica	10.78
Dominican Republic	15.46
El Salvador	15.94
Grenada	*
Guatemala	15.14
Haiti	*
Honduras	15.63
Jamaica	23.75
Mexico	15.71
Nicaragua	4.58
Panama	*
Saint Kitts and Nevis	*
Saint Lucia	*
Saint Vincent and the Grenadines	39.57
Trinidad and Tobago	21.89

Argentina	9.27
Bolivia	53.13
Brazil	*
Chile	3.52
Colombia	*
Ecuador	13.41
Guyana	5.37
Paraguay	15.19
Peru	28.46
Suriname	*
Uruguay	*
Venezuela	*

*** = no data available**

IMPRISONMENT RATE OF CHILDREN IN PRE-TRIAL DETENTION AND PRISONS

Rate per 100,000 children

60.00 — **0.00**

Source: Responses to the Global Study Questionnaire; World Prison Brief

Children throughout their deprivation of liberty are in a situation of **extreme vulnerability** and frequently suffer from systemic abuse, violence and ill-treatment[59], torture and sexual exploitation,[60] as already highlighted in the 2006 UN Global Study on Violence against Children.[61] This is confirmed by young people who, having taken part in several studies in a range of jurisdictions, reported feeling unsafe while in detention.[62] Moreover, in many countries suicide and self-harm is a serious issue among children deprived of liberty.[63] Sometimes these actions are a result of or accompanied by bullying and peer pressure.[64]

Deprivation of liberty **particularly affects boys (94%)[65] as well as children from economically and socially disadvantaged backgrounds**. Children in such circumstances are overrepresented in detention and are particularly at risk of abuse and discrimination. Other groups, including girls, children with disabilities,[66] LGBTI children as well as children with drug and alcohol issues often find themselves in particularly vulnerable situations. As commentators have noted: 'wherever we might care to look in the world, child prisoners are routinely drawn from some of the most disadvantaged, distressed and impoverished

59 Office of the Special Representative of the Secretary-General on Violence against Children, *Prevention of and responses to violence against children within the juvenile justice system,* UN 2012/15; Ton Liefaard, Joni Reef & Maryse Hazelzet, *Report on Violence in Institutions for Juvenile Offenders,* Council of Europe, PC-CP, 2014, p.13; Barry Goldson, *Vulnerable Inside: Children in Secure and Penal Settings,* London, The Children's Society, 2002. Research and media reports from Pakistan suggest that up to 70 percent of children in contact with the child justice system have been abused. [cf. Penal Reform International, *A review of law and policy to prevent and remedy violence against children in police and pre-trial detention in eight countries,* 2012, p. 73]. A recent survey conducted in Kenya on VAC in the justice setting showed that 79.8% of the respondents reported having witnessed violence perpetrated on other children, while 72.2% had been subjected to violence [cf. Diego Ottolini, *Violence Does Not Fall on One Roof Alone: A Baseline Survey on Violence Against Children in the Kenya Juvenile Justice System,* Nairobi, Kolbe Press, p. 43].

60 A 2010 report from the U.S. Bureau of Justice surveyed 9,000 youth in 195 juvenile detention facilities. It found that an estimated 12 percent of youth reported experiencing one or more incidents of sexual victimisation during the 12-month period examined by the report. 80 percent of the sexual abuse reported in the study was perpetrated by staff at the facilities. The actual number of incidents is likely much higher than those reported as many children in detention facilities will not report instances of abuse (especially on-going abuse), out of fear and shame; see also: Independent Inquiry into Child Sexual Abuse, *Child sexual abuse in custodial institutions: A rapid evidence assessment*, London, Independent Inquiry into Child Sexual Abuse, 2018; Independent Inquiry into Child Sexual Abuse, *Sexual Abuse of Children in Custodial Institutions: 2009-2017,* London, Independent Inquiry into Child Sexual Abuse, 2019.

61 Paulo Sérgio Pinheiro, Independent Expert for the United Nations, *UN Secretary-General's Study on Violence against Children: World Report on Violence against Children,* 2006, Chapter 5.

62 Kate Gooch, 'A Childhood Cut Short: Child Deaths in Penal Custody and the Pains of Child Imprisonment', *The Howard Journal of Crime and Justice,* Vol. 55(3), 2016, p. 285; André van der Laan, 'Juvenile adaptation to imprisonment: Feelings of safety, autonomy and wellbeing, and behaviour in prison', *European Journal of Criminology,* Vol. 10(4), 2013, p. 424; National Children's Commissioner, *Children's Rights Report 2016,* Sydney, Australian Human Rights Commission, 2016, p. 171; Carolyne Willow, *Children Behind Bars: Why the abuse of child imprisonment must end,* Bristol, Policy Press, 2015, p. 220; Howard League for Penal Reform, *Future Insecure: Secure Children's Homes in England and Wales,* London, Howard League for Penal Reform, p.4; Children's Rights Alliance for England, *Speaking Freely: Children and Young People in Europe Talk About Ending Violence in Custody: Research Report,* London, Children's Rights Alliance for England, p. 31.

63 E.g. in the UK and Canada: Hygeia Casiano *et al.*, 'A Population-Based Study of the Prevalence and Correlates of Self-Harm in Juvenile Detention', *Plus ONE,* Vol. 11(1), 2016; Cf. Willow, *op. cit.*, pp. 45-71.

64 Cf. Gooch, *op. cit.*, p. 286.

65 See Chapter 8 on Gender Dimension.

66 Eileen Baldry, Damon Briggs, Barry Goldson & Sophie Russell, '"Cruel and unusual punishment": an inter-jurisdictional study of the criminalisation of young people with complex support needs', *Journal of Youth Studies,* Vol. 21(5), 2018, pp. 636-652.

families, neighbourhoods and communities.'[67] In many countries forms of racism permeate juvenile justice systems and serve to expose minority ethnic children and young people to disproportionate and excessive levels of criminalisation and penal detention.[68]

3.2 Arrest and Police Custody

Generally, States permit police to arrest and detain a child when caught in the act of committing a criminal offence, or when there is reasonable cause to suspect that the child has committed an offence. Even when statistics from countries are available, they can be misleading, since the **definition of arrest** varies from country to country. Moreover, the number of arrests per year often does not reflect that a single child may have been arrested and released several times during a year.[69]

Statistics on children subject to police detention have to be treated with caution, since detention of children for 'anti-social behaviour' (working on the street, begging or loitering) is less likely to be recorded. Children accused of such behaviour or of status offenses are arrested and kept in detention either by police or another administrative body, in most cases for a short time, but in others for extended periods.[70] When **street-connected children** are arrested, they experience higher risks of being denied their rights, mistreated and becoming victims of violence.[71] Violence in any stage of the criminal proceedings has a long-lasting impact on children's lives and the stigmatisation that street-connected children commonly experience is exacerbated by deprivation of liberty.[72] As a child living in the streets of Harare, **Zimbabwe**, perfectly conveyed: 'every time the police attack us, we become better street kids'.[73]

67 Barry Goldson, 'The Circular Motions of Penal Politics and the Pervasive Irrationalities of Child Imprisonment', Barry Goldson (ed.), *Youth Crime and Justice,* London, Sage, 2015, p. 179.

68 According to research on over-representation of minorities, in countries with relatively populous ethnic minorities (at least 7% of the country total population), the child detention rate is 11.9 per 100,000 children, nearly double that of countries with fewer minorities. Data on the share of ethnic minorities among the countries populations was extracted from the Ethnic Power Relations core dataset (2018), see Manuel Vogt *et al.*, 'Integrating Data on Ethnicity, Geography, and Conflict: The Ethnic Power Relations Data Set Family', *Journal of Conflict Resolution,* Vol. 59(7), 2015, pp. 1327–1342. The child detention rate has been calculated based on the data extracted from the UN Global Study questionnaire responses, World Prison Brief, UNODC, World Bank and the EPR Core dataset.

69 Some systems already classify children as arrested when apprehended on the suspicion of having committed a crime (which may not result in a charge), others require sufficient evidence to be present to record an arrest. Carolyne Hamilton, Kirsten Anderson, Ruth Barnes & Kamena Dorling, *Administrative detention of children: a global report,* Discussion Paper of the Children's Legal Centre, University of Essex and UNICEF, 2011, pp. 99-100.

70 Ibid., p. 102.

71 See the landmark case by the Inter-American Court of Human Rights, *Villagrán Morales et al. v. Guatemala,* Judgment, 19 November 1999; see also: Consortium for Street Children, *Submission to the UN Global Study on Children Deprived of Liberty,* 2018.

72 Cf. CRC-Committee, *General Comment No. 21 (2017) on children in street situations,* CRC/C/GC/21, 21 June 2017, para. 26; see also: Carolyne Hamilton *et al.* (2011), *op. cit.*, p. 102. Note as well: Although the total number of children detained in police custody may well exceed 1 million per year, more precise data have been excluded from the Global Study statistics for lack of reliable data.

73 GUOTS, Harare Resilience Focus Group 5, 24 April 2014, quoted in: 'Response to the Consortium for Street Children's call for input to the Global Study on Children Deprived of Liberty', *StreetInvest*, 2018, p. 3.

In many countries, the recommended **24-hour limit** to police custody[74] is not legally implemented. Globally, the length of lawful police detention varies from several days, to weeks or even months.[75] Even when States incorporate this standard into national legislation, they do not always comply with it in practice.[76] Children are even more exposed to abuse in countries without laws requiring the child to be brought to court within a certain period of time, since courts might then not even be aware of the child's deprivation of liberty and children become 'lost in the system'.[77]

Even very short periods of deprivation of liberty can have detrimental effects on a child's psychological and physical wellbeing and cognitive development.[78] Moreover, the risk of **violence** is highest during the investigative phase when children are held in police detention and in temporary detention cells.[79] Violence in police custody may amount to torture and lead to the violent death of children.[80] Locations of police custody vary considerably, as children can be held in a police vehicle, in a waiting or an interview room or cell at the police station. Children are often not separated from adults, due to a lack of adequate resources and infrastructure, despite the abundant evidence that this compromises their basic safety, wellbeing and future ability to remain free of crime and to reintegrate.[81] As a result, young people risk becoming victims of violence, including sexual violence, bullying, extortion and torture, inflicted by adult inmates.[82] In situations of detention, girls often face heightened vulnerability, intensified by the lack of separation between men and women

74 Cf. CRC/C/GC/24, *op. cit.*

75 Some striking examples are Sierra Leone (72 hours, 10 days for homicide), Burundi (7 days), Algeria (12 days), Pakistan (14 days, 28 for terrorism offences), Nepal (25 days), Iran (1 month), Saudi Arabia (6 months), Mozambique (6 months for drug trafficking, and between 45-90 days depending on crime) and Mongolia (8 months). See: Hamilton *et al.* (2011), *op. cit.*, pp. 115-116.

76 Ibid., p. 109.

77 Cf. Joint report OHCHR/UNODC/SRSG-VAC, *Prevention of and responses to violence against children in the juvenile justice system*, A / HRC/21/25, June 2012, p. 8, citing Human Rights Watch, *Children of the Dust: Abuse of Hanoi Street Children in Detention,* 2006.

78 Juan E. Méndez, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* A/HRC/28/68, 5 March 2015, p. 4.

79 Cf. Penal Reform International, *Second Voice of the Child Report: Findings from a Survey of Children detained in Closed Institutions in Kazakhstan, Kyrgyzstan and Tajikistan in 2015*, p. 4, Available at https://www.unicef.org/publications/files/Progress_for_Children-No.8_EN_081309.pdf (accessed 25 September 2018); Diego Ottolini, *Violence Does Not Fall on One Roof Alone: A Baseline Survey on Violence Against Children in the Kenya Juvenile Justice System,* Nairobi, Kolbe Press, 2016, p. 43; European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, *24th General Report of the CP 2014,* Strasbourg, Council of Europe, 2015, para.97; Aoife Daly, Sandy Ruxton & Mieke Schuurman, *Challenges to Children's Rights Today: What Do Children Think?,* 2016, p.11; Moritz Birk *et al.*, *Pretrial Detention and Torture: Why Pretrial Detainees Face the Greatest Risk,* Open Society Foundations, New York, 2011.

80 See, the case of IACtHR, *Bulacio v. Argentina,* Judgment, 18 September 2003; NGO Advisory Council for Follow-up to the UN Study on Violence against Children, *Five Years On: A global update on violence against children,* October 2011, p.21.

81 Joint Report of the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Office on Drugs and Crime (UNODC), and the Special Representative of the Secretary-General (SRSG), *Violence against Children (VAC) on prevention of and responses to violence against children within the juvenile justice system,* A/HRC/21/25, 27 June 2012, p. 7; Carolyne Hamilton *et al.* (2011), *op. cit.*, p. 114; Penal Reform International, *Voice of the child: Findings from a survey of children detained in Kazakhstan, Kyrgyzstan and Tajikistan,* London & Astana, Penal Reform International, 2015, pp. 13 & 19.

82 Defence for Children International, *Kids Behind Bars: A study on children in conflict with the law: towards investing in prevention, stopping incarceration and meeting international standards,* 2003, p. 40.

and women and girls.[83] Typically, the conditions in police detention are particularly poor as these places are intended for short periods. Prolonged detention in police stations often amounts to inhuman treatment.[84]

During the stage of police custody respect for legal safeguards and procedural rights are of particular importance but often not effectively guaranteed.[85] Many countries lack clear legal obligations such as the presence of a lawyer from the earliest stage and during police interrogations, and police fail to provide children with information about their rights. The **lack of legal representation** disproportionately affects children who cannot afford to hire a lawyer and in States where there is no or no effective system of free legal advice and assistance.[86] The treatment of children in this case is of particular concern, notably when police interrogations take place without contact with their parents, guardians, lawyers or legal aid providers. Upon the apprehension of a child, her or his parents or guardian should be immediately notified and all children arrested should receive information about the proceedings and about their rights – in a language that is appropriate to their age and development. However, implementation in practice remains weak. In some cases, parents may be notified only late or not at all,[87] or they will not go to the police station because they fear being arrested themselves.[88] This can be highly detrimental for the child, given the crucial role that the presence of a concerned adult has in protecting the child from ill-treatment and providing support throughout the process.[89]

83 Tomris Atabay, *Women in detention: a guide to gender-sensitive monitoring,* APT & PRI, 2015, p. 8 & 10; Office of the Special Representative of the Secretary-General on Violence Against Children, *Safeguarding the Rights of Girls in the Criminal Justice System: Preventing violence, stigmatisation and the deprivation of liberty,* 2015; Penal Reform International and Thailand Institute of Justice, *Global Prison Trends 2017,* London, Penal Reform International, 2017, p. 18.

84 Cf. Prisons in the Central African Republic, *Report on a visit June 19-29, 2000, by Prof. E.V.O. Dankwa, Special Rapporteur on Prisons and Conditions of Detention in Africa,* African Commission on Human and Peoples' Rights, Series IV, No. 7, p. 7; see also: Manfred Nowak, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment,* A/64/215, August 3, 2009, para. 76; Moritz Birk *et al.*, Pretrial Detention and Torture: Why *Pretrial Detainees Face the Greatest Risk,* Open Society Foundation, New York, 2011, p. 30.

85 UNODC, *Introducing the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice,* 2015, p. 16.

86 Carolyne Hamilton *et al.*, *Administrative detention of children: a global report, Discussion Paper of the Children's Legal Centre,* University of Essex and UNICEF, 2011, p. 112.

87 In the Occupied Palestinian Territories at the West Bank, parents of Palestinian children arrested by the Israeli military authorities are often not informed about the place where their child is being held in custody. See: Jaap E. Doek *et al.*, *Palestinian Children and Military Detention,* April 2014, Available at https://www.gate48.org/wp-content/uploads/2015/07/PL-REPORT-3-DIGI.pdf (accessed 8 June 2019).

88 In Uganda, parents or guardians often reported being too scared to accompany their children to the police station. See: Foundation for Human Rights Initiative, *Juvenile Justice in Uganda: Report for the Period January to July 2009,* Available at https://www.fhri.or.ug/index.php/2015-07-22-14-08-32/thematic-reports/32-juvenille-justice-in-uganda-january-july-2009/file (accessed 8 June 2019).

89 Cf. Joint report OHCHR/UNODC/SRSG-VAC, *op. cit.*, p. 7.

3.3 Pre-trial Detention

Data collected for the Global Study indicate that almost three quarters of all children deprived of liberty per year in the administration of justice (297,200 out of a total of 410,000 children, not counting police custody) are held in pre-trial detention. A recent international survey conducted on 118 countries reports that the lack of a clear and strong pre-trial limit in international human rights law, which would define what is meant by' shortest appropriate period of time', makes the implementation of this standard very difficult. The survey shows that the **excessive length** of pre-trial detention for children is a global concern. It is not limited to certain regions or countries of the world. Neither is the use of pre-trial detention linked to the socio-economic development of a country nor its commitment to a human rights-oriented criminal justice system. Thus, the establishment of strong pre-trial detention limits for children is particularly urgent.[90] The survey revealed that the length of pre-trial detention can last weeks, months or even longer in those countries where clear legislation defining the maximum time permitted is still lacking.[91] At the same time, non-custodial measures are well established in some jurisdictions. Some countries, for example, indicate that children are left in the custody of their parents or with a foster family while awaiting judgement.[92]

Children around the globe in pre-trial detention are particularly **vulnerable** to violations of their rights and often see their access to basic services, education and fair treatment in detention denied. In many jurisdictions, rights and access to such services are limited due to the nature and purpose of pre-trial detention, which is supposedly intended for a very short period. Access to the services is commonly' gained' when (and if) finally sentenced. Many children are detained for petty crimes, so they often end up spending more time in pre-trial detention than the maximum sentence provided by law for the offence of which they are accused. Sometimes, having spent time in pre-trial detention, they are even sentenced to a non-custodial measure, resulting in a paradoxical situation where conviction means 'freedom'.[93] At the same time, research in several jurisdictions across the globe indicates that pre-trial detention significantly increases the likelihood of the child being found guilty and

90 Juvenile Justice Advocates International report, *Children in pre-trial detention: Promoting stronger international time limits*, 2018.

91 Ibid.

92 Such as in many Western European countries, as well as in Benin, Burkina Faso, Chad, Liberia, Libya, Mauritius, Republic of Congo and Kuwait, according to *Global Study Questionnaire* replies.

93 Juvenile Justice Advocates International report, *Children in pre-trial detention. Promoting stronger international time limits*, 2018.

given a custodial sentence.[94] In some jurisdictions, evidence suggests that pre-trial detention of children is even used to anticipate a custodial sentence.[95] Moreover, several studies show racial, ethnic and/or other disparities in the use of pre-trial detention of children.[96]

Reports of a failure to **separate adults from children** in detention facilities are common in many regions and particularly widespread in pre-trial detention where the conditions and physical space make separation difficult.[97]

Overcrowding is a serious problem worldwide, particularly affecting children in pre-trial detention. This does not only lead to a lack of adequate physical space, but impacts also on the quality of nutrition, sanitation, access to educational activities, access to appropriate health services and the care for children in situations of particular vulnerability.[98] Overcrowding and the inevitable imbalanced ratios between staff and children held in a facility create a hostile environment, increasing the risk of violence. In this regard, staff often justify the use of violence for security reasons and attribute peer violence to a lack

94 See *inter alia:* Sharon Moyer & Maryanna Basic, *Pre-trial detention under the Young Offenders Act: a study of urban courts,* Department of Justice Canada, 2004; Nancy Rodriguez, 'The Cumulative Effect of Race and Ethnicity in Juvenile Court Outcomes and Why Pre-adjudication Detention Matters' *Journal of Research in Crime and Delinquency,* Vol. 47(3), pp. 391-413; Yannick van den Brink, 'Young, Accused and Detained; Awful, But Lawful? Juvenile Pre-Trial Detention and Children's Rights Protection in Contemporary Western Societies', *Youth Justice,* 2019 (forthcoming).

95 Ibid.

96 See: Lori Guevara, Denise Herz & Cassia Spohn, 'Gender and Juvenile Justice Decision Making: What Role Does Race Play?', *Feminist Criminology,* 2006, pp. 258-282; Kelly Richards & Lauren Renshaw, *Bail and remand for young people in Australia: A national research project,* Canberra, Australian Institute of Criminology, 2013; Miriam A. DeLone & Gregory J. DeLone, 'Racial Disparities in Juvenile Justice Processing', Christopher J. Schreck (ed.), *The Encyclopedia of Juvenile Delinquency and Justice,* John Wiley & Sons Inc., 2017; Yannick van den Brink & Bart Lubow, 'Reforming Pre-Trial Detention of Children: Strategies and Challenges in The Netherlands and The United States', Wendy O'Brien & Cédric Foussard (eds.), *Violence Against Children in the Criminal Justice System,* London, Routledge, 2019 (forthcoming).

97 Afghanistan: girls held on pre-trial detention are not separated from women (see Lena Salaymeh, 'Juvenile Justice in Muslim Majority States', Franklin E. Zimring *et al.* (2015), *op. cit.*, p. 275; Switzerland: only 9 of 33 detention centres have separate facilities for children. Defence for Children International, *Stop the violence!: The overuse of pre-trial detention, or the need to reform juvenile justice systems: Review of Evidence,* 2010, p. 14; UN Economic and Social Council, *Report of a mission to Belarus (addendum),* Working Group on Arbitrary Detention, E/CN.4/2005/6/Add.3, 2004; UN General Assembly, *Report of a mission to Equatorial Guinea (addendum),* Working Group on Arbitrary Detention, A/HRC/7/4/Add.3, 2008; Working Group on Arbitrary Detention, *Report of a mission to Ukraine (addendum),* A/HRC/10/21/Add.4, 2009; Manfred Nowak, *Report of the Special Rapporteur on Torture, mission to Nigeria,* A/HRC/7/3/Add.4.0, 2007; Human Rights Watch, *'Presumption of Guilt': The Global Overuse of Pretrial Detention Paying the price: Violations of the rights of children in detention in Burundi,* 2007, Available at http://www.hrw.org/reports/2007/burundi0307/ (accessed 9 June 2019); Human Rights Watch, 'Nepal: End torture of children in police custody', (press statement), 2008, Available at https://www.hrw.org/news/2008/11/18/nepal-end-torture-children-police-custody (accessed 8 June 2019); Adnan Aziz, 'Penal reform', *The News,* 7 May, 2011, Available at http://www.thenews.com.pk/TodaysPrintDetail.aspx?ID=45633&Cat=9 (accessed 9 June 2019); UN Economic and Social Council, *Report of a mission to South Africa (addendum),* Working Group on Arbitrary Detention, E/CN.4/2006/7/Add.3, 2005; Human Rights Watch, *'Making their own rules': Police beatings, rape and torture of children in Papua New Guinea',* 2005, Available at http://www.hrw.org/en/node/11626/section/7 (accessed 9 June 2019); UN General Assembly, *Report of a mission to Angola (addendum),* Working Group on Arbitrary Detention, UN doc. A/HRC/7/4/Add.4, 2008; Consideration of reports submitted by States parties under Article 19 of CRC. Open Society Justice Initiative, *Concluding observations of the Committee against Torture: Slovakia,* CAT/C/SVL/CO/2, 17 December 2009, para. 8, Available at https://www.opensocietyfoundations.org/sites/default/files/presumption-guilt-09032014.pdf. (accessed 9 June 2019).

98 UNODC, *Handbook on strategies to reduce overcrowding in prisons,* 2013.

of supervision.[99] As emphasised earlier in relation to police custody, even short periods of detention can be tremendously harmful for children compromising their contact with family and friends, disrupting their education, and exposing them to the risk of violence. What is more, the possibility of engaging in education, training and/or employment activities is hampered, and the risk of self-harm, depression, drug use and suicide increases.

3.4 Detention after Sentencing/Imprisonment

Detention as a sentence should always be considered as a measure of last resort. Moreover, the guiding principle of detention must be to ensure rehabilitation and social reintegration. The **regimes** under which children are deprived of liberty vary greatly worldwide. Some countries claim to take an individualised and rehabilitative approach where children go through different stages of restriction while in detention, whereas in others detention is based on a punitive approach, with little or no opportunities of education, work or other rehabilitative activity. In such instances, children are locked in their cells for most of the time, resulting in serious consequences for the physical and mental health, including higher risks of self-harm and suicide.[100]

Contact with the outside world through visits from family and friends is a crucial prerequisite for the proper reintegration of a child, but also has a notable positive impact on the psychological health and well-being of children in detention. It encourages them to seek out employment prospects and accommodation possibilities for after they are released and helps motivate them to desist from future offending. However, many rules governing the deprivation of liberty inappropriately restrict the number of visits and limit the time that children can spend with their families. Additionally, not enough attention is paid to the conditions of a visit and the positive emotional impact it can have on a child. Moreover, the communication with families and friends by phone, email etc. is unnecessarily restricted in many countries, particularly where children are only allowed to contact their parents

99 According to Human Rights Watch, due to serious overcrowding in Brazil's detention facilities, 11 children were killed in two detention facilities. Cf. Penal Reform International, *Global Report 2018,* p. 19.

100 Cf. Barry Goldson & Deborah Coles, *In the Care of the State? Child Deaths in Penal Custody in England and Wales,* London, INQUEST, 2005; see also: Chapter 6 on the Impacts on Health of Children Deprived of Liberty (sections 3.1 and 4.1).

with' express permission' by the police or administration.[101] Institutions that detain children are often poorly located geographically, making visits from families difficult – especially those of socioeconomically disadvantaged backgrounds. Further, particularly in the case of indigenous children, the removal from their communities can cause a sense of detachment and cultural strain. This is strongly detrimental for their mental health and reintegration back into their communities.[102]

Some countries hold children in special wings or sections within adult prisons.[103] Even though the requirement to **separate children from adults** is often enshrined in national law, it is not always realised throughout the country.[104] In a number of countries, there are no separate facilities for children.[105] The separation between girls and women is even more difficult due to the smaller numbers of women in detention and fewer specialist facilities for women.

Access to **appropriate health services** is of particular importance for children and to their physical and mental development.[106] Moreover, there is a clear overrepresentation of children in detention with mental health issues. Some psychological disorders may be present before admission to detention, but deprivation of liberty may have a detrimental impact on existing conditions or may even contribute to their development.[107] In particular children from situations of specific vulnerability (indigenous or LGBTI children for instance) may have already experienced varying degrees of trauma before coming into conflict with the law. This may further contribute to their susceptibility to mental health and behavioural

101 See for example: Mongolia and China, where children are required to obtain permission. Carolyn Hamilton, Kristen Anderson, Ruth Barnes & Kamena Dorling, *Administrative detention of children: a global report,* New York, UNICEF, Child's Legal Centre, University of Essex, 2011, p. 115. In South Asia, most countries do not require the presence of a parent, support person or legal representative with the child during police questioning and parental notification poses a challenge, especially in urban areas where children are displaced from their families and the police lack resources and time (See South Asia: With the exception of Maldives and Nepal, the police are required to make efforts to locate and inform parents of their child's arrest. In India, Pakistan and Sri Lanka, they must also notify a probation officer).

102 Chris Cunneen, Barry Goldson & Sophie Russell, (2016) 'Juvenile Justice, Young People and Human Rights in Australia', *Current Issues in Criminal Justice*, Vol. 28(2): pp. 173-189.

103 UN Global Study Questionnaire, Benin (State Reply), Burkina Faso (State Reply), Djibouti (State Reply), Gambia (State Reply), Republic of Congo (State Reply), Madagascar (NGO), Denmark (NHRI Reply), Estonia (State Reply), France (State Reply & NGO Reply: Grandir Dignement).

104 UN Global Study Questionnaire, Chad (State Reply), Democratic Republic of Congo (NHRI Reply), Madagascar (NGO Reply), Slovenia (State Reply).

105 UN Global Study Questionnaire, Finland (State Reply), Libya (UN Agency Reply).

106 See Article 24(1) CRC: States Parties recognise the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

107 Seena Fazel, Helen Doll & Niklas Långström, 'Mental Disorders Among Adolescents in Juvenile Detention and Correctional Facilities: A Systematic Review and Meta-regression Analysis of 25 Surveys', *Journal of the American Academy of Child & Adolescent Psychiatry,* Vol. 47(9), 2008, pp. 1010–1019.

problems.[108] Health conditions are generally below standards in child facilities that are underfunded and affected by a shortage of medical staff and equipment. Overcrowding exacerbates this problem. Specialised equipment and material to meet the demand or to respond to more specific issues is also often lacking. Strategies for preventing or controlling sexually transmitted diseases are rare, while sexually reproductive health as well as general sex education are seriously under-resourced. This creates particular risks for girls and LGBTI children.[109] Access to health is closely connected with and dependent on the coordination between child detention facilities and public health services, which in many parts of the world are ineffective and under-sourced.[110] Connected to the right to health, literature suggests that **poor food** is a particular concern to many children, in terms of quality and variety.[111]

Access to **education, vocational training, work and recreational activities** is vital for a child's development, rehabilitation and reintegration, but in many countries, it is not provided to children, usually due to the lack of resources and investments in care and education.[112]

In 2012, a joint report by the Office of the High Commissioner for Human Rights (OHCHR), the United Nations Office on Drugs and Crime, and the Special Representative of the Secretary-General on Violence against Children was released.[113] It reported findings of **widespread neglect and violence** including endemic bullying, humiliation and ill-treatment (both at the staff-on-child and peer-on-peer levels), racism and other forms of discrimination of children in detention. Systemic invasion of privacy, long and uninterrupted periods of solitary confinement as well as deprivation of basic necessities were also found prevalent

108 Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory, Volume 2A, 2016, p. 362, Available at http://www.territorystories.nt.gov.au/jspui/bitstream/10070/277125/4/Royal%20Commission%20NT%20Final%20Report%20Volume%202A.pdf (accessed 10 June 2019); see also Chapter 6 on Impacts on Health of Children Deprived of Liberty.

109 An interesting project on the sexual development of children in prison was run by the Howard League for Penal Reform in the UK in 2016, Available at https://howardleague.org/publications/healthy-sexual-development-of-children-in-prison/ (accessed 8 June 2019).

110 Cf. Chapter 6 on the Impacts on Health of Children Deprived of Liberty.

111 Cf. Aoife Daly *et al.* (2016), *op. cit.*, p.18; Howard League for Penal Reform, *Life Inside 2010: A unique insight into the day-to-day experiences of 15-17 year old males in prison,* London, Howard League for Penal Reform, p. 22.

112 The failure to provide children in detention with an appropriate level of education has been documented in Albania, Belgium, Colombia, Ecuador, Lebanon, Niger, Nigeria, the Occupied Palestinian Territories, Sierra Leone and Uganda, among many other countries. Cf. Defence for Children International, *Education in Chains: Gaps in Education Provision to Children in Detention,* 2009, pp. 24-25; see also: Defence for Children International, *Stop the violence: The overuse of pre-trial detention, or the need to reform juvenile justice systems: Review of Evidence,* 2010, p. 32; Defence for Children International, *Apuntes Sobre Seguridad Ciudadana y Jusiticia Penal Juvenil: Tendencias en America del Sur* (undated).

113 OHCHR/UNODC/Special Representative of the Secretary-General on Violence against Children, *Joint report of the prevention of and responses to violence against children within the juvenile justice system,* A/HRC/21/25, 27 June 2012.

in many facilities.[114] The use of force by staff in places of detention is a key concern for children, who mention the use of particular restraining techniques causing them to feel terrified and panicked.[115] In some cases, children report feeling as if their breathing was constricted, resulting in vomiting.[116] Equally, separation or segregation of children as a disciplinary measure is a serious concern. It causes feelings of isolation and boredom, limits activity and exposes children to bare conditions of detention.[117]

Corporal punishment has not been fully prohibited as a disciplinary measure in penal institutions of 58 countries, and 33 States still inflict corporal punishment as a sentence.[118] Inadequately qualified, trained and remunerated staff are key risk factors for violence in detention. Overworked staff may also resort to violent or aggressive methods to maintain discipline. The selection and appointment of staff members is often unstructured, with many countries not undertaking rigorous background checks during recruitment.[119] Peer violence is also widespread due to overcrowding, lack of supervision and a failure to separate especially vulnerable children from others. Such situations are often exacerbated by racism or the involvement of detained children in gangs.[120] Ill-treatment and even torture are too often under-reported and inadequately investigated. In reality, children have little or no opportunity to complain and/or make representations.[121]

114 See also, Barry Goldson, 'Child Incarceration: Institutional Abuse, the Violent State and the Politics of Impunity', Phil Scraton & Jude McCulloch (2009), op cit., pp. 86-106; Barry Goldson & John Muncie (2009), *op. cit.*; Richard Mendel, *No Place for Kids: The Case for Reducing Juvenile Incarceration,* Baltimore, Annie E. Casey Foundation, 2011; Barry Goldson & John Muncie (2012), *op. cit.*; Barry Goldson & Ursula Kilkelly, (2013), *op. cit.*, pp. 345-371; Barry Goldson, 'The Circular Motions of Penal Politics and the Pervasive Irrationalities of Child Imprisonment', Barry Goldson & John Muncie (eds.), *Youth Crime and Justice,* 2nd edition, London, Sage, 2015, pp. 170-190; Chris Cunneen, Barry Goldson & Sophie Russell, 'Human rights and youth justice reform in England and Wales: A systemic analysis', *Criminology and Criminal Justice*, Vol. 18(4), 2018, pp. 405-430. Lena Salaymeh, 'Juvenile Justice in Muslim Majority States', Franklin E. Zimring *et al.* (2015) *op. cit.*

115 Children's Rights Alliance for England, *Speaking Freely: Children and Young People in Europe Talk About Ending Violence in Custody: Research Report,* London, Children's Rights Alliance for England, 2013, p. 26.

116 Carolyne Willow, *Children Behind Bars: Why the abuse of child imprisonment must end,* Bristol, Policy Press, 2015, p.103; see also: Children's Rights Alliance for England (2013), *op. cit.*, p. 33.

117 Howard League for Penal Reform, *Life Inside 2010: A unique insight into the day-to-day experiences of 15-17 year old males in prison,* London, Howard League for Penal Reform, 2010, p. 20.

118 Global Initiative to End All Corporal Punishment of Children, *Global progress towards prohibiting all corporal punishment,* October 2018, p. 1.

119 Cf. A/HRC/21/25, *op. cit.*, p. 12.

120 Cf. A/HRC/21/25, *op. cit.*; see also: Ton Liefaard, Joni Reef & Maryse Hazelzet, *Report on Violence in Institutions for Juvenile Offenders,* Council of Europe, PC-CP, 2014, p.13.

121 The Children's Rights Alliance for England, cited in Barry Goldson (2015), *op cit.*, pp. 180-181; Inspectorate of Prisons and the Youth Justice Board (2013). Australia: the Royal Commission into the Protection and Detention of Children in the Northern Territory (2017).

Focus on: Girls in detention

According to the replies submitted under the Global Study questionnaire, it is estimated that girls constitute 6% of detainees held in either pre-trial facilities or prisons.[122]

Nevertheless, even though numbers show that they are much less represented within detention facilities than boys, across all regions there is an increase of girls in detention facilities. This is explained by the fact that there is a general lack of alternative non-custodial options tailored for girls' needs.[123] In addition, girls are particularly vulnerable to violence while in police custody, pre-trial and post-trial detention. The risk of violence in detention is high for girls, who are often subject to physical, sexual and mental violence that includes rape and other forms of sexual violence such as threats of rape, touching, 'virginity testing', being stripped naked, invasive body searches, insults and humiliations of a sexual nature. The risk of violence is strongly connected to the lack of separation between men and women, and between women and girls (especially in police custody and pre-trial detention).[124]

States parties should establish separate facilities for girls in the rare cases where detention is demonstrably unavoidable. Fair treatment should be ensured and by no means should less care, protection, assistance, treatment and training be afforded to them than young male offenders. Special attention needs to be put on the protection of girls from all the forms of violence they are exposed to, such as ensuring their dignity through search methods by female officers. Clear policies and regulations about the conduct of the staff should be established.

122 The estimation is based on the limited sample of 20 countries.

123 UN General Assembly, *Safeguarding the rights of girls in the criminal justice system - Preventing violence, stigmatisation and deprivation of liberty,* Office of the Special Representative of the Secretary-General on Violence against Children, 2015, pp. 25-28. UN General Assembly, *Pathways to, Conditions and Consequences of Incarceration for Women, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Rashida Manjoo,* A/68/340, 21 August 2013.

124 As in the US, where routine strip searches were performed. This is especially degrading for girls during their period. It is also deeply traumatic for children, who have been victims of sexual abuse (Cf. Jude McCulloch & Amanda George, 'Naked power: Strip searching in women's prison', Phil Scraton & Jude McCulloch, *The Violence of Incarceration,* London, Routledge 2009).

4. Pathways to Deprivation of Liberty

The reasons why children are deprived of their liberty are manifold, from excessive criminalisation, to a lack of adequate protection services in the community. Some children are detained under the guise of protection while excessively harsh sentencing is bestowed on those who commit offences. Without being offered an appropriate rehabilitation and reintegration programme, children who end up in detention are also more likely to be stuck in the circle of re-offending leading them back to detention.

4.1 Repression over Protection

Police officers are often not trained in dealing with children, while they are also frequently not able to handle cases in a way that avoids the formal justice system. Lack of investment in prevention and over-reliance on child detention are further exacerbated by negative attitudes towards children in the justice system that call for more retributive and tougher responses to children who commit crimes. These trends then reduce the investment in protection systems and family or community programmes, which in turn leads to a vicious circle of failing to adequately respond to crime committed by children and children's needs.

Failure to guarantee liberty and protection of children in the administration of justice is thus fuelled by negative attitudes in society towards children in conflict with the law. In some countries, neo-correctionalist models are gaining ground. More repressive approaches and retribution are emphasised over diversion, de-criminalisation and deinstitutionalisation. Individual responsibility is affirmed over collective social responsibility.[125] Such a punitive approach affects children in different ways, but results in greater use of detention, causing harm to their wellbeing and development. It also fails to tackle the root causes of the reasons that children commit offences and increases reoffending.[126]

A punitive approach called for by politicians and policy-makers to tackling child offending is often the drive for the introduction of repressive legislation. It is frequently accompanied by a hardening attitude among police officers and judicial officials. This shift in attitude and policy can result in increased criminalisation of adolescent behaviour and legislative efforts to decrease the minimum age of criminal responsibility[127] and an increase in the length of custodial sentences for children.[128] Punitive approaches trickle down in the daily work of the personnel dealing directly with children in the child justice system, negatively affecting their relationship on a day-to-day basis.[129] The role that the media play in this

125 Frieder Dünkel, *Juvenile Justice and Human Rights: European Perspectives,* Helmut Kury & Evelyn Shea (eds.), *Women and Children as Victims and Offenders: Background, Prevention, Reintegration,* Switzerland, Springer International Publishing, 2016; Yves Cartuyvels & Francis Bailleau, 'La justice pénale des mineurs en Europe: evolutions et enjeux', *International Annals of Criminology,* Vol. 51(1-2), 2013, pp. 113-131; Loïc Wacquant, 'Crafting the Neoliberal State: Workfare, Prisonfare, and Social Insecurity', *Sociological Forum,* Vol. 25(2), June 2010, pp. 197.

126 See: Barry Goldson, 'New Punitiveness: The politics of child incarceration', Gordon Hughes, Eugene McLaughlin & John Muncie (eds.), *Youth Justice: Critical Readings,* London, Sage, 2002; Nikhil Roy & Frances Sheahan, 'Children and Diversion Away from Formal Criminal Justice Systems: A Perspective from an NGO Working on Criminal Justice Reform', *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem* (2017), *op. cit.*, pp. 195-196.

127 In recent years, for example, the minimum age of criminal responsibility has been reduced in different circumstances in Australia, the Philippines and Russia (cf. Penal Reform International & Thailand Institute of Justice, *Global Prison Trends,* London, Penal Reform International, 2017, page 18.

128 Ibid., pp. 127-143.

129 Cf. A/HRC/21/25, *op. cit.*, p.11.

context, the reaction of public opinion and the politicians' call for more security and retribution are inextricably interconnected and influence one another in a vicious circle. This whole process negatively affects children in the criminal justice system.

Public opinion about children who commit crimes is influenced in many ways, including through the media, and has a strong impact on the development of legislation and policy.[130] It can be difficult for policy makers and judicial actors to avoid resorting to punitive measures when faced with public fear of youth crime at local and national levels. Especially so when public awareness (and therefore support) of non-custodial solutions and restorative approaches is low. The lack of an informed public debate about child justice and crime committed by children results in distorted public opinions and attitudes that are often not evidence-based but, nonetheless, influence policy-making and legislation.[131] Public opinion on these themes, and more generally about crime and security, is often misinformed, largely due to media's omission of concrete evidence and reporting of specific cases that have caused public concern and calls for immediate change.[132]

Public fear of gang violence and youth crime fuels the perception of children as a danger, rather than as being at risk themselves, and mass media stigmatisation fosters tolerance of institutionalised violence against them.[133] In turn, this generates societal pressure to criminalise children, to lower the minimum age of criminal responsibility and impose longer prison sentences, disregarding the fact that gang practices may become reinforced during imprisonment.[134] This fear is fuelled by a number of policy makers who respond to citizens' anxiety about the future by providing 'easy' targets and scapegoats: young people, particularly from specific minority groups, through distorted representations in the media, disproportionate to reality. This again leads to calls for harsher measures.[135] Despite statistical evidence of the contrary, public perception often considers children to commit a significant proportion of crimes.[136] To put it another way, detention rates of children in

130 Penal Reform International, *Ten-Point Plan for Fair and Effective Criminal Justice for Children*, July 2013, Available at https://www.penalreform.org/resource/tenpoint-plan-fair-effective-criminal-justice-children/ (accessed 9 June 2019); Jane L. Wood, 'Why Public Opinion of the Criminal Justice System is Important', *Public Opinion and Criminal Justice,* Willan, 2009, pp. 33-48.

131 Cf. A/HRC/21/25, *op. cit.*, p. 9.

132 Carolyn Hamilton & Rachel Harvey, 'The Role of Statistics and Public Opinion in the Implementation of International Juvenile Justice Standards', The European Institute for Crime Prevention and Control, Helsinki, Vol. 21, 2005, pp. 24-26, Available at https://www.unicef.org/tdad/roleofstatspublicopinion1.pdf(accessed 8 June 2019).

133 Barry Goldson (ed.), *Youth in Crisis? 'Gangs', territoriality and violence,* Abingdon, Routledge, 2011.

134 David Skarbek, *The social order of the underworld: How prison gangs govern the American Penal system,* Oxford, Oxford University Press, 2004, quoted in UN Special Representative of the Secretary-General on Violence Against Children, *Protecting children affected by armed violence in the community,* 2016, p. 9.

135 UN Special Representative of the Secretary-General on Violence against Children, *Promoting restorative justice for children,* 2011, p. 35.

136 Thomas Hammarberg, 'A juvenile justice approach built on human rights principles', *Youth Justice,* Vol. 8(3), December 2008, pp. 103-196; Cf. A/HRC/21/25, *op. cit.*, p. 9.

the justice system tend to be driven in circular motions by penal politics ('political and administrative decisions') as distinct from the nature and scale of child offending.[137] The public generally perceive the rate of crime committed by children to be higher than it is, even where data show that youth offending has decreased.[138] This results in an increased lack of trust in, and dissatisfaction with, the child justice system as a whole particularly when high discretion and power is perceived to be given to courts in sentencing.

4.2 Criminalisation of Children

As a direct result of a repressive approach, the tendency towards the 'criminalisation' of children's behaviour (as opposed to relying on child protection and welfare systems) has spread in many countries. A common trend is the reliance on formal mechanisms of social control, regulating children's lives and defining what behaviour is legitimate at what age. The complex changes in societies experienced by children and adults alike are not taken into account. Such changes need similarly complex responses that start before and go beyond criminal justice systems. A simplistic approach to only view the child 'as a danger' or 'as a risk' (as opposed to the 'child in danger' or 'child at risk') will neither do justice to children's situations nor support responses based on responsibilities shared among families, communities, States and individuals. Instead, it has been observed that concepts of universal welfare for children retreat to a context of 'classification, control and correction where interventions are targeted at the "criminal", the "near criminal", the "possibly criminal", the "sub-criminal", the "anti-social", the "disorderly" or the "potentially problematic" in some way or another'.[139] At the same time, patriarchal concepts and perceptions about children as objects of parental control, owing obedience and submission to 'grown-ups', still persist in many countries. Behaviours that are to some extent typical of young people are criminalised, often known as 'status offences'. Adolescence is, however a critical phase of each person's life, a transitional period during which the young person goes through a range of physical, cognitive and psychological transformations. It is a stage of development in which the emotional and mental abilities are strengthened and identity (in all its multiple facets, from gender, sexuality, ethnicity, culture, tradition, etc.) is formed. Limits are also tested and norms are challenged, rejected, transformed or solidified. This cognitive

137 Barry Goldson, 'The Circular Motions of Penal Politics and the Pervasive Irrationalities of Child Imprisonment', Barry Goldson & John Muncie (2015), *op. cit.*, pp. 170-190.

138 Julian Roberts & Mike Hough (eds.), *Changing Attitudes to Punishment: Public Opinion, Crime and Justice,* London, Routledge, 2002; Julian Roberts & Mike Hough, *Understanding Public Attitudes to Criminal Justice,* Maidenhead, Open University Press, 2005.

139 Barry Goldson, 'Taking liberties: policy and the punitive turn', in Harry Hendrick (ed.), *Child Welfare and Social Policy,* Bristol, Policy Press, 2005, p. 259.

and emotional development leads to a general openness to various societal influences and creates vulnerabilities that differ from those experienced during adulthood. Families and communities thus have a crucial responsibility in accompanying children through this process and child justice systems should refrain from criminalisation.

a. Low Minimum Age of Criminal Responsibility

Age limits within criminal justice systems determine criminal responsibility, set minimum ages for detention, define access to certain services, but also disciplinary sanctions children may face.[140] Almost all countries have set a minimum age of criminal responsibility (MACR), indicating the lowest age at which children can be charged with a criminal offence and processed within the criminal justice system.[141] In this regard, States maintain a wide range of minimum ages.[142]

The Global Study questionnaire has asked specifically for information on the MACR. Replies received from the questionnaire have been complemented by official sources, including via UN agencies. As a result, data show that while some countries still do not have a MACR, the highest is legally set at 18 years. Although some countries set *de jure* the MACR at 18 years of age, children below that age can be subjected to various protective and penal measures, and can *de facto* be deprived of liberty.[143] Both the worldwide **average of 11.3 years** and the **median of 12 years** fall far below the **minimum of 14 years** recommended by the Committee on the Rights of the Child in General Comment 24.[144]

Most commonly, a single lower limit is set at which point a child may be charged and prosecuted for any criminal offence. However, at least 39 States set different age limits for different offences, usually allowing children to be held criminally responsible for more

140 Don Cipriani, *Children's rights and the minimum age of criminal responsibility: A global perspective*, Ashgate, 2009.

141 For a web-based overview of minimum ages, see the CRIN project at https://archive.crin.org/en/home/ages.html (accessed 9 June 2019); as far as European Union Member States are concerned, see the overview and analysis in Fundamental Right Agency of the EU, *Children's rights and justice – Minimum age requirements in the EU*, Vienna 2018.

142 The minimum age of criminal responsibility across the 47 Member States of the Council of Europe 'extends from 10 years (in Switzerland and in three of the UK jurisdictions – England and Wales and Northern Ireland), to 18 years (in Belgium). The minimum age of criminal responsibility stands at 14 years in most of the Member States, but 10 countries 'responsibilise' children below the age of 14 years and 11 jurisdictions refrain from imposing such responsibility until children reach the age of 15 years or beyond' (Barry Goldson, 'Reading the Present and Mapping the Future(s) of Juvenile Justice in Europe: Complexities and Challenges', Barry Goldson, (2019), *op. cit.*, pp. 223-224).

143 See for example legislation of Latin American States: CRIN, *Minimum Ages of Criminal Responsibility in the Americas,* Available at https://archive.crin.org/en/home/ages/Americas.html (accessed 22 September 2019). Moreover, the Infographic entitled 'Minimum Ages of Criminal Responsibility Worldwide' depicts the *de facto* MACR.

144 Cf. CRC/C/GC/24, *op. cit.*, para. 22.

serious offences at a lower age.[145] Other definitions allow a degree of discretion with regard to the legitimacy of a particular child to be prosecuted for a particular offence.[146] A small number of States unambiguously set no MACR[147] while others define the limit in a way that fundamentally undermines the function of setting an age.[148] The MACR also has a connection to the age at which children can be subject to deprivation of liberty,[149] but the relationship is not absolute.[150] The final key age in the criminal justice system is the age at which children may be treated as adults. All children under 18 are entitled to the protections of a specialised child justice system.[151] At least 22 countries allow children to be tried as adults under certain circumstances,[152] whether generally for all children over a particular age or as an exception for particularly serious offences.[153] Legal and policy safeguards should be in place to prevent inaction by law enforcement against children until they reach the age of majority for the purpose of being able to apply adult sanctions.

145 CRIN, *Inhuman Sentencing: A global report on life imprisonment of children,* 2016, p. 20, Available at https://archive.crin.org/sites/default/files/life_imprisonment_children_global_0.pdf (accessed 4 November 2019). For a full breakdown of mini-mum ages and legislation by country, see CRIN, Minimum ages of criminal responsibility around the world, n.d. Available at https://archive.crin.org/en/home/ages.html (accessed 4 November 2019).

146 Countries within the Commonwealth, and those particularly influenced by the English law doctrine of *doli incapax,* commonly set a lower age below which no child may be prosecuted. However, they set an age range beyond that in which a child may be prosecuted if the court considers that they have the necessary capacity, see, for instance, on the situation in Sri Lanka (MACR at eight years, with an age range up to 12 years), Elisabeth Bischofreiter, *Children Deprived of their Liberty in Sri Lanka,* Master thesis, University of Vienna, 2017, p. 18.

147 Most notably, several jurisdictions within the United States set no age below which a child may be prosecuted.

148 Poland formally set its MACR at 15 years old, but courts now have the power to impose measures on children of any age in response to evidence of the 'demoralisation of a child'. Since evidence of demoralisation includes criminal activity, the distinction created by the minimum age of criminal responsibility is not clear (Convention on the Rights of the Child, *Second periodic report of Poland to the CRC-Committee,* CRC/C/70/Add.12, 2002; Barbara Stando-Kaweka, 'The Juvenile Justice System in Poland', presented at the *Conference of the European Society of Criminology,* Amsterdam, 25-28 August 2004; and Don Cipriani, *Children's Rights and the Minimum Age of Criminal Responsibility: A Global Perspective,* Ashgate, 2009, p. 212.

149 See 'Havana Rules', Rule 11(a), requiring determination by law of a minimum age for deprivation of liberty of children.

150 Switzerland, for example, sets its minimum age of criminal responsibility at 10, but does not allow sentences of detention for children younger than 15 (cf. *Loi fédérale régissant la condition pénale des mineurs,* Article 25). For a wider discussion of this phenomenon see: Barry Goldson, 'Reading the Present and Mapping the Future(s) of Juvenile Justice in Europe: Complexities and Challenges', Barry Goldson (2019), *op. cit.*

151 Cf. Article 40(3) CRC; see also: CRC/C/GC/24, *op. cit.*, para. 34.

152 De la Vega *et al.*, *Cruel and Unusual: US sentencing practices in a global context,* University of San Francisco Law School, 2012, p. 55.

153 See, for example India, Juvenile Justice (Care and Protection of Children) Act 2015, Sections 15 and 19(1). Children over the age of 16 may be tried and sentenced as adults for 'heinous offences'; see also, particularly about this trend in Europe, Frieder Dünkel, 'Juvenile Justice and Human Rights: European Perspectives', Helmut Kury & Evelyn Shea (2016), *op. cit.*, pp. 710-712.

Minimum Ages of Criminal Responsibility Worldwide

AGE

0

Cuba
F.S. Micronesia
Mauritius
United States

7

Bahrain
Brunei Darussalam
Egypt
Grenada
India
Kuwait
Lebanon
Liberia
Libya
Malawi
Mauritania
Myanmar
Namibia
Nigeria
Qatar
Seychelles
Singapore
Sudan
Tanzania
Tonga
Trinidad and Tobago
United Arab Emirates
Yemen
Zimbabwe

8

Antigua and Barbuda
Botswana
Indonesia
Iran
Kenya
Saint Vincent and the Grenadines
Solomon Islands
Zambia

9

Bangladesh
Belize
Ethiopia
Iraq
Oman

10

Australia
Bahamas
Bhutan
Cameroon
Côte d'Ivoire
Fiji
Guinea
Guyana
Ireland
Kiribati
Lesotho
Malaysia
Marshall Islands
Nauru
Nepal
New Zealand
Pakistan
Palau
Papua New Guinea
Saint Kitts and Nevis
Samoa
South Africa
Suriname
Switzerland
Syria
Thailand
Tuvalu
United Kingdom*
Vanuatu

11

Barbados
Japan

12

Afghanistan
Andorra
Belgium
Bolivia
Brazil
Canada
Costa Rica
Dominica
Ecuador
El Salvador
Eritrea
Eswatini
Gambia
Ghana
Honduras
Hungary
Israel
Jamaica
Jordan
Mexico
Morocco
Netherlands
Panama
Portugal
Republic of Korea
Saint Lucia
San Marino
Saudi Arabia
Sri Lanka
Turkey
Uganda
Venezuela

13

Algeria
Benin
Burkina Faso
Chad
Comoros
Congo
Djibouti
Dominican Republic
France
Gabon
Greece
Guatemala
Haiti
Madagascar
Mali
Monaco
Nicaragua
Niger
Senegal
Tunisia
Uruguay
Uzbekistan

14

Albania
Armenia
Austria
Azerbaijan
Belarus
Bosnia and Herzegovina
Bulgaria
Cambodia
Central African Republic
Chile
China
Colombia
Croatia
Cyprus
Democratic People's Republic of North Korea
Democratic Republic of the Congo
Denmark
Estonia
Georgia
Germany
Italy
Kazakhstan
Kyrgyzstan
Latvia
Liechtenstein
Lithuania
Malta
Moldova
Mongolia
Montenegro
North Macedonia
Paraguay
Peru
Romania
Russian Federation
Rwanda
Serbia
Sierra Leone
Slovakia
Slovenia
Somalia
South Sudan
Spain
Tajikistan
Togo
Turkmenistan
Ukraine
Vietnam

15

Burundi
Czech Republic
Finland
Iceland
Lao People's Democratic Republic
Maldives
Norway
Philippines
Poland
Sweden

16

Angola
Argentina
Cabo Verde
Equatorial Guinea
Guinea-Bissau
Luxembourg
Mozambique
São Tomé and Príncipe
Timor-Leste

THE MINIMUM AGE OF CRIMINAL RESPONSIBILITY AGE SHOULD BE AT LEAST 14 YEARS (CRC COMMITTEE, GENERAL COMMENT NO. 24).

*Scotland (12)

Source: CRIN - Child Rights International Network; Responses to the Global Study Questionnaire

It is worrying to note that some countries have already lowered or are considering reform to lower the MACR.[154] While age limits may be clear in law, in the absence of universal birth registration or, in the case of undocumented child migrants, the assessment of whether a child falls above or below that limit may undermine the protection guaranteed to children.[155] The inability to **determine the age** of a child may result in children being tried as adults or facing adult sentences and may even lead to undermining the categorical prohibition on the death penalty for children.[156] Lack of birth registration and the consequences within the justice system are also most likely to impact children who are already marginalised, whether as a result of poor accessibility in rural areas and a low socio-economic or immigration status. In cases in which the age of a child cannot be established, the CRC-Committee recommends a comprehensive assessment of the child's development conducted by skilled paediatricians or other professionals. These assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner, and guarantees for independent legal review or appeal should be in place. States should refrain from using medical methods based on, *inter alia*, bone and dental exam analysis, which may be inaccurate, with wide margins of error and which can be traumatic and lead to unnecessary legal processes. In the case of inconclusive evidence after this process, the subject of an age assessment should be presumed to be a child.[157]

b. Criminalisation instead of Protection

In several countries, children are commonly challenged by State authorities for truancy, running away from home, underage drinking, curfew violations, 'disobedience' and 'unruly' or 'disruptive' behaviours.[158] These **'status offences'** criminalise conduct of young people

154 Proposals to lower the age for adult jurisdiction and punishment have for example emerged in the Philippines in recent years. See for example: UNICEF, 'Lowering the age of criminal responsibility: UNICEF', Press release, 18 January 2019, Available at https://www.unicef.org/philippines/press-releases/lowering-age-criminal-responsibility-against-child-rights-unicef (accessed 2 September 2019), while India enacted legislation introducing adult jurisdiction for 'heinous offences' committed by children from the age of 16 in 2015 (Cf. *Juvenile Justice Care and Protection of Children Act 2015,* Sections 15 & 19(1)).

155 United Nations High Commissioner for Human Rights, *Birth registration and the right of everyone to recognition everywhere as a person before the law,* A/HRC/27/22, 17 June 2014, paras. 27-28.

156 Cf. UN Human Rights Committee, *General comment No. 36 (2018) on article 6,* para. 52: 'If there is no reliable and conclusive proof that the person was not below the age of 18 at the time in which the crime was committed, he or she will have the right to the benefit of the doubt and the death penalty cannot be imposed'. CRC-Committee, *Concluding Observations on the fourth periodic report of Yemen,* CRC/C/YEM/CO/4, 25 February 2014; Concluding observations on the fifth periodic report of Pakistan, CRC/C/PAK/CO/5, 11 July 2016, paras. 33-34 & 24-25.

157 Cf. CRC/C/GC/24, *op. cit.*, para. 45; CRC-Committee, *General Comment No. 23*, para. 4.

158 Michael Garcia Bochenek, 'The Global Overuse of Detention of Children', Human Rights Watch, 2016; Marc Levin & Derek Cohen, *Kids Doing Time for What's Not a Crime: The Over-Incarceration of Status Offenders,* Texas Public Policy Foundation, March 2014, Available at http://www.modelsforchange.net/publications/521 (accessed 10 June 2019); Child Rights International Network, *Discrimination and disenfranchisement: A Global Report on Status Offences,* 3rd ed., 2016, pp. 25-27.

that otherwise would not be punished in the case of adults; they can be more effectively and comprehensively addressed through child protection mechanisms.[159] Children in contact with the justice system come disproportionately from the poorest and most marginalised groups of society. Belonging to a minority group and/or a marginalised community increases the risk of being criminalised.[160] As addressed at the beginning of this chapter, the increase in the arrest and detention of children is best explained by reference to the decisions of policy-makers rather than by an actual increase in the volume and/or gravity of offending.

Children living or working on the street are among the most vulnerable. In some countries where they are perceived as a threat, such children are specifically targeted, victimised by the police and exposed to the risk of detention.[161] Research conducted specifically for the purpose of the Global Study has highlighted the stigmatisation of children in street situations both by communities and police. They are vulnerable to abuse in the street and more likely to come into contact with the justice system because of the discrimination based on their street status.[162] As a common phenomenon, street-connected children are often subjected to extra-judicial punishment, arrest and detention for the same street-status and interventions based on the assumption of guilt. They are often treated as criminals by law enforcement officials and addressed with dehumanising and stereotyped language. They are not only treated as a threat to public order, but their survival strategies are often criminalised: use of public spaces for sleeping and/or for playing, the search for food and working on the streets.[163] Other reasons for deprivation of liberty can be routine round-ups, removal from the streets for construction or cleaning purposes, to prepare the

159 In China, for example, 'status offences' are a 'police matter [...] usually defined as "public security administration law violations"'; Weijian Gao, 'The Development and Prospect of Juvenile Justice in the People's Republic of China', Franklin E. Zimring, Maximo Langer & David Tanenhaus (eds.), *Juvenile Justice in Global Perspective,* New York, New York University Press, 2015, p. 131.

160 See: Chris Cunneen, Barry Goldson & Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia', *Current Issues in Criminal Justice,* Vol. 28(2), 2016, pp. 173-189; Chris Cunneen *et al.* (2018), *op. cit.*, pp. 405-430;

161 Cf. A/HRC/21/25, *op. cit.*, p.15; The African Child Policy Forum & Defence for Children, *Spotlighting the Invisible: Justice for children in Africa,* 2018; Cf. CRIN (2016), *op. cit.*, pp. 6-14. For discussion of the treatment of 'street children' in Egypt see, Nisrine Abiad & Zia Mansoor Farkhanda, *Criminal law and the rights of the child in Muslim states: A comparative and analytical perspective,* London, British Institute of International Law and Comparative Law, 2010.

162 The CRC-Committee refers to examples of direct discrimination, such as 'disproportionate policy approaches to "tackle homelessness" that apply repressive efforts to prevent begging, loitering, vagrancy, running away or survival behaviours, for example, the criminalization of status offences, street sweeps or "round-ups", and targeted violence, harassment and extortion by police', CRC-Committee, *General Comment 21 (2017) on children in street situations,* para. 26.

163 CRC-Committee, *General Comment 21 (2017),* para. 32: 'States have an obligation to respect the dignity of children in street situations and their right to life, survival and development by refraining from State-led violence and by decriminalizing survival behaviours and status offences.'

city for celebrities' arrivals and for major sports events,[164] or simply driven by suspicion.[165] Street children are at risk of being exploited for prostitution as a means of survival. In some countries they are arrested and detained for such activities.[166] In some cases, girls who have not yet reached the minimum age of sexual consent, are charged and put in detention, despite being themselves victims of sexual exploitation.[167]

In certain countries, children can be **charged for consensual sexual relationships**, with the absence of close-in-age exemption resulting in an over-criminalisation of sexual behaviour/experimentation in adolescents.[168] This criminalisation results in a crucial paradox typical of child offending and justice: the same young person who is deemed not fully mature when engaging in a consensual teenage sexual relationship is nevertheless considered fully responsible to be charged for an offence.[169] Depending on applicable age limits, this can result in cases, where a boy below the age of 18, who had consensual sexual intercourse with a girl close to or the same age as him, is charged under criminal law, while the girl is treated as a victim.[170] In other circumstances, girls are charged and detained due to so called 'improper contact' with a man, often referred to as seclusion or mingling.[171]

164 See, for instance, Amnesty International, *Violence has no place in these games! Risk of human rights violations at the Rio 2016 Olympic Games,* 2016.

165 Consortium for Street Children, StreetInvest *et al.*, *Submission to the UN Global Study on Children Deprived of Liberty,* September 2018, p. 6; In the Philippines, despite vagrancy being decriminalised in 2012, a directive issued in 2018 – the 'Oplan Tambay' – claims that people, including children, found loitering are arrested even if not committing any crime. Consequently, children violating curfew ordinances have been the largest group of arrested children. In the city of Manila the largest number of children have been arbitrarily removed from public spaces. See Statement against arbitrary arrest of minors under 'Oplan Tambay'; Martin Perry, 'Thousands of Philippine poor nabbed in Duterte's latest war', *Reuters*, 24 July 2018, Available at https://www.reuters.com/article/us-philippines-crime/thousands-of-philippine-poor-nabbed-in-dutertes-latest-war-on-loitering-idUSKBN1KE0MT (accessed 4 August 2019).

166 Geert Cappelaere, *Children deprived of liberty: rights and realities,* Éditions Jeunesse et droit, May 2005, p. 37; CRIN, *Discrimination and disenfranchisement* (2016), *op. cit.,* p. 9; CRC, *Concluding observations on the second periodic report of Bangladesh,* CRC/C/Add.221, October 2003, para. 7; In the US 'anti-prostitution laws', have led to around 1,000 children and adolescents arrested every day in 2015, 64% of whom being African Americans , even when they are forced into prostitution and could be considered victims of human trafficking for the purpose of sexual exploitation. See Inter-American Commission on Human Rights, *Violence, Children and Organized Crime,* 11 November 2005, p. 100, Available at http://www.oas.org/en/iachr/reports/pdfs/violencechildren2016.pdf (accessed 5 August 2019).

167 Ibid.; Erika Eichelberger, 'Why are police still arresting children for "prostitution"', *Splinter News,* 22 June 2016, https://splinternews.com/why-are-police-still-arresting-children-for-prostituti-1793857701 (accessed 4 August 2019).

168 Kate Warner, 'Setting the Boundaries of Child Sexual Assault: Consent and Mistake as to Age Defences', *Melbourne University Law Review 1010,* Vol. 36(3), 2013; Human Rights Watch, *'Raised on the Registry': The Irreparable Harm of Placing Children on Sex Offender Registries in the US,* May 2013. E.g. A 17-year-old boy was deprived of his liberty for having consensual sex with his 15-year-old girlfriend; Jyoti Belur & Brijesh Bahadur Singh, 'Child sexual abuse and the law in India: a commentary', *Crime Science,* Springer, 2015. Legal reform for decriminalisation following a South African Constitutional Court case, *Teddy Bear Clinic for Abused Children and another v Minister of Justice and Constitutional Development,* ZACC 35, 2013; and Godfrey Dalitso Kangaude & Ann Skelton, '(De)Criminalizing Adolescent Sex: A Rights-Based Assessment of Age of Consent Laws in Eastern and Southern Africa', *Sage Journals,* Vol. 8(4), 2018.

169 Cf. Don Cipriani (2009), *op. cit.*; Barry Goldson, 'Unsafe, Unjust and Harmful to Wider Society': Grounds for Raising the Minimum Age of Criminal Responsibility in England and Wales', *Youth Justice,* Vol. 13(2), 2013, pp. 111-130.

170 Silvia Randazzo, *Human Rights and deprivation of liberty in Kenya,* 2016, Available at https://www.oijj.org/sites/default/files/human_rights_and_deprivation_of_liberty_in_kenya-report.pdf (accessed 2019).

171 Human Rights Watch, *Adults Before Their Time Children in Saudi Arabia's Criminal Justice System,* March 2008, pp. 33-34 (Human Rights Watch interview with Dr. Zuhair Fahed al-Harthi, former prosecutor and current Human Rights Commission board member, and Dr. Eisa AbdulAzize al-Shamekh, Human Rights Commission board member, Riyadh, 9 March 2008).

Girls are also exposed to the risk of being charged with an offence and detained when seeking or having **abortions** - even where the pregnancy was a result of rape. In some countries, including **Nicaragua**,[172] **El Salvador**,[173] **Philippines**[174] and **Malta**[175] seeking or having an abortion is criminalised with no exceptions, potentially leading to the deprivation of liberty of girls. In others (including **Brazil**,[176] **Chile**,[177] **Bolivia**,[178] **Burkina Faso**[179] and **Indonesia**[180]), although abortion is not criminalised when there is a danger to a woman's physical or mental health or when the pregnancy is as a result of rape, girls can still be deprived of their liberty if they seek or have an abortion and it does not fall under these exceptions or within the specified legal timeframe.

The **criminalisation of homosexuality** persists in 70 countries worldwide - some via legislation and others on the basis of Sharia law.[181] These laws are discriminatory in themselves and further exacerbate the discrimination experienced by this minority group of children, often leading to homelessness and life in the streets, harassment by the police, and sexual exploitation activating a vicious circle that puts them at higher risk of entering into contact with the criminal justice system and ending up in detention.

Other behaviours related to cultures and traditions are also criminalised in some parts of the world – a practice that jeopardises the wellbeing of children and puts them at a high risk of detention. In some countries, **'witchcraft'** is recognised as a crime and vulnerable people, including children, are the most exposed to these kinds of allegations.[182] The

172 Penal Code, *Law No. 641 of 16 November 2007,* Chapter II, 2007, Articles 143-145.

173 Penal Code, *Legislative Decree 1030 of 26 April 1997,* Chapter II, 1997, Articles 133-137.

174 Revised Penal Code of the Philippines, *Act. No. 3815 of 8 December 1930,* Articles 256-259.

175 *Criminal Code of Malta,* Chapter 9 of the Laws of Malta, Articles 241-244A.

176 Penal Code, *Decree-Law Number 2.848,* Special Part, Title I, Chapter I, 1940, Articles 124-128.

177 Penal Code, *Second Book, Title VII, 1874,* Articles 342-345 and Law 21030 Regulating the Voluntary Interruption of Pregnancy on Three Grounds, Article 1.

178 Penal Code, *Title VIII, Chapter II, 1972,* Articles 263–269.

179 Penal Code, *Law No. 043/96/ADP,* Chapter II, Section 3, 13 November 1996, Articles 383-390 and *Law No. 049-2005/Year Concerning Reproductive Health,* Jo No. 06, Chapter III, 9 February 2006, Article 21.

180 Cf. *36/2009 Health Law,* Article 75 (1), (2), Article 76 (a).

181 Lucas Ramon Mendos, 'State-Sponsored Homophobia 2019', International Lesbian, Gay, Bisexual, Trans and Intersex Association, Geneva, March 2019; Amnesty International, *Making Love a Crime: Criminalisation of Same-Sex Conduct in Sub-Saharan Africa,* 2013, Available at https://www.amnesty.org/download/Documents/8000/afr010012013en.pdf (accessed 9 June 2019);

182 For instance, Mauritania in its periodic report submitted to the CRC-Committee, reported 15 criminal cases in which a child was accused for 'witchcraft and charlatanism'. See: CRC-Committee, *Report submitted by Mauritania in 2017,* CRC/C/MRT/3-5, para. 22; African Child Policy Forum & Defence for Children International, *Spotlighting the Invisible: Justice for children in Africa,* 2018, Available at https://defenceforchildren.org/wp-content/uploads/2018/05/Spotlighting-the-Invisible-Justice-for-children-in-Africa-Final.pdf, (accessed 9 June 2019); Children accused of witchcraft or spirit-possession is a phenomenon exploited by revivalist, charismatic or Pentecostal churches on the African continent. See Aleksandra Cimpric, *Children Accused of Witchcraft. An Anthropological study of contemporary practices in Africa,* UNICEF, 2010, p. 1-3, Available at https://www.unicef.org/wcaro/wcaro_children-accused-of-witchcraft-in-Africa.pdf (accessed 9 Junde 2019).

children concerned are usually already in situations of vulnerability, including children with disabilities, children whose births were considered unusual (e.g. twins), children with albinism, orphans, children whose families suffered economic or other crises after their birth, children living in foster homes, children who are gifted, left-handed, or exhibiting challenging behaviour.[183] It is challenging to acquire reliable data on the scope of the problem, as cases of witchcraft are typically tried unofficially in family courts. Moreover, accusations often lead to detention and questioning by the police, while inquiries can last for months or years.[184]

Many children in detention worldwide are charged or sentenced for **offences related to drug use**. Children may be deprived of their liberty ostensibly for the sake of their own 'treatment' or care, for example, when they are assessed to need support for drug or alcohol misuse and community-based programmes are lacking.[185] On the other hand, research shows that 'adolescence' *per se* seems to be a profiling factor, whereby such children are more vulnerable than adults to arrest for certain behaviour, due to laws that allow police to arrest children either for being out in public at certain times or when they are using legal drugs, or to be harsher with highly targeted minority groups as a result of security raids.[186] Even in States where drugs have been liberalised, the consequences for under-18s may remain severe, or at least under-researched. Drug trade and trafficking are also a significant source of violence, especially in urban areas. Researchers and policy makers increasingly recognise that violence associated with this illicit market is largely driven by the law enforcement activities intended to disrupt it.[187] The adolescent population is often targeted by police raids which form part of public safety programmes, often in the context of a country's drug policies. The general perception is in fact that young people are more

183 Council on Violence against Children, *Violating Children's Rights: Harmful practices based on tradition, culture, religion or superstition,* 2012, p. 39.

184 Cf. Cimpric, *op. cit.*, p. 39.

185 Human Rights Watch, *'Torture in the Name of Treatment': Human Rights Abuses in Vietnam, China, Cambodia, and Lao PDR,* July 2012.

186 About 40% of stop-and-searches on under-18s in London, UK, are justified on suspicion of drugs offences, even though many police decisions to detain fail to meet the 'reasonable suspicion' threshold. See S. Flacks, 'The Stop and Search of Minors: A Vital Police Tool?', *Criminology and Criminal Justice,* 2017; In Paraguay consumption of crack is not considered a crime, but it is responsible for a high number of teenagers held in the child justice system (85% in 2014). See: Defence for Children International & Regional Juvenile Justice Observatory, *Monitoring Report on Juvenile Justice Systems in Latin America,* 2014, p. 1 & 18.

187 UN Special Representative of the Secretary-General on Violence Against Children, *Protecting children affected by armed violence in the community,* 2016, p.12.

susceptible to violence and crime, and thus more likely to be subjected to police raid arrest, prosecution and imprisonment.[188]

Generally, policies targeting organised crime strongly affect **children recruited by criminal gangs** and therefore perceived by the police and the community as a threat.[189] For instance, children may be recruited by organised crime groups involved in drug trafficking, considered one of the 'worst forms of child labour',[190] and typically used for 'low level' functions. These include monitoring, transport, sale, theft (where exposure to violence is particularly high due to clashes over territory), the protection of merchandise, or punishment if they fail.[191] When children are coerced to join organised crime groups[192] and forced into exploitation, including by committing criminal offences (e.g. petty crimes, begging, or prostitution), they should be considered as **victims of the crime of trafficking in human beings**.[193] In such situations, the 'principle of non-punishment' of persons for crimes committed while being compelled to do so due to the trafficking context[194] may pose particular challenges to identify those children as actual victims of a crime, not as perpetrators.[195]

188 Defence for Children International & Regional Juvenile Justice Observatory, *Monitoring Report on Juvenile Justice Systems in Latin America,* 2014, p. 16 & 18; A particularly significant example comes from the Philippines, where the 'war on drugs' has claimed an estimated 12,000 lives of primarily poor urban dwellers, including children. Reportedly 56 children (dismissed as 'collateral damage' by the Government) have been killed by the police since the start of the 'drug war' – mostly while in company of an adult apparent target of the shooting. See: Human Rights Watch, *World Report 2018,* pp. 428-432; Karen McVeigh, 'Police have killed dozens of children in the Philippines war on drugs, Amnesty says', *The Guardian,* 4 December 2017, Available at https://www.theguardian.com/global-development/2017/dec/04/police-have-killed-dozens-of-children-in-philippines-war-on-drugs-amnesty-says (accessed 9 June 2019). In August 2018, the Government in the Philippines enforced mandatory drug testing in high schools and colleges - thereby allowing the police to extend its power and anti-drug operations to schools See: Human Rights Watch, *World Report 2018,* pp. 428-432; see also: Phelim Kine, 'Philippines School Kids may face mandatory drug tests', *Human Rights Watch,* 22 June 2018, Available at https://www.hrw.org/news/2018/06/22/philippine-school-kids-may-face-mandatory-drug-tests (accessed 9 June 2019).

189 On 'gangsterism' and community violence, lack of social and child protection in relation to detention, see: Reina-Marie Loader, *Children in Conflict with the Law in South Africa: Investigating Ubuntu as a Viable Pathway towards Systemic Change,* Master Thesis, University of Vienna, 2018. In relation to girls, global estimates suggest there are between 66,000 and 132,000 female gang members worldwide. See Small Arms Survey, *The Other Half: Girls in Gangs,* 2010, Available at http://www.smallarmssurvey.org/?id=286 (accessed 10 June 2019).

190 International Labour Organisation, *ILO Worst Forms of Child Labour Convention,* No. 182, 17 June 1999, Article 3(c): 'the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties'.

191 UN Special Representative of the Secretary-General on Violence Against Children, *Protecting children affected by armed violence in the community,* 2016, p. 19.

192 Ibid.

193 Art 3 of the *Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children* ('Palermo Protocol'), 2000, supplementing the United Nations Convention against Transnational Organized Crime; cf. UNODC, *Global Report on Trafficking in Persons,* 2018; see also Article 2 of the *EU Directive preventing and combating trafficking in human beings and protecting its victims,* 2011, which explicitly refers to 'the exploitation of criminal activities' as one of the exploitative purposes of human trafficking. In relation to child victims of trafficking, cf. Helmut Sax, 'Child trafficking – a call for rights-based integrated approaches', Piotrowicz/Rijken/Uhl (eds.), *Routledge Handbook of Human Trafficking,* 2017, pp. 251-261.

194 Art 26 of the *CoE Convention on Action against Trafficking in Human Beings,* 2005; Art 8 of the *EU anti-trafficking Directive*, 2011.

195 For an assessment of challenges to prevent child trafficking and to identify and protect child victims in the European region, cf. the reports by the Council of Europe's anti-trafficking expert body (GRETA): CoE/GRETA, *6th General Report on GRETA's activities,* Strasbourg, 2017, Available at https://www.coe.int/en/web/anti-human-trafficking/general-reports (accessed 9 June 2019).

Children living in areas known for gang activities may become **stigmatised** because of their environment and perceived as criminals, with the consequent higher risk of being arrested and detained, as well as limited access to rehabilitation and reintegration programmes. They can sometimes be criminalised for their outer appearance by laws designed to curb gang activity, particularly in **Latin America**, where adolescents are arrested or detained on unfounded allegations based on the way they dress, or the fact that they have a tattoo or another marking.[196] This has been the case in **El Salvador**[197] and **Honduras**,[198] for instance. The proliferation and availability of small arms and guns is another crucial risk factor across the globe, fuelling illicit trades, facilitating the recruitment of young people into organised crime groups, and more generally putting children and adolescents in risk situations such as peer fights and quarrels.[199]

c. Criminalisation of Minorities

Minorities are disproportionately affected by patterns of criminalisation described above. Such phenomena may appear at all stages of the criminal justice process – from arrest to bail determinations to sentencing and parole decisions.[200] This can be attributed to various forms of discrimination, ranging from treatment by individual police officers to broader social exclusion factors, such as poverty, socio-economic marginalisation, domestic violence, gang violence and barriers to education, among others.[201]

196 CRIN, *Discrimination and disenfranchisement: A Global Report on Status Offences,* 2009, p. 37, Available at https://archive.crin.org/sites/default/files/crin_status_offences_global_report_0.pdf (accessed 10 June 2019).

197 CRC-Committee, *UN Committee on the Rights of the Child: Concluding observations: El Salvador,* CRC/C/15/Add.232, 30 June 2004, paras. 67 & 68.

198 Honduran Penal Code, Article 332. Amended January 2005.

199 Research conducted in the US also shows that children who are repeatedly exposed to or victims/witnesses of gun violence are more likely to experience negative psychological effects, including anger, desensitisation to violence, post-traumatic stress, lower educational and career aspirations, risk sexual behaviours, substance abuse and an increase in aggressive behaviour. See: UN Special Representative of the Secretary-General on Violence Against Children, *Protecting children affected by armed violence in the community,* 2016, p.15

200 Barry Goldson & Ruth Chigwada-Bailey, '(What) Justice for Black Children and Young People?', Barry Goldson (ed.), *Youth Justice: Contemporary Policy and Practice,* Aldershot, Ashgate, 1999, pp. 51-74; Annette Lareau, *Unequal childhoods: class, race, and family life,* University of California Press, 2011; Colin Webster, 'Race, Youth Crime and Youth Justice', Barry Goldson & John Muncie (2015), *op. cit.*; Chris Cunneen, Barry Goldson & Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia', *Current Issues in Criminal Justice,* Vol. 28(2), 2016, pp. 173-189; Chris Cunneen *et al.* (2018), *op. cit.*, pp. 405-430; Colin Webster, 'Race, Ethnicity, Social Class and Juvenile Justice in Europe', Barry Goldson (2019), *op. cit.*

201 Cf. Bochenek (2016), *op. cit.*, p. 5; Cf. A/HRC/21/25, *op. cit.*, p. 18.

Across the world children from racial and ethnic minorities face discrimination within the justice system and are overrepresented in detention. For instance, in the **US**[202] it has been reported that in 2011, 71% of all child detainees were children of colour, despite accounting for only 43% of the total US youth population.[203] In 2015, minority youth accounted for 69% of children in residential placement in the USA, while black people made up the largest share of children in placements (42% black, 31%white, 22% Hispanic, 5% youth of two or more races). The current trend of a decreasing use of youth prisons and the consequent reduction of the incarceration rate of children has not reduced racial disparities.[204] In the cases of **Canada** and **Australia**, historical patterns of discrimination against minorities – particularly represented by indigenous people – have been documented, impacting also on their right to personal liberty. In Canada, Black Canadians and indigenous young people are chronically over-represented at all levels of State intervention (child protection services, police, child justice, detention).[205] Despite a general decline in crime in the last decades, the prison population has also seen an increase in indigenous people, migrants and other minorities, including children and youth. This is regarded as a symptom of marginalisation and the result of a combination of socio-economic and individual vulnerabilities. A general socio-economic dysfunctional condition

202 African Americans and Latinos are disproportionately targeted by punitive policies. They are the main victims of the so-called 'school-to-prison pipeline': this expression describes a phenomenon where zero tolerance policies in schools were introduced in the US during 1990s; Cf. Christopher Boccanfuso & Megan Kuhfield, *Multiple Responses, Promising Results: Evidence-Based Nonpunitive Alternatives to Zero Tolerance,* Washington, DC, Child Trends, 2011; In 2011-2012, 92,000 students were arrested for in-school offenses and over 70% of these students were African Americans or Latinos; see also: Advancement Project at https://advancementproject.org/resources/breaking-the-school-to-prison-pipeline/ (accessed 4 November 2019); Daniel J. Losen & Amir Whitaker, *The Centre for Civil Rights Remedies,* University of California, Race, Discipline, and Safety at U.S. Public Schools, 2018, Available at https://www.aclu.org/sites/default/files/field_document/final_11-million-days_ucla_aclu.pdf (accessed 4 August 2019); Civil Rights Data Collection, 'Discipline of Students without Disabilities: Expulsion under Zero Tolerance Policies', U.S. Department of Education Office for Civil Rights, 2009, Available at https://ocrdata.ed.gov/Page?t=s&eid=251347&syk=5&pid=440 (accessed 18 July 2019); U.S. Department of Education Office for Civil Rights, *Civil Rights Data Collection Data Snapshot: School Discipline,* Issue Brief No. 1, March 2014, Available at https://ocrdata.ed.gov/Downloads/CRDC-School-Discipline-Snapshot.pdf (accessed 5 August 2019); Children and youths from these minority groups receive harsher treatment than white child offenders when facing identical charges. Compared to their white counterparts, African American children are more likely to be formally charged (and less likely to have their cases dismissed or to be diverted from court). They are more likely to be detained pending trial and are often placed in a residential facility. They are also less likely to receive a probation sentence. See: Richard Mendel, *No Place For Kids: The Case for Reducing Juvenile Incarceration,* The Annie E. Casey Foundation, Baltimore, Maryland, 2011, p. 23; The National Association of Social Workers, in a Social Brief released in 2018, 'The Color of Juvenile Transfer: Policy & Practice Recommendations', states that while black youth represent 14% of the total youth population, they also represent 47.3% of those youths who are transferred to adult courts by child court judges, Available at http://cfyj.org/images/pdf/Social_Justice_Brief_Youth_Transfers.Revised_copy_09-18-2018.pdf (accessed 18 July 2019). See Ibid. based on *Juvenile Justice Statistics: 1985-2015,* Washington DC, Office of Juvenile Justice and Delinquency Prevention, 2018.

203 See Annie E. Casey Foundation, *Juvenile Detention Alternatives Initiative: Progress Report 2014*, p. 19; Texas Public Policy Foundation, *Kids Doing Time for What's Not a Crime: The Over-Incarceration of Status Offenders,* March 2014.

204 See W. Haywood Burns Institute, *Stemming the Rising Tide. Racial & Ethnic Disparities in Youth Incarceration & Strategies for Change,* Oakland, CA, 2016, p. 1. At the same time, minority youths were detained longer than white youths – see: Eileen M. Garry, *Juvenile Justice Statistics. National Report Series Bulletin,* US Department of Justice's Office of Juvenile Justice & Delinquency Prevention, January 2018, p. 12-15.

205 Emerson Douyon, *Ethnocultural Minorities and the Canadian Correctional System,* Correctional Service Canada, 2016, p. 17-18; Akwasi Owusu-Bempah, 'Race, Crime and Criminal Justice in Canada', *The Oxford Handbook of Ethnicity, Crime, and Immigration,* 2014, pp. 5-7; André Normandeau & Emerson Douyon, *Justice et communautés culturelles?,* Méridien Laval, 1995; Camille Messier, *Rapport sur les centres de la protection de la jeunesse,* CDPDJ Montréal, 1980.

fuels harsh reaction of the criminal justice system that works instead on reinforcing the vulnerabilities of indigenous young people, exposing them to a retributive justice system and to detention, consequently depriving them of alternatives.[206] In Australia's Northern Territory, only 25.5% of the population are of indigenous origin and yet 94% of children and young people in prisons were Indigenous in 2015-2016.[207] Despite the vastly disproportionate rate of boys detained in the justice system, there has been an increase of girls in detention since 2006, with an average of four to five girls entering detention every night. All of these girls were indigenous.[208] In general, the over-representation in the justice system of young indigenous people increased over the last years. Between 2012 and 2017, indigenous people were 15 times more likely to end up under supervision than their non-indigenous peers.[209] In **certain States across Europe**, the regulation of urbanisation and poverty is being moved away from social welfare structures to the criminal justice sphere.[210] This shift appears to affect minority ethnic groups (e.g. Roma and immigrant groups) disproportionately and can ultimately lead to deprivation of liberty.

d. Harsh Sentencing

Regardless of whether a distinct child justice system has been established, children continue to be sentenced to harsh penalties in many countries. Most countries establish rules to reduce the maximum sentences that may be applied to children, commonly by requiring reductions of the corresponding adult sentence, such as half the sentence under the Criminal Code, or setting explicit caps on detention sentences for children. In some jurisdictions, however, there are exceptions to these general rules allowing children to receive the same sentences as adults, usually for serious offences.[211] The replies to the

206 Cf. Emerson Douyon (2016) *op. cit.*; Correctional Investigator, *The 40th Annual Report of the Office of the Correctional Investigator,* Ottawa, November 26, 2013.

207 Michael Cain, *Juveniles in Detention: Issues of Over-Representation,* Department of Juvenile Justice, 1995, pp. 8, 12 & 26; see also: Chris Cunneen *et al.* (2016), *op. cit.*, pp. 173-189.

208 Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory (2016), *op. cit.*, p. 49. See the statement of Joe Yick (14 October 2016, tendered 9 December 2016), pp. 48 & 55: out of a total 254 distinct youths admitted into Northern Territory youth detention in 2015-2016, 241 were Aboriginal (male and female).

209 Australian Government, Australian Institute of Health and Welfare, *Youth justice in Australia 2016–17,* 25 May 2018, Available at https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2016-17/contents/table-of-contents (accessed 10 June 2019); Government of South Australia, Department for Communities and Social Inclusion, *Youth Justice Strategic Policy Paper,* August 2015, p. 5; Gartb Luke & Chris Cunneen, *Aboriginal juveniles and the juvenile justice system in New South Wales,* Criminology Research Council,1993.

210 Loïc Wacquant, *Prisons of Poverty,* Minneapolis, University of Minnesota Press, 2009; see also: Barry Goldson & John Muncie, 'Towards a global "child friendly" juvenile justice?', *International Journal of Law, Crime and Justice,* Vol. 40, 2012, pp. 47-64.

211 Nessa Lynch, 'Human Rights for "Hard Cases": Alternatives to Imprisonment for Serious Offending by Children and Youth', Elizabeth Stanley (ed.), *Human Rights andIncarceration,* Palgrave Studies in Prisons and Penology, 2018, pp. 153-179; Nessa Lynch, 'Towards a Principled Legal Response to Children Who Kill', *Youth Justice,* Vol 18(3), 2018, pp. 211-229.

Study questionnaire did not reveal particular trends across regions for upper limits of detention sentences for children. However, other research explains that trends might relate to legal tradition and culture: A large majority of countries that have life imprisonment for children (around two-thirds) are within the Commonwealth and come from the English legal tradition, while countries with a Spanish or Portuguese legal history commonly tend to set explicit limits on maximum sentences and prohibit any kind of 'perpetual imprisonment'. **Most post-Soviet States**, in **Eastern Europe** and **Central Asia**, on the other hand, have coalesced around a 10-15 year maximum fixed term sentence for children.[212] Beyond these trends, the length of sentences largely varies between countries and sometimes within the same country – mainly depending on the child's age and the seriousness of the crime.

In the 110 countries/territories for which data could be obtained and that do not have life imprisonment for children[213], the maximum sentence for children ranges from 3 to 50 years. The average maximum sentence is 13.3 years. The median average maximum in turn lies at 12 years. The Asian region stands out with a range from minimum of 10 years and a maximum 50 years. The average sentence in this specific region therefore falls at 17.9 years, with a median average of 15 years.

Reflecting on the clear prohibition of life imprisonment without the possibility of parole or release in international law, such sentences have been abolished in a majority of countries, although life sentences remain legal in 67 States, specifically in **Africa**, **Asia**, **the Caribbean** and **Oceania**, covering a range of practices (see graphic below).[214] It is not known how many children are currently detained under life sentences globally.

Fixed term sentences that are so long that they preclude the possibility of release are also a form of life sentence imposed on children. This eventuality is a particular risk when a child is sentenced for multiple offences and the sentences are to be served consecutively. The risk of establishing this form of de facto life sentences for children is avoided in jurisdictions that set clear limits on maximum detention sentences that also cover consecutive sentencing of children.

212 CRIN, *Inhuman Sentencing: A global report on life imprisonment of children*, 2016, p. 7. Report and individual country data, Available at https://archive.crin.org/en/library/publications/inhuman-sentencing-life-imprisonment-children-around-world.html.

213 For life imprisonment and death penalty data, see graph below.

214 This includes, for instance, the requirement of a person to serve a minimum period in detention before being eligible for release – subject to conditions and recall to detention if those conditions are breached. The sentence remains in place indefinitely and children may again be detained under this sentence for life without any further conviction.

Death Penalty and Life Imprisonment Sentences for Children

ANTIGUA AND BARBUDA
AUSTRALIA
BAHAMAS
BAHRAIN
BARBADOS
BELIZE
BOTSWANA
BRUNEI DARUSSALAM
BURKINA FASO
CANADA
CHINA
HONG KONG (CHINA)
CUBA
CYPRUS
DOMINICA
ETHIOPIA
FIJI
GABON
GAMBIA
GRENADA
GUYANA
INDIA
IRAN, ISLAMIC REPUBLIC OF
IRELAND
ISRAEL
JAMAICA
JAPAN
KENYA
KIRIBATI
KOREA, DEMOCRATIC PEOPLE'S REPUBLIC
LIBERIA
MALAWI
MALAYSIA
MALDIVES
MARSHALL ISLANDS
MAURITIUS
MICRONESIA
NAMIBIA
NAURU
NEW ZEALAND
NIGERIA
PAKISTAN
PALAU
PAPUA NEW GUINEA
QATAR
SAINT KITTS AND NEVIS
SAINT LUCIA
SAINT VINCENT AND THE GRENADINES
SAMOA
SAUDIA ARABIA
SEYCHELLES
SIERRA LEONE
SINGAPORE
SOLOMON ISLANDS
SOMALIA
SOUTH AFRICA
SOUTH SUDAN
SRI LANKA
SUDAN
SWAZILAND
TANZANIA
TONGA
TRINIDAD AND TOBAGO
TUVALU
UNITED ARAB EMIRATES
UNITED KINGDOM
UNITED STATES
VANUATU
YEMEN
ZAMBIA
ZIMBABWE

Source: CRIN - Child Rights International Network; Responses to the Global Study Questionnaire

Although **capital punishment** is strictly forbidden under international law, according to the data collected it still persists in 12 countries.[215] From 1990 to March 2018, at least 129 people have been executed across nine countries for offences allegedly committed while they were children[216] and four countries are known to have carried out executions of child offenders during the last 10 years.[217] The global scale of children on death row remains difficult to estimate, the problems of age determination and secrecy militate against complete statistics, but estimates indicate that as many as 1,000 people may be on death row for offences allegedly committed as children.[218]

4.3 Lack of a Functional Child Protection System

A root cause for deprivation of liberty of children is the **lack of a holistic approach** where law enforcement, judiciary, local authorities, health, education and social services, child protection agencies and others would be expected to function together to create and maintain a protective and enabling environment for children and ensure support for their families. The **lack of or inefficient coordination and cooperation** between responsible institutions and actors result in duplication of efforts and conflicting goals as well as additional costs. This in turn undermines the effective overall functioning of the child justice process.[219] Moreover, effective screening and assessment, case assignment, case flow management and interagency collaboration are essential to minimise the harm to children in the justice system.[220] The intervention of different professionals could potentially be counterproductive if not properly coordinated and structured. It can notably lead to competing priorities, risks of roles' overlapping, concerns about the boundaries of roles as well as issues with confidentiality and information-sharing. All these difficulties are

215 CRIN, *The Death Penalty: Inhuman sentencing of children,* n.d. Available at https://archive.crin.org/en/home/campaigns/inhuman-sentencing/problem/death-penalty.html (accessed 4 November 2019); the 2016 Report of the UN Secretary-General on the Question of the death penalty, UN Doc. A/HRC/33/20 (12 July 2016), at para. 50, cites even 15 States.

216 Amnesty International, *Executions of Juveniles Since 1990 as of March 2018,* Available at https://www.amnesty.org/download/Documents/ACT5038322016ENGLISH.pdf (accessed 10 June 2019); see also, Barry Goldson & Ursula Kilkelly (2013), *op. cit.*, pp. 345-371.

217 Islamic Republic of Iran, Pakistan, Saudi Arabia, Yemen.

218 International NGO Council on Violence Against Children, *10 Years On: Global progress and delay in ending violence against children - the rhetoric and the reality,* 2016, p. 11.

219 A solution used in several jurisdictions in the US is a specialised child unit for children in different systems, which can include social workers, police and probation officers working together on cases. See: National Center for Juvenile Justice, *When Systems Collide: Improving Court Practices and Programs in Dual Jurisdiction Cases,* 2004; At European level, see: Fundamental Rights Agency of the European Union, *Child-friendly Justice – perspective and experiences of children and professional,* 2017; see also: Save The Children, *A 'Rough Guide' to Child Protection Systems,* 2011.

220 Judge Michael Nash & Shay Bilchik, 'Child Welfare and Juvenile Justice – Two Sides of the Same Coin, Part II.', *Juvenile and Family Justice Today,* Winter 2009, p. 23.

detrimental for the children involved.[221] Lack of cooperation can also result in situations where both the children and the responsible professionals are insufficiently informed throughout the judicial proceedings.[222] This particularly occurs when children find themselves falling under both child protection and justice systems. This is often the case for children who are arrested and detained, but are also in foster care. Research in **England and Wales** notably shows that children living in children's homes are being criminalised at higher rates than other groups of children, because staff are prone to contact the police for minor incidents that would not trigger this response in the family home.[223] Lack of effective cooperation between different services may also prevent children in detention from having access to the relevant legal, psychological and other appropriate assistance, and to effective complaint mechanisms.[224] In the context of an integrated system, the child justice component is in fact also required to go beyond its 'justice' mandate to address other child protection issues to which it is not always best suited.[225]

Without a functioning holistic and integrated child protection system, children more readily end up in pre-trial detention – either in situations where they await pre-adjudication or a court date. They often also find themselves detained when waiting to be placed in another facility or a community-based programme.[226] This, it should be noted, has a significant 'knock-on' effect on family relations, while also straining the child's entire support network.[227] The responsibility for children in conflict with the law is often exclusively left to the criminal and child justice systems – thus functioning as a substitute for effective care and protection systems.[228] As a consequence, the whole system fails to effectively prevent children from entering into the justice system that eventually leads to their deprivation of liberty.

221 Noel Cross *et al.*, 'Still Children First? Developments in Youth Justice in Wales', *Youth Justice,* Vol. 2(3), 2002, pp. 154-155.

222 Fundamental Rights Agency of the European Union, *Child-friendly Justice – perspective and experiences of children and professionals: summary,* 2017, pp. 10-11.

223 The Howard League for Penal Reform, *Criminal Care: children's homes and criminalizing children*, 2016

224 Chris Graveson, 'Making Deprivation of Liberty a Last Resort, Diversion Focussed Legislation, Policies, and Practice', *6th IJJO International Conference,* Brussels, 3-4 December 2014, p. 14.

225 Bruce Abramson, *Juvenile Justice: The 'Unwanted Child' of State Responsibilities. An analysis of the Concluding Observations of the UN Committee on the Rights of the Child in Regard to Juvenile Justice from 1993 to 2000,* International Network on Juvenile Justice/Defence for Children International, Brussels.

226 Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities,* November 2006, p. 2.

227 Cf. Chris Graveson (2014), *op. cit.* p. 15.

228 Contribution to the *UN Global Study on Children Deprived of Liberty* from Ann-Kristin Vervik, Office of the Special Representative of the UN Secretary-General on Violence against Children.

4.4 Over-reliance on Detention and Inadequate Responses to Child Offending

a. Lack of a Specialised Child Justice System

When a child comes in contact with the justice system, there should be a default, standardised response by a specialised child justice system. This system must be child friendly and responsive to the specific needs and vulnerabilities of children.[229] Evidence shows however that the appropriate implementation of such a child-oriented system is still the exception, not the rule. In fact, instead of offering protection and rehabilitation, exposure to the criminal justice system often generates further victimisation of children.[230] This gap between the law and its implementation is confirmed by many responses to the Study questionnaire. In **Libya**, for example, there are no specialised professionals dealing with children, while child courts exist only on paper.[231] The child-friendly justice legislation in **Canada** is however not always followed in practice – especially in remote areas.[232] In **Argentina** and **France** speeded-uptrial procedures have detrimental consequences for children.[233] Shortcomings in the implementation of safeguards are often explained by a lack of resources and in some regions of the world also by armed conflict where UN agencies and NGOs have a vital role in building institutions such as child courts.[234]

The **availability of non-custodial sentences** is another basic requirement of a functioning child justice system. Legislation and policies are, however, often insufficient, especially considering the gap that exists between child justice law and the actual experiences of children. The differential use of diversion and non-custodial measures can produce discriminatory effects, for instance, for minority children who are often perceived as more dangerous and thought to be less susceptible to rehabilitation.[235]

229 Ian M. Kysel, 'Reflections on a new tool for protecting the rights of the child', *Protecting Children Deprived of Liberty from Torture: Reflections on the Special Rapporteur on Torture's 2015 Thematic Report,* 2017, pp. 33-38.

230 Lesley McAra & Susan McVie, 'Transformations in Youth Crime and Justice across Europe: Evidencing the Case for Diversion', Barry Goldson (ed.), *Juvenile Justice in Europe: Past, Present and Future.* London, Routledge, 2019, pp. 74-103; Lesley McAra & Susan McVie, 'Youth Justice? The impact of system contact on patterns of desistance from offending', *European Journal of Criminology,* 2007; Anthony Petrosino, Carolyn Turpin-Petrosino & Sarah Guckenburg, *Formal processing of juveniles: effects on delinquency,* Campbell Systematic Reviews, 2010.

231 *UN Global Study Questionnaire,* Libya (UN Agency Reply).

232 *UN Global Study Questionnaire,* Canada (NGO Reply: DCI).

233 *UN Global Study Questionnaire,* Argentina (NHRI Reply), France (NGO Reply: Grandir Dignement).

234 *UN Global Study Questionnaire,* South Sudan (State Reply).

235 Joshua C. Cochran & Daniel P. Mears, 'Race, Ethnics and Gender divides in Juvenile Court Sanctioning and Rehabilitative Intervention', *Journal of Research in Crime and Delinquency,* Vol. 52(2),2015; Chris Cunneen, Barry Goldson & Sophie Russell, 'Juvenile Justice, Young People and Human Rights in Australia', *Current Issues in Criminal Justice,* Vol. 28(2), 2016, pp. 173-189; Chris Cunneen *et al.* (2018), *op. cit.*, pp. 405-430. James V. Ray & Kristina Childs, 'Juvenile Diversion', Marvin D. Krohn & Jodi Lane (eds.), *The Handbook of Juvenile Delinquency and Juvenile Justice,* 2015, pp. 422-438; Jamie J. Fader *et al.*, *The colour of juvenile justice: Racial disparities in dispositional decisions,* 2014; Michael J. Leiber *et al.*, 'A closer look at the individual and joint effects of gender and race on juvenile justice decision making', *Feminist Criminology,* Vol. 4(4), 2009; Lori Guevara *et al.*, 'Gender and Juvenile Justice decision making: what role does race play?', *Feminist Criminology,* Vol. 1(4), 2006.

The absence of **children's courts** and related services outside of major cities poses a real challenge for ensuring that children accused of an offence are met with institutions capable of accommodating their needs and the requirements of comprehensive child justice laws. In more than a quarter of the world's countries (i.e. 58 countries across the **Americas**, **Asia**, **Africa** and the **MENA region**), the right of children to be heard is not protected in national legislation.[236]

Additionally, despite the crucial role of **legal assistance and legal aid**, functioning State-funded legal aid systems are completely absent from 42 countries worldwide. This means that 220 million children have no access to free legal aid for any type of legal action. The remaining countries have some form of legal aid available, often however for very limited circumstances. Only 28 countries make legal aid available to some extent across all types of cases. When available, legal aid is often limited to the most serious offences, while services are often restricted to only certain regions/major cities. While *pro bono* legal aid is a crucial contribution common in many systems, a range of barriers against its application is prevalent in 40% of countries. This is sometimes caused by cultural resistance against this practice and reluctance to provide free legal services.[237]

Insufficient training of staff on how to work with children and implement policies/laws is often encountered.[238] Policies and practices related to staff recruitment (including multi-disciplinary teams at detention facilities, training, employment and rights-compliant codes of conduct), help translate law into practice. The actors involved that come into contact with children throughout the justice system should come from a broad range of professions. This is crucial also as the greater majority of children in the justice system have significant speech, language and communication needs: most of the services provided by the criminal justice system are speech-based using professional language or jargon. This creates a barrier of communication between justice professionals and children.[239] What is more, the over-representation of indigenous children in some justice systems is not met with a strong presence of staff who are connected to indigenous culture to so more easily build positive relationships with the children in their care.[240]

236 Child Rights International Network, *Rights, remedies and representation: global report on access to justice for children*. 2016, p. 18.

237 Ibid, pp. 29-30; see also Stephanie Rap & Ton Liefaard, 'Right to Information: Towards an Effective Legal Position for Children Deprived of Liberty', *Today's Children are Tomorrow's Parents*, Vol. 45-46, pp. 49-61.

238 See CRC/C/GC/24, *op. cit.*, para. 97.

239 Sally Kedge, 'Communication Assistance', *Children's Court Conference Presentation*, South Pacific Council of Youth and Children's Courts, Wellington, October 2018; Karen Bryan, Jackie Freer & Cheryl Furlong, 'Language and communication difficulties in juvenile offenders', *International Journal of Language & Communication Disorders*, Vol. 42(5), 2007, pp. 505-520.

240 Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory (2016), *op. cit.*; Cf. Douyon, (2016), *op. cit.*

b. Inadequate First Response

In many countries, the police are the first and only agency that responds to children in need of care and are thus required to fill a gap left by inadequate child protection systems. The police are therefore a crucial part within the administration of justice, as they are almost always the first contact a child has with the system. The way in which police respond will therefore often determine the nature and extent of a child's contact with the justice system. However, due to a lack of alternatives, children who have *not* committed an offence are frequently detained in adult prisons, child detention centres and protective custody.[241] In such cases, the system clearly fails to balance the protection of the community with the wellbeing of the child.[242]

In reality, there exists a widespread lack of specialised training for police officers as well as a serious shortage of human and economic resources worldwide. This often results in high levels of corruption.[243] Too often the police (who hold crucial discretionary power), do not have the capacity to choose an appropriate alternative response to detention. In many countries, when this reality is coupled with a punitive approach, the first contact a child has with the justice system is often the most detrimental. Additionally, members of marginalised communities are most affected by police profiling and harassment on the streets. This is a daily reality for many in several States, thus increasing the likelihood of committing an offence in the future.

The blurry distinction between the police and military institutions in some jurisdictions also leads to increased criminalisation of children.[244] Paramilitary policing is a global phenomenon and could potentially lead to dangerous consequence when the 'offender' is seen as the 'enemy'. This becomes particularly problematic when applied to children.[245]

241 Paulo Sérgio Pinheiro, *World Report on Violence against Children,* New York, United Nations, 2006, p. 195, from the Contribution to the *UN Global Study on Children Deprived of Liberty* from Ann-Kristin Vervik (Office of the Special Representative of the UN Secretary-General on Violence against Children); see also: Chapter 10 on Children Living in Prisons with their Caregivers.

242 Penal Reform International, *Protecting children's rights in criminal justice systems: A training manual and reference point for professionals and policymakers,* 2013, p. 39, Available at https://www.penalreform.org/resource/juvenile-justice-manual/(accessed 10 June 2019).

243 See UNODC, *Handbook on Police Accountability, Oversight and Integrity. Criminal Justice Handbook Series,* New York, United Nations, p. 9; Examples of corruption include members of the police force asking detainees for money and if children fail to deliver they money, they prolong the investigations. This issue was raised during informal interviews with informal justice professionals. The interviews were carried out by researches in India, Bahrain, Burundi and Guatemala for the purpose of a joint study by UNICEF and the Children's Legal Centre of the University of Essex, published in 2011, Carolyne Hamilton *et al.* (2011), *op. cit.*, pp. 19 & 166.

244 Barry Goldson, 'Imprisonment in Military Realms', Ross McGarry & Sandra Walklate (eds.), *Palgrave Handbook on Criminology and War,* London, Palgrave/Macmillan, 2016, pp. 289-311

245 Stephen Hill & Randall Beger, 'A Paramilitary Policing Juggernaut', *Social Justice,* Vol. 36(1), pp. 25-40; P.B. Kraska 'Militarisation and Policing – Its Relevance to 21st Century Police', *Policing: A Journal of Policy and Practice,* Vol. 1(4), 2007, pp. 501-513.

4.5 Failing Rehabilitation and Reintegration

Rehabilitation and social reintegration of children are cornerstones of child justice.[246] Failure to realise this and to accomplish a tailor-made approach to the child's needs, results in undeniable harm to the children themselves and to society at large.[247] Research largely shows that contact with the child justice system where severe sanctions are placed on a child likely leads to an increase in re-offending.[248] The impact that detention has on children is even more problematic given the evidence that deprivation of liberty does not prevent or reduce crime or improve community safety.[249] When tailor-made rehabilitation programmes are not provided for children in detention, it leads to a vicious circle, in which detention **increases reoffending, leading to the deprivation of liberty once more**.[250]

Evidence about pre-trial detention shows that even short periods of detention have a detrimental impact on children's mental health and development. This in turn directly leads to decreased chances of successful community reintegration. Pre-trial detention has also been shown to lead to re-offending more than non-custodial programmes. It notably cultivates a sense of unfair justice that effects the respect children have for the legitimacy of the justice system.[251] Findings from a recent study conducted in the **Netherlands** also clearly show a strong **correlation between the use of pre-trial detention and the imposition of a custodial sentence.** Children who spend time in pre-trial detention are far more likely to receive a custodial sentence after conviction than children who are (conditionally) released at the first pre-trial court hearing. Moreover, the length of pre-trial detention correlates strongly with the length of the imposed custodial sentence. There is often a strong but unfounded belief among judges and other child justice professionals that using pre-

246 See: Pinheiro, *World Report on Violence Against Children* (2006), *op. cit.*, p. 219.

247 Cf. CRC/C/GC/24, *op. cit.*, paras. 23 & 80.

248 Cf. Lesley McAra & Susan McVie (2007), *op. cit.*; Malcolm W. Klein, 'Labeling theory and delinquency policy: An experimental test', *Criminal Justice and Behavior,* Vol. 13, 1986, pp. 47-79; Lawrence W. Sherman *et al.*, *Preventing Crime: What Works, What Doesn't, What's Promising*, US Department of Justice, International Institute of Justice, July 1998, Available at https://www.ncjrs.gov/pdffiles/171676.PDF (accessed 7 August 2019).

249 Jerome G. Miller, *Last One Over the Wall: The Massachusetts Experiment in Closing Reform Schools,* Columbus, OH, Ohio State University Press, 1991, pp. 181-182, notes 'the hard truth that [...] juvenile penal institutions have minimal impact on crime [...] incapacitation as the major tenet of crime control is a questionable social policy'. Similarly, Ann Hagell & Neal Hazel, 'Macro and Micro Patterns in the Development of Secure Custodial Institutions for Serious and Persistent Young Offenders in England and Wales', *Youth Justice Journal,* Vol. 1(1), 2001, pp. 3-16, have observed that concern with 'poor performance' (with regard to reconviction rates) is a recurring theme in penal discourse.

250 Justice Policy Institute, *The Dangers of Detention: The Impact of Incarcerating Youth in Detention and Other Secure Facilities,* November 2006, pp. 4 & 5, Available at https://www.issuelab.org/resource/the-dangers-of-detention-the-impact-of-incarcerating-youth-in-detention-and-other-secure-facilities.html, (accessed 10 June 2019); see also: Annie E. Casey Foundation, *Juvenile Detention Alternatives Initiative: Progress Report 2014*, p. 5, Available at http://www.aecf.org/resources/2014-juvenile-detention-alternatives-initiative-progress-report/ (accessed 10 June 2019).

251 Juvenile Justice Advocates International report, *Children in pre-trial detention. Promoting stronger international time limits*, 2018, pp. 11-16.

trial detention as an early intervention strategy, and a direct response to child criminal behaviour is pedagogically effective and therefore justified.[252]

The length of the proceedings also has an impact on a child's experience of the justice system. When the time between the commission of the offence and the actual disposition of the case is excessively long, it becomes increasingly difficult for children to make sense of what is happening to them and accept the court's decision. During lengthy proceedings, children may also spend excessive time in pre-trial detention. In such situations their sense of justice is often undermined.[253] Recent research shows that only 15% of countries demonstrate no undue systematic delay in proceedings involving children, while 45% reported serious delays. The reasons for this can be manifold and include a shortage of judges, corruption and/or poor court infrastructures.[254]

It is clear therefore that without effective rehabilitation, detention itself may become a reason why children reoffend and are repeatedly detained. Resorting to deprivation of liberty in the administration of child justice is further questionable when its failure to provide community safety is set against its failure to prevent or reduce child offending. Deprivation of liberty (with its extraordinary fiscal costs) is even more problematic when considering its harmful impact on children as well as on society at large.

252 Yannick Van den Brink *et al.* (2017), *op. cit.*; Yannick Van den Brink (2018), *op. cit.*; Yannick Van den Brink & Bart Lubow, in Wendy O'Brien & Cédric Foussard (2019), *op. cit.*

253 Juvenile Justice Advocates International, *Children in pre-trial detention. Promoting stronger international time limits*, 2018, pp. 11-16.

254 Cf. Child Rights International Network (2016), *op. cit.*, p.32.

5. Ways forward: Ensuring Liberty for Children in the Administration of Justice

5.1 Adopting a Systemic Approach

An effective response aimed at reducing the use of deprivation of liberty for children requires a systemic approach. This requires a **reconsideration of the entire system** that leads to the deprivation of liberty (looking at the 'big picture' and integrating multiple perspectives).[255] It also means analysing the root causes behind the problem, including the economic, social, political and cultural situation. The less visible causes, such as attitudes, perceptions and power dynamics also have to be addressed since they too shape the dynamics and limits of such systemic approaches. For instance, discrimination against certain groups of children not only prevails among professionals but also continues to form part of public debates and perceptions.[256]

A systemic approach further **recognises the inherent complexity of social problems** as well as the difficulty of solving them, constantly vigilant so as to avoid unintended consequences. This requires 'iterative and flexible planning processes based on learning and experimentation'.[257] It is fundamentally oriented towards the existing resources (rather than deficits) and aimed at identifying leverage points for intervention.

A systemic approach implies **avoiding a compartmentalisation of the problem and solutions**. That means to concentrate on the relationship between rather than on the different parts of the system, focusing on systemic rather than individual failures. This goes hand in hand with a 'systems approach'[258] to child protection and to the prevention of deprivation of liberty, recognising that the issue needs to be addressed holistically, requiring cooperation across families, society and all of the professionals who work with children in the justice system. Less fragmentation of policies and programmes will lead to greater efficiency in implementation.[259] It also entails increasing collaborative action in the field of child justice. This could, for example, include aligning policies for child protection with diversion policies, and establishing protocols for inter-agency cooperation. This should in turn be complemented by targeted training for relevant professionals as well as

255 For an explanation of the approach see: Moritz Birk & Walter Suntinger, 'A systemic approach to human rights practice', Patricia Hladschik & Fiona Steinert, *Menschenrechten Gestalt und Wirksamkeit verleihen - Making Human Rights Work, Festschrift für Manfred Nowak und Hannes Tretter,* NWV, Wien/Graz, 2019, pp. 650-675; David Peter Stroh, *Systems Thinking for Social Change: A Practical Guide to Solving Problems, Avoiding Unintended Consequences, and Achieving Lasting Results,* Chelsea Publishing, 2015.

256 Cf. 'Havana Rules', *op. cit.*, para. 8, on local-level awareness-raising and support for release: 'The competent authorities should constantly seek to increase the awareness of the public that the care of detained juveniles and preparation for their return to society is a social service of great importance, and to this end active steps should be taken to foster open contacts between the juveniles and the local community'.

257 UNICEF, UNHCR, Save the Children & World Vision, *A Better Way to Protect ALL Children: The Theory and Practice of Child Protection Systems, Conference Report,* UNICEF 2013, p. 69.

258 Ibid, p. 3.

259 Ibid., pp. 4 & 62.

support for family and local community-strengthening programmes. Additionally, such a focus entails developing a sound external communication strategy designed to inform and sensitise both the media and the general public about objectives of child justice policies.

International and regional standards have established a far-reaching, rights-based framework for **inter-agency cooperation**. The CRC notably calls for comprehensive child justice policies. A core element of these policies should entail the prevention of offences committed by children in the first place. They should also promote the involvement of children themselves, including also their parents and all other key actors.[260] The promotion of a 'national coordinating framework' to address violence against children is also key.[261] Over the last decade, the importance of systems approaches have been recognised by major actors in the field, including international agencies, service providers and civil society organisations.[262] In order to overcome the risks of contact with the child *justice* system, national child *protection* systems need to be comprehensive and well-resourced so as to reach those children at risk. Such systems should provide a continuum of care across all relevant contexts, including prevention, early intervention, street outreach, helplines, drop-in centres, day-care centres, temporary residential care, family reunification, foster care, independent living or other short- or long-term care options.[263] The 2014 UN Model Strategies on Violence against Children have further stressed 'the complementary roles of the justice system on the one hand, and the child protection, social welfare, health and education sectors on the other, in creating a protective environment and in preventing and responding to violence against children'.[264]

260 UN CRC-Committee, *General Comment No 10 (2007)* on Children's rights in juvenile justice, paras. 15 & 20.

261 This'national coordinating framework to address violence against children' should be based on a child rights approach, giving recognition to the gender dimensions of situations. It should strengthen protective factors and resilience of children, including support for families and care arrangements. It should address risk factors and specific vulnerabilities of children and establish structures with adequate resources. This should also include mechanisms 'to ensure effective coordination at central, regional and local levels, between different sectors and with civil society, including the empirical research community' [UN CRC-Committee, *General Comment No 13 (2011)on the right of the child to freedom from all forms of violence,* para. 72(i)]. On the regional level: the Council of Europe, *Policy guidelines on integrated national strategies for the protection of children from violence,* Appendix to the Recommendation CM/Rec(2009)10 of the CoE Committee of Ministers. On a policy development level: see the 10 quality principles for integrated child protection systems developed by the European Commission, *Coordination and cooperation in integrated child protection systems - Reflection paper, 9th European Forum on the rights of the child,* 2015. For a discussion on a human rights and evidence-based approach to children in conflict with the law see Barry Goldson & John Muncie, 'Children's human rights and youth justice with integrity', in Barry Goldson, & John Muncie, (eds) (2015), *op. cit.*

262 See: UNICEF, *Child Protection Strategy,* 2008; UNICEF, *Child Protection Resource Pack: How to Plan, Monitor and Evaluate Child Protection Programmes,* 2015; UNICEF Regional Office for West and Central Africa, *Promoting synergies between child protection and social protection – West and Central Africa,* 2009; UNHCR, *Policy Framework for the Protection of Children,* 2012; Save the Children, *Save the Children's Child Protection Strategy,* 2013; World Vision, *A systems approach to child protection,* 2011; For regional assessments, including practical examples, see: ECPAT International, Plan International, Save the Children, UNICEF & World Vision, *National Child Protection Systems in the East Asia and Pacific Region: A review and analysis of mappings and assessments,* ECPAT International, Bangkok, 2014, and the contributions to the 2014 European Commission public consultation on child protection systems. For example: UN/IOM, Every Child – Contribution of the United Nations organisations with a presence in Brussels & the International Organisation for Migration to the European Commission Consultation, *EU guidance on integrated Child Protection Systems,* 2014.

263 CRC-Committee, *General Comment No. 21,* C/CRC/GC/21, para. 17.

264 UN Model Strategies, *GA Resolution 69/194,* para. 2.

5.2 Effectively Preventing Children's Contact with the Justice System

The most effective means of preventing children from being exposed to the detrimental effects of the criminal justice system is to prevent them from coming into contact with the system in the first place.[265] Emphasis should therefore be placed on preventive and diversion policies that direct children away from formal criminal justice proceedings at the earliest possible opportunity. States should give priority to programmes in support of families, communities and education for all. Close cooperation is crucial between the child justice sectors, different services in charge of law enforcement, as well as the social welfare and education sectors. This is not only required under international law standards but also more effective.

To achieve this, a first suitable measure is to simply **avoid the unnecessary criminalisation of children**. Most importantly, this should include:

- increasing the age of criminal responsibility at least to 14 years,
- decriminalising 'status offences' and behaviour related to morality,
- de-penalising petty crimes,
- introducing close-in-age exemptions to decriminalise consensual sexual relationships between teenagers,
- investing in early prevention of offending, and
- ensuring that children in need of care are dealt with by functioning protection channels.

Another important way is to **ensure appropriate police intervention**. Police officers who come in contact with children engaged in acts prohibited by criminal law must have the capacity and training to deal with such a situation in an appropriate manner. It should ensure the protection of children, avoid traumatisation and refer the case to child protection authorities. Promising examples include: specialised training that allows police officers to engage with children while still treating them in a child-friendly and child-sensitive manner.[266] Further interesting examples come from the **Democratic Republic of Congo** (DRC) in 2015 and **Sierra Leone** in 2016, where police officers were trained on how to appropriately deal with street-connected children. Police officers from both countries felt

265 Barry Goldson & John Muncie, 'Critical Anatomy: Towards a Principled Youth Justice', Barry Goldson & John Muncie (eds.) *Youth Crime and Justice: Critical Issues*, London, Sage, 2006, pp. 203-231 & 227-257.

266 Ton Liefaard, 'Child-Friendly Justice: Protection and Participation of Children in the Justice System', *Temple Law Review*, Vol. 88(4), 2016, Available at https://www.templelawreview.org/lawreview/assets/uploads/2016/08/Liefaard-88-Temp.-L.-Rev.-905.pdf, (accessed 10 June 2019); Council of Europe, *Guidelines on Child-Friendly Justice*, Guidelines 14, 15 & 67. As a regional instrument the Council of Europe Guidelines set out the need for states to consider working with trained police officials in special juvenile police units.

that the training changed not only their attitude, but also the way they spoke to children. Their language shifted from a threatening and abusive tone to one inviting dialogue and openness. Equally, children also reported that some police officers were more open to conversations. Significantly, children felt they were better treated than before, and that their time in detention often was reduced.[267]

5.3 Establishing a Specialised Child Justice System

A functioning child justice system requires that, when a child commits an offense, the sanctions and responses provided by law are not the same as those intended for adults. Responses should address the factors that brought a child into conflict with the law as well as the consequences of committing a criminal act. Here, the ultimate goal should be to reintegrate the child into the community. In such a system, children are put at the centre of their own proceedings. These proceedings offer a wide range of non-custodial options for remand and sentencing, which relegates detention as a measure of last resort.[268]

In several regions in the world, States are taking steps towards establishing a distinct child justice system. **Trinidad** and **Tobago** are planning to set up three Children's Courts. In **Georgia**, a new Juvenile Justice Code has been developed with the support of UNICEF and the EU. This Code foresees mandatory specialisation of criminal justice professionals and proposes a range of non-custodial sanctions and diversion measures, which would enable professionals to use detention as a measure of last resort.[269]

267 StreetInvest *et al.*, *Submission to the UN Global Study on Children Deprived of Liberty,* Consortium for Street Children, September 2018, p.19.

268 Some other examples of child-friendly justice standards elaborated in national, regional and international courts, showing how some courts have approached children's rights and child-friendly justice, are taken from: Child Rights International Network, *CRC in Court: Case Law Database,* Available at https://archive.crin.org/en/home/law/research/crc-court-case-law-database.html (accessed 10 June 2019). In Europe, a useful resource on the implementation of the *Directive 2016/800* is: Stephanie Rap *et al.*, *White Paper on the EU Directive 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings,* 2018; For comprehensive standards on a universal level see: International Association of Youth and Family Judges and Magistrates, *Guidelines on children in contact with the Justice system,* 2017.

269 Penal Reform International & Thailand Institute of Justice, *Global Prison Trends 2018;* UNICEF, Georgia, *Children in conflict with the law,* Available at http://unicef.ge/10/Children-in-conflict-with-law/16 (accessed 25 September 2018).

The **Italian child justice system** is a promising example in that it seeks to protect the best interests of the child by providing him/her with an individualised programme for rehabilitation and reintegration. The system is based on six guiding principles provided by the law:

1. Minimum harmfulness of the proceedings;
2. Detention only ever as a last resort;
3. Criminal liability for 14 years old and above, but the ability to understand and take action is always to be ascertained;
4. Tailor-made proceedings;
5. De-stigmatisation;
6. Priority of educational needs in proceedings.

The main judicial body dealing with children is a specialised Juvenile Court composed of two ordinary magistrates and two other professionals with proven expertise in child issues (usually psychologists or pedagogues). Its functions are supported by a Public Prosecutor Office in the Juvenile Court with professionals commanding specific expertise. Police headquarters in Italy have a specialist child unit that deals with investigations where a child is accused of an offence.[270]

Several countries reported child-specific qualifications within the police often organised in **special child units or sub-sections**.[271] Others point towards child welfare or family support units within the police[272] as well as child welfare teams that consist of education and police officers.[273] Most **European countries** did not emphasise specialised units in their replies to the questionnaires although some refer to special training in child rights for police officers and other professionals in the administration of justice.[274] In **Malaysia**, UNICEF organises

270 Silvia Randazzo, 'Italy,' *Keeping Youth Away from Crime: Searching for the best European practices*, Volume 2, International Juvenile Justice Conservatory, pp. 184-234, Available at http://providus.lv/article_files/2913/original/Volume_2_-_Compendium_of_Ten_Best_European_Practices.pdf?1428501072 (accessed 10 June 2019).

271 *UN Global Study Questionnaire,* Australia (State Reply), Belgium (State Reply), Bosnia Herzegovina (State Reply), Cambodia (UNICEF), Colombia (State Reply), Chad (State Reply), Fiji (UNICEF), India (NHRI Reply), Iran (UNICEF), Iraq (State Reply), Lao (UNICEF), Madagascar (NGO Reply), Philippines (UNICEF), Samoa (UNICEF), Ukraine (State Reply).

272 *UN Global Study Questionnaire,* Gambia (State Reply), Sierra Leone (State Reply).

273 *UN Global Study Questionnaire,* Malaysia (UNICEF).

274 *UN Global Study Questionnaire,* Croatia (UNICEF), Georgia (State Reply).

special training for prosecutors.[275] Countries from various regions indicate that prosecutors involved in child cases are specialists.[276] In **India**, the Juvenile Justice Act from 2000 provides that Special Juvenile Protection Units (SJPU) may be created in every district in every city. Police officers who deal with children should also be appropriately trained. SJPUs are now established in each district in India, even though they are sometimes dormant in practice.[277] In **Afghanistan**, a number of police units specialised in human rights and child rights have been set up in several regions, working with child witnesses and children accused of offences. The tasks of these units include the prevention of offending and cooperation with other stakeholders working in areas of education, justice, employment, social affairs and other law enforcement and crime prevention bodies.[278] In **Palestine**, since the establishment of the 2016 Juvenile Protection Law, specialised police units have been put in place, complementing civil society service providers with a view of protecting the right of children to have access to psychological support and other assistance. These services are available directly upon arrest and throughout the proceedings.[279]

Countries from all regions mention **specialised children's courts**[280] as well as family courts,[281] minor sections within national courts[282] or specialised children's judges.[283] In some countries requirements for these judges are especially high: a **Ukrainian** judge must have at least 10 years of experience as a judge, before becoming eligible to conduct criminal proceedings related to children. A small number of countries also reported special children's chambers

275 *UN Global Study Questionnaire,* Malaysia (UNICEF).

276 *UN Global Study Questionnaire,* Cambodia (UNICEF Reply), Estonia (State Reply), Finland (State Reply), Georgia (State Reply), Iran (UNICEF), Lao (State Reply), Kuwait (State Reply), Madagascar (State Reply), Philippines (UNICEF), Fiji (UNICEF), Samoa (UNICEF), Spain (State Reply).

277 Vishrut Kansal, 'Special Juvenile Police Unit: Its constitution, training, powers and procedure in relation to the juveniles in conflict with the law', *National Law School of India Review,* Vol. 27, 2015, pp. 102-124.

278 International Bureau for Children's Rights, *Mapping Report on the Role of the Police in Child Protection in Afghanistan,* 2015, p. 41, Available at http://www.ibcr.org/wp-content/uploads/2016/06/Mapping-report-Afghanistan-1.pdf (accessed 10 June2019).

279 League of Arab States, *Contemporary Arab Report on Implementing the Recommendations of the UN Secretary-General's Study on Violence against Children,* 2012, p. 82; Mutaz M. Qafisheh, 'Palestine' in Scott H. Decker & Nerea Marteache (eds.), *International Handbook of Juvenile Justice,* 2nd Edition, Springer, 2017, pp. 497-526.

280 *UN Global Study Questionnaires:* Australia (State Reply), Argentina (State Reply), Burkina Faso (State Reply), USA, California (NGO Reply: Children Defense Fund), Cambodia (UNICEF), Canada (NGO Reply: DCI), Croatia (UNICEF), Czech Republic (State Reply), Democratic Republic of Congo (NHRI Reply), Fiji (UNICEF), France (State Reply & NGO Reply: Grandir Dignement), Germany (State Reply), Greece (State Reply), Honduras (State Reply), India (NHRI Reply), Iraq (State Reply), Iran (UNICEF), Ireland (State Reply), Italy (State Reply), Kuwait (State Reply), Lao (State Reply), Liberia (NHRI Reply based on Liberia National Police), Malaysia (UNICEF Reply), Mauritius (State Reply), Mexico (State Reply), Portugal (State Reply), Qatar (State Reply), Republic of Congo (State Reply), Samoa (UNICEF), Sierra Leone (State Reply), South Africa (State Reply), Vietnam (UNICEF).

281 *UN Global Study Questionnaire,* Austria (State Reply), Philippines (UNICEF).

282 *UN Global Study Questionnaire,* Spain (State Reply).

283 *UN Global Study Questionnaire,* Argentina (State Reply), Belgium (State Reply), Croatia (State Reply), El Salvador (State Reply), France (State Reply & NHRI Reply), Madagascar (State Reply), Malaysia (UNICEF Reply), Russia (State Reply).

or units within Supreme Courts[284]. Other relevant child institutions include Juvenile Justice Boards (consisting of judicial magistrates and social workers in **India**[285]), Child Care and Protection Boards (advising the court in the **Netherlands**[286]) and Child Probation Officers.[287]

Specialised children's courts are reported in 40% of the countries around the world, even though their jurisdictions are often limited in scope and geographical range. Moreover, the commitment expressed within the legislation of many countries still remains unfulfilled.[288] Several States have in fact passed legislation to establish a minimum number of children's courts within a country so as to ensure all children will be heard in front of a judge.

In **Bangladesh** the Children Act substantially reformed the child justice system in 2013. The new Act was adopted with provisions for child friendly children's courts and child-oriented practices in a number of settings. These provisions include the establishment of 'child help-desks' in police stations and a national child welfare board, while the introduction of probation officers and alternative preventive measures for children aim to streamline the protection of children in conflict with the law.[289]

Where specialised courts exist, but are not accessible to all children across the country, mobile courts have been used, particularly across **francophone Africa**.[290] Where specialised children's courts do not exist, however, a number of systems provide divisions of ordinary courts to process cases involving children. This practice is particularly common in Africa (for example in **Togo** and **Eswatini**), but it has also been adopted further in other regions, including **Kosovo** and **Laos PDR**.[291]

284 *Global Study Questionnaire,* Croatia (UNICEF), El Salvador (State Reply), Lao (UNICEF Reply).

285 *Global Study Questionnaire,* India (NHRI Reply).

286 *Global Study Questionnaire,* Netherlands (State Reply).

287 *Global Study Questionnaire,* Fiji (UNICEF Reply), Malaysia (UNICEF Reply), Mauritius (State Reply), Samoa (UNICEF Reply), Tonga (UNICEF Reply).

288 Cf. Child Rights International Network (2016), *op. cit.*, p.29.

289 Nahid Ferdousi, 'The establishment of children's courts in Bangladesh: from principle to practice', *Oxford University Commonwealth Law Journal*, Vol. 15(2), 2016.

290 Benin, Burkina Faso, Burundi, Cameroon, Central African Republic, Chad, Cote d'Ivoire, Comoros, Congo, Djibouti, Democratic Republic of the Congo, Gabon, Guinea, Mali, Madagascar, Niger, Senegal; see also: Child Rights International Network (2016), *op. cit.*, p. 29.

291 *Ibidem*.

At the European regional level, Guidelines on child-friendly justice have been adopted by the **Council of Europe**'s Committee of Ministers in 2010, based on direct consultation also with children, and which have become influential for further standard-setting and implementation.[292] The Guidelines reconfirm fundamental child rights principles and provide standards for child-friendly justice before, during and after any type of judicial proceedings, including in relation to detention; here, specific attention is paid inter alia to the child's right to regular contacts to the outside world and to pre-release preparation programmes.[293] The Guidelines have been widely disseminated and taken into account in judgments by the European Court of Human Rights,[294] as well as in **European Union** legislation. In this regard, reference should be made to the EU **directive 2016/800/EU on special safeguards for children suspected or accused in criminal proceedings**,[295] which requires the child's access to legal assistance from the earliest point of investigations and proceedings and which contains limitations concerning deprivation of liberty, the provision of 'alternative measures' and safeguards for children while in detention.

A key component to prevent deprivation of liberty is the provision of free **legal assistance** for every child arrested, suspected or accused of a crime. This assistance should be available from the earliest stage of proceedings at the police station and available to the child throughout the proceedings. A lawyer should be present at the first moment of detention at the police station, while also playing an active role during the hearing so as to ensure that no violation of procedures or children's rights occur. For example, in **Belgium**, appointed and specialised lawyers are registered for on-call services and can be contacted by the police. Children in these circumstances are also not permitted to waive their rights to legal assistance.[296] In **Malawi**, the Paralegal Advisory Service Institute is engaged in an innovative public-private partnership to alleviate the lack of lawyers. With this programme, civil society representatives submit to codes of conduct to work in police stations and prisons so as to provide assistance from the early stages of the criminal justice process. For instance, one of the things these paralegals do is to interview children detained in police stations to

292 CoE, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice*, 17 November 2010, Available at https://www.coe.int/en/web/children/child-friendly-justice (accessed 10 June 2019); see also the extensive documentation on relevant CoE action in CoE, *Report to the UN Global Study on Children Deprived of Liberty*, 2018.

293 Ibid., section IV.A.6. (Deprivation of Liberty).

294 Cf. for relevant case law, CoE (2018), *op. cit.*, and the HUDOC database of case-law of the European Court of Human Rights, Available at https://hudoc.echr.coe.int/ (accessed 7 August 2019).

295 For further information, cf. European Commission, *Children in judicial proceedings, Available at* https://ec.europa.eu/info/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice_en (accessed 10 June 2019).

296 For a collection of inspiring good practices in Europe in terms of procedural safeguards for children, see 'My lawyer, my rights', Available at www.mylawyermyrights.eu (accessed 7 August 2019) and the Defence for Children Guide, *Practical Guide for Lawyers: How to defend a child in conflict with the law?*, 2018, Available at http://www.mylawyermyrights.eu/wp-content/uploads/2016/05/PRACTICAL-GUIDE-FOR-LAWYERS.pdf (accessed 10 June 2019).

identify possible mechanisms that may be applicable to divert the children away from the criminal justice system. Similar schemes have been adopted by **Bangladesh**, **Benin**, **Kenya**, **Niger** and **Uganda**.[297] In **Ireland**, every child is guaranteed legal aid and protocols are signed among the judicial authorities to guarantee the quality of the legal aid system.

Typically, eligibility criteria for direct access to free legal aid take into account the financial situation of the child's parents. However, where a parent is not supportive of a child, this measure may impose restrictions on a child's access to legal aid and assistance. To overcome this issue, in **Lithuania** and **Luxembourg** the income of parents does not play a deciding role in the decision to guarantee children access to free legal aid. In **Finland**, the income of parents is only taken into account when the parents support the child in bringing the case before the court. Free legal services by law firms, legal clinics, charities and other organisations are increasingly common worldwide, extending beyond the criminal justice context. In some cases these avenues provide the only free legal assistance available for children – this is true for counties such as **Ethiopia**, **Eswatini** and the **Bahamas**. In the **Philippines** and **Uganda**, lawyers are obliged by law to provide a certain number of hours of free legal assistance (respectively 60 and 40 hours annually) while in other States, such as **France** and **India**, bar associations and other professional legal associations play a strong active role in the promotion of *probono* assistance.[298]

Access to bail should be guaranteed to every child in order to ensure the possibility of non-custodial measures at the pre-trial stage of proceedings. This should also apply to other conditional forms of pre-trial release, such as day reporting, community supervision, or regular contact with probation officers. These options should especially be given to children who do not have strong family/community support.

The **children and their families should be properly informed** and prepared for the various procedures within the justice system by specialised professionals (social workers, sociologists, psychologists, social anthropologists and legal professionals). This happens in **Greece**[299], for example where professionals involved in the proceedings are trained to communicate with children in an age appropriate manner tailored to the child's level of understanding. Since 1999 in the **Maldives**, all cases involving children under 18 are referred to a Police Family and Child Protection Unit (FCPU). Investigation of children in conflict with the law must be carried out by **plain-clothed members** of the FCPU, who must conduct the

297 UNODC, *Handbook on improving access to legal aid in Africa*, 2011, pp. 31-32.

298 Cf. Child Rights International Network (2016), *op. cit.*, pp. 29-30.

299 Ton Liefaard, Stephanie Rap & Apollonia Bolscher, *Can anyone hear me? – Participation of children in juvenile justice*, International Juvenile Justice Observatory, 2016, p. 64.

investigation with due consideration of their age. Moreover, all aspects of the investigation are considered confidential.[300]

The **right to be heard** is an essential requirement for a fair and just trial. It should be guaranteed in all proceedings concerning children. Decisions made by the court should also give due weight to the views of children in accordance with their age and understanding. About a quarter of all countries provide the legal right for children to be heard in all matters concerning them. Particularly States from the French legal tradition guarantee strong protections of this right, generally allowing any child capable of forming an own opinion to be heard directly by the court or judge in any proceedings involving them.[301]

When a child commits an offence, the **sanctions and responses** provided by the law should not be the same as those for adults. They should further be proportionate to the act. Importantly, the law should address the consequences of the act while also considering the factors that led the child to commit an offence. The aim should be to provide a range of strategies and non-custodial options.[302]

In an effective system, multi-disciplinary approaches will require **social workers and psychologists** to assist prosecutors and judges in the decision-making process. The latter are thus provided with inquiry reports containing information about the child's family, social environment and all the relevant information about the background, with the purpose of helping the judge to pass asentence in the best interests of the child; **Austria** is a good example of such an approach.[303]

It is paramount that the various actors in the child justice system and the larger child protection system cooperate closely. A promising example of coordination and inter-agency work may be noted from **South Africa**: Co-operative work of an inter-sectoral government committee reduced the number of children in prison from 3,757 in 2001 to 203 in 2018.[304] One-Stop Child Justice Centres have been established on the basis of the Child Justice Act 75 of 2008 and prevent children from being transferred from service to service. These centres

300 UNICEF & Inter-Parliamentary Union, *Improving the Protection of Children in Conflict with the Law in South Asia: A regional parliamentary guide on juvenile justice,* 2007, p. 25, Available at http://archive.ipu.org/PDF/publications/chil_law_en.pdf (accessed 21 September 2018).

301 Cf. Child Rights International Network (2016), *op. cit.*, p.18; see also Stephanie E. Rap, *The participation of juvenile defendants in the youth court: A comparative study of juvenile justice procedures in Europe,* Amsterdam, Pallas publications, 2013, Available at https://dspace.library.uu.nl/handle/1874/287562 (accessed 4 July 2019).

302 In this regard, see examples for successful comprehensive juvenile detention reforms based on the *Juvenile Detention Alternatives Initiative* (JDAI) in the United States: Cf. Annie E. Casey Foundation, *Juvenile Detention Alternatives Initiative Progress Report 2014.*

303 The so-called 'Jugendgerichtshilfe' is a decentralised service institution at courts across the country for juvenile judges providing reports and assessments from a social work perspective – cf. Scott H. Decker & Nerea Marteache, *International Handbook on Juvenile Justice,* Springer, 2017, pp. 219-239.

304 Ann Skelton 'Hiding to something: Reduction of violence against children in South Africa's justice system' Wendy O'Brien & Cédric Foussard (eds.), *Violence Against Children in the Criminal Justice System,* London, Routledge, 2019, pp. 153-154.

allow streamlining of the entire justice process, from arrest to formal court proceedings. In **Zambia** an Arrest, Reception and Referral Service (ARRS) based on the One-Stop Child Justice model was established in 2000, to ensure that all children arrested in a city are located in one centralised police station. This guarantees more accurate monitoring and enables the concentration of resources, e.g. employing a probation officer and family finders, at one locality.[305]

5.4 Effectively Applying Diversion

A vitally important means of avoiding undue contact with the criminal justice system is to divert children at the earliest stage possible.[306] 'Diversion' itself does not respond to a clear-cut universal definition,[307] but for the purposes of this Study it is associated with 'measures for referring children away from the judicial system, at any time prior to or during the relevant proceedings'.[308] It can more specifically be referred to as the earliest intervention put in place by the law enforcement and judicial authorities to keep the young person away from the formal justice system. It implies non-entry or expeditious exit from formal proceedings. Diversion can be applied by the police, the prosecutor or the court, and varies greatly from one country to another. Some strategies involve non-intervention measures, while others involve diversion with educational measures. Diversionary measures can range from informal warnings by the police, to community service, training and/or educative programmes, medical and psychological treatment, counselling and community programmes.

Diverting children as much as possible and providing a variety of options for this purpose should be a matter of priority by States , as enshrined in Article 15 of the Vienna Guidelines.[309] A package of accessible non-custodial measures should be offered at all stages of the proceedings and should always be used in a lawful and proportionate manner. Diversion

305 The African Child Policy Forum, *Achieving Child-Friendly Justice in Africa,* Continental Conference on Access to Justice for Children in Africa, Addis Ababa, 8-10 May 2018, p. 44, Available at https://www.childjusticeinafrica.info/index.php/resources/item/2-achieving-child-friendly2 (accessed 7 August 2019).

306 Barry Goldson & John Muncie (2006), *op. cit.*, pp. 203-231; Barry Goldson & John Muncie, 'Children's human rights and youth justice with integrity', Barry Goldson & John Muncie (2015), *op. cit.*, pp. 227-257.

307 Kelly Richards, 'Blurred Lines: Reconsidering the Concept of 'Diversion', *Youth Justice Systems in Australia,* 2014, pp. 122-139.

308 Cf. CRC/C/GC/24, *op. cit.*, para. 22; see also the definition used by UNICEF, *Diversion not Detention: A study on diversion and other alternative measures for children in conflict with the law in East Asia and the Pacific*, 2017: 'The conditional channelling of children in conflict with the law away from formal judicial proceedings towards a different way of resolving the issue that enables many – possibly most – to be dealt with by non-judicial bodies, thereby avoiding the negative effects of formal judicial proceedings and a criminal record, provided that human rights and legal safeguards are fully respected'.

309 Cf. Article. 40 CRC; 'Beijing Rules,' Rules 17-18. The 'Tokyo Rules' also provide minimum standards for non-custodial measures (1990); see also: United Nations Economic and Social Council, *Administration of juvenile justice ('Vienna Rules'),* Resolution 1997/30, 21 July 1997. The 'Vienna Guidelines' reiterate the recommendation for States to make available a broad array of alternative and educative measures at the pre-arrest, pre-trial, trial and post-trial stages – in order to prevent reoffending and promote the social rehabilitation of child offenders (Article.15); see also the UN Model Strategies, p. 31.

and non-custodial measures should be chosen only with the child's consent, and efforts should be made to provide community programmes and restorative justice practices.

Non-intervention and unconditional diversion

This form of diversion refers to the dismissal of a case when formal proceedings are not deemed appropriate – based on the circumstances of the offence and the commitment to divert a child away from further formal action within the justice system.[310] In many practices around the globe police, prosecutors or judges can dismiss the case and give a formal or informal caution to the child without any other conditions. Ideally, where police officers have this power, they should apply this measure as soon as the child is apprehended or admits to committing an offence. In such cases, police officers may either give a verbal caution directly to the child on the spot or later at the police station when the parents/guardians are present. In **Europe**, police cautioning is common, although it takes different forms.[311] In **New Zealand** the number of young people arrested has decreased consistently in recent decades due to the recourse of police to informal warning, sometimes accompanied by restorative measures such as apology and/or reparation to the victim,[312] while in the **Asia-Pacific region** unconditional diversion/police warning is practiced by 23 countries.[313]

Unconditional diversion/police warning in **Papua New Guinea** is applied by a police officer when a child (who has allegedly committed a minor offence) is stopped somewhere and then given a warning with an explanation about the consequences of his/her behaviour. Sometimes the child is asked to give an apology to the victim (but only if the victim gives consent). The child must not be taken into police custody. Usually, when cases are solved through 'mediation at the police level', they are not registered beyond a note in the Juvenile Occurrence Book stating that 'action has been taken'.[314]

310 Barry Goldson, 'Beyond Formalism: Towards "Informal" Approaches to Youth Crime and Youth Justice', Tim Bateman & John Pitts (eds.), *The Russell House Companion to Youth Justice,* Dorset, Russell House, 2015, pp. 236-241; Frieder Dünkel, 'Diversion: A Meaningful and Successful Alternative to Punishment in European Juvenile Justice Systems', Josine Junger-Tas & Frieder Dünkel (eds.), *Reforming Juvenile Justice,* 2009; Louise Forde, Ursula Kilkelly & Deirdre Malone, *Alternatives to detention for juvenile offenders. Manual of good practices in Europe,* International Juvenile Justice Observatory, 2016.

311 An exception is Germany where police diversion is not allowed, the reason being the abuse of power during the Nazi regime: Frieder Dünkel (2009), *op. cit.*, p.151.

312 Nikhil Roy & Frances Sheahan, 'Children and Diversion Away from Formal Criminal Justice Systems: A Perspective From an NGO Working on Criminal Justice Reform', *Protecting children from torture in detention: Global solutions for a global problem,* 2017, pp. 193–208; Cf. Melissa Goemann, 'New Zealand Shows Power of Limited Arrest While Lowering Crime', *Juvenile Justice Information Exchange,* Available at https://jjie.org/2018/07/05/new-zealand-shows-power-of-limiting-arrests-while-lowering-crime/ (accessed 10 June 2019).

313 In the Asia-Pacific region, the unconditional diversion/police warning can be found in the practice of 23 East Asian and Pacific countries: Cf. UNICEF, *Diversion not Detention: A study on diversion and other alternative measures for children in conflict with the law in East Asia and the Pacific,* 2017, p. 37.

314 Ibid.

Diversion with conditions: towards child protection

When the nature of the offence and the circumstances suggest that 'non-intervention' is not the best solution, the authorities should be able to choose among a set of diversionary measures with rehabilitative purposes. These measures can include counselling, treatment for substance abuse, training and vocational courses and other measures, which are all aimed at avoiding further formal criminal justice action by calling upon the child protection system.[315]

In **Indonesia**, diversion is implemented at the national level in the form of 'diversion from formal judicial proceedings without or with a restorative justice approach' and can be initiated by police, the prosecution and/or at court level. This conditional form of diversion requires a child to commit to a plan that can include different conditions, ranging from victim compensation, to medical and psychological rehabilitation, training, education courses or community services. Informal police diversion is also used, where the police officer refers the child to the local leader and the dispute is solved through customary law.[316]

Croatia is a country where diversion has been reflected in legislation since the 1990s. A set of different measures is put in place, which led to very low numbers of children in detention. A successful programme called 'STOP' is, for example, running in the city of Zagreb. The project is inspired by the 'Halt' project in the Netherlands.[317]

Diversionary measures should be appropriate to the child's age, level of maturity, the circumstances of the offence and the situation in the community, with reference to support available.

Despite the fact that diversion has been criticised and that measures differ greatly worldwide,[318] there is a **widespread consensus on its general benefits** on education, prevention of drug use

315 Different educative/rehabilitative interventions and programmes can be combined depending on each specific case.

316 Cf. *Diversion not Detention* (2017), *op. cit.*

317 Defence for Children International, *Protecting the Rights of Children in Conflict with the Law – Research on Alternatives to the Deprivation of Liberty in Eight Countries*, 2008. In the Central and Eastern European (CEE) region many countries have seen huge reforms of their child justice systems in the last couple of decades. These reforms are interestingly characterised by the introduction of and investment in diversion and restorative measures to prevent the formal justice proceeding and detention for children. Serbia and Albania, among others, have introduced sets of diversionary restorative measures for children/young people in conflict with the law. Terre des Hommes Foundation, 'Lausanne in Hungary', *Alternative ways to address Youth (Away) project, Research synthesis report*, 2018.

318 See particularly Daniel P. Mears *et al.*, *Juvenile Court and Contemporary Diversion*, 2016; and Marianne Moore, *Save money, protect society and realise youth potential: Improving youth justice systems in a time of economic crisis*, European Council for Juvenile Justice & International Juvenile Justice Observatory, 2013; Jeffrey Butts, 'Critical diversion', *Criminology & Public Policy*, Vol. 15(3), 2016; Robert D. Hoge, 'Application of pre-charge diversion programs', *Criminology & Public Policy*, Vol. 15(3), 2016; Mark C. Stafford, 'New Call for assessing the effects of 21st century juvenile diversion', *Criminology & Public Policy*, Vol. 15(3), 2016; James V. Ray & Kristina Childs, 'Juvenile Diversion', Marvin D. Krohn & Jodi Lane (eds.), *The Handbook of Juvenile Delinquency and Juvenile Justice*, 2015, pp. 422-438; Rebecca D. Ericson *et al.*, 'Racial disparity in Juvenile Diversion: the Impact of focal concerns and organisational coupling', *Race and Justice*, Vol. 6(1), 2016; Joshua C. Cochran & Daniel P. Mears, 'Race, Ethnic and Gender divides in Juvenile Court sanctioning and Rehabilitative intervention', *Journal of Research in Crime and Delinquency*, Vol. 52(2), 2015.

and mental health. Diversion has been proven to have more positive effects on reoffending, than formal court proceedings and provisions. There are several positive examples from different regions in the world.[319] Low rates of reoffending should, however, not be the only indicator for the effectiveness of a child justice system, since the absence of re-offending does not indicate the child's wellbeing. A broader perspective should include the child's overall best interests.[320] In this regard, diversion allows the design of a balanced and individualised response that addresses children's specific needs and risk factors. In this way, diversion produces a positive overall impact on the wellbeing of the child, on the victim(s) as well as on the community. Furthermore, diversion reduces stigmatisation and avoids the detrimental effects of a formal criminal proceeding. It is also more cost-effective and decreases court caseloads, ultimately making the system more efficient.[321]

Diversion from Detention at Different Stages of the Justice System

319 Lesley McAra & Susan McVie, 'Transformations in Youth Crime and Justice across Europe: Evidencing the Case for Diversion', Barry Goldson (ed.) *Juvenile Justice in Europe: Past, Present and Future.* London: Routledge, 2019, pp. 74-103; Cathrine Wood, *Diversion in South Africa: A review of policy and practice, 1990–2003,* 2003; Frieder Dünkel (2009), *op. cit.*, p. 159.

320 Stefaan Pleysier *et al.*, 'Restorative Justice and Adolescent Health', Andrew L. Cherry *et al.*, *International Handbook on Adolescent Health and Development,* 2017, p. 133.

321 Cf. Frieder Dünkel (2009), *op. cit.*; Models for change Juvenile Diversion Workgroup, *Juvenile Diversion Guidebook,* 2011; Craig S. Schwalbe, *A meta-analysis of experimental studies of diversion programs for juvenile offenders,* 2012; Marianne Moore (2013), *op. cit.*; Holly A. Wilson & Robert D. Hoge, *The effect of Youth diversion programs on recidivism: A meta-analytic review,* 2013; James C. Howell, Mark W. Lipsey & John J. Wilson, *A handbook for evidence-based juvenile justice,* Lexington Books, 2014; James V. Ray & Kristina Childs (2015), *op. cit.*; Frieder Dünkel (2016), *op. cit.*; Daniel Mears *et al.* (2016), *op. cit.*

An assessment of practices in several countries worldwide indicates that diversion works best when:

- it is entrenched within the national legal framework;
- child protection/support services are available nationwide;
- different modes of intervention take the child's environment (families and communities) into account;[322]
- all the stakeholders (police, prosecutors, lawyers, judges, probation officers, social services, etc.) involved in the child protection network receive appropriate training and adequate resources;
- adequate human and financial resources are made available to guarantee equal provision of services for children;
- procedures are smooth with little bureaucracy required;
- guidelines are set nationwide and awareness is raised about the benefits and advantages of diversionary measures, including for serious offences; programmes offer opportunities for restorative justice interventions;[323]
- measures are gender-sensitive, accessible to all children, including children from minorities, children with less socio-economic opportunities as well as children with disabilities and developmental issues (who, for these same reasons, are often excluded from diversionary programmes).[324]

322 Cf. Craig S. Schwalbe *et al.* (2012), *op. cit.*, p. 31: 'Cognitive-behavioural interventions and family-based interventions based on an ecological framework have been fully established as key ingredients for successful interventions with delinquent youths'.; Donald A. Andrews & James Bonta, 'Rehabilitating Criminal Justice Policy and Practice', *Psychology, Public Policy, and Law,* Vol. 16, No. 1, pp. 39–55, 2010; Nana A. Landenberger & Mark W. Lipsey, 'The positive effects of cognitive-behavioral programs for offenders: A meta-analysis of factors associated with effective treatment', *Journal of Experimental Criminology,* Vol. 1(4), 2005, pp. 451–476. This review also shows an overall positive effect on reoffending of family treatment; see also: Johann A. Koehler, 'A systematic review and meta-analysis on the effects of young offender treatment programs in Europe', *Journal of Experimental Criminology,* Vol. 9(1), 2013, p. 20.

323 Cf. Craig S. Schwalbe *et al.* (2012), *op. cit.*; William Bradshaw *et al.*, 'The effect of victim-offender mediation on juvenile offender recidivism: a meta-analysis', *Conflict Resolution Quarterly,* Vol. 24(1), 2006; William R. Nugent, 'Participation in victim–offender mediation and the prevalence and severity of subsequent delinquent behaviour', *Research on Social Work Practice,* Vol. 14(6), 2003.

324 Rebecca D. Ericson *et al.* (2016), *op. cit.*; Cf. Joshua C. Cochran & Daniel P. Mears (2015), *op. cit.*; Jamie J. Fader *et al.* (2014), *op. cit.*; Eileen Baldry, *et al.* (2018), *op. cit.*, pp. 636-652.

A promising model comes from **South Africa**, a country that witnessed a complex reform of its child justice system emanating in the Child Justice Act in 2008. This provides for a wide range of diversionary measures: the child apprehended by the police can be at first released with an informal warning or referred to a probation officer, who prepares an assessment report. After this assessment, one of the various diversion options can be chosen (even in combination) –if deemed appropriate.

These diversion measures must be distinguished from cases where children commit an offence before they have actually reached the minimum age of criminal responsibility. Typically, child protection authorities play the central role in addressing such situations in that they develop individualised responses in collaboration with parents and the child concerned. The intention is to prevent future offences from happening. In these cases, justice responses are also limited to eventual interventions – specifically in relation to custody violations by parents.[325]

5.5 Applying Informal Justice Systems

In many parts of the world, an unknown but large number of children are treated within informal justice mechanisms. These informal settings include traditional/indigenous courts, councils of elders and other traditional authorities, who all play a crucial role in the resolution of disputes. Informal justice systems can be defined as 'every mechanism and process that exists separately from formal State-based justice institutions and procedures, such as police, prosecution, courts and custodial measures.'[326] These mechanisms commonly rely either on customary and oral laws or traditions and religious texts. In some countries they operate in parallel to the formal/central justice system, while in others they are recognised by the States to have an important role in the resolution of disputes.[327]

The main challenge posed by informal systems is the risk of violation of fair trial rights and the rule of law. The presumption of innocence can be compromised, as processes are voluntary yet based upon the assumption of guilt. Furthermore, some sanctions/responses can result

325 See, for instance, the debate in Austria on the difficult interplay between child protection authorities and the justice sector in cases of children committing offences before reaching the age of criminal responsibility: Federal Ministry of Justice, *Final Report - Runder Tisch 'Untersuchungshaft für Jugendliche – Vermeidung, Verkürzung, Vollziehung',* 2014, p. 63.

326 African Child Policy Forum, *Spotlight the invisible: Justice for children in Africa,* 2018, p. 83; UN Women, UNICEF & UNDP, *Informal Justice systems: Charting a course for human rights-based engagement,* New York, United Nations, 2012; Office of the High Commissioner for Human Rights, *Human rights and traditional justice systems in Africa,* 2016.

327 So-called 'legal pluralism', see African Child Policy Forum, *Spotlight the invisible* (2018), *op. cit.*, p. 83.

in violations of human rights (such as corporal punishment),[328] while the risk of corruption is also heightened.[329] In many cases there is no minimum age restriction for participation in informal processes.[330] Additionally, no' distinct' child justice system is provided. Given the patriarchal nature of many traditional communities and informal structures as well as the subordinate role that children usually occupy in these environments, there remains a great risk of gender discrimination. The participation of children in decisions that affect their lives can also be significantly reduced. Hence, it is crucial to train professionals and stakeholders on how to work alongside individuals from informal settings so as to make them more aware of child and other human rights. It is also important to collect more data on the actual extent of the use of informal justice.[331]

Informal justice, however, also holds potential for enhancing access to justice for all children thereby protecting them from the risk of violence and abuse in detention.[332] It can be a highly accessible form of justice, also being available for economically disadvantaged people in remote rural areas. It is flexible, cost-effective and usually avoids the use of detention for children – both at the pre-trial and sentencing stages. It can also reduce the detrimental effects of a formal proceeding. Inherently, informal processes within traditional justice are based on cooperation, communitarianism, strong group coherence, consensus-based decision-making as well as strong social ties. They rely heavily on a sense of **collective responsibility** that, in the formal system, is increasingly replaced by the opposite – notably a strong sense of individualism (even when a child's wellbeing is at stake). Moreover, informal justice is based on voluntary participation, which fosters relationships. Significantly, it offers restorative justice outcomes while giving a certain level of autonomy to the parties involved.[333] What is more, informal justice mechanisms play a particularly strong role for indigenous children and young people, who are often discriminated against

328 Cf. OHCHR, *Human Rights and Traditional Justice Systems in Africa,* Geneva 2016.

329 In its *Global Report on Corruption in Judicial Systems of 2007,* Transparency International claims that a 'lack of clear regulation of the interface between formal and informal institutions exposes women and children to disproportionate risk of corrupt practices' (Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems,* Cambridge University Press, 2007); see also Francis Karuiki, *African traditional justice systems,* 2017, p. 2, Available at https://www.academia.edu/34157113/African_Traditional_Justice_Systems (accessed 10 June 2019).

330 Claudia Campistol *et al.*, 'Customary justice for children in Egypt: an overview of the situation in the Governorate of Assyut', *Restorative Justice: An International Journal,* Vol. 5(1), 2017.

331 The variety of practices can be enormous, given that each community within the same ethnic/religious group can rely on specific practices. Research on children's experiences in the informal justice systems is then needed to confirm or dismantle these truths, to guarantee that informal processes take account of children's rights (Cf. African Child Policy Forum, *Spotlight the invisible* (2018), *op. cit.*; Francis Kariuki (2017), *op. cit.*; Francis Kariuki, 'Conflict resolution by elders in Africa: successes, challenges and opportunities', *Alternative Dispute Resolution Journal,* Vol. 3(2), 2015.

332 Chris Cunneen & Juan Tauri, *Indigenous Criminology,* Bristol, Bristol University Press, 2017.

333 Francis Kariuki, (2017), *op. cit.*; Danish Institute for Human Rights, *A study of informal justice systems: access to justice and human rights,* UN Women, UNICEF & UNDP, 2013.

in more formal settings. Moreover, the decision regarding suitable responses to the offence committed is usually more appropriate from a cultural perspective. It also respects the right to self-determination of indigenous communities more generally to develop and control their own culturally specific programmes and institutions.

In **Samoa**, the Village Fono Act 1990 provides the legislative basis for community justice. It allows the Ali'i and Faipule of a village[334] to resolve disputes and punish acts of village misconduct according to the customs of that village. The community leaders use traditional mediation to deal with the majority of cases involving children in conflict with the law. Only serious cases and those that the community leaders are not able (or not willing) to settle, are referred to the formal child justice system. The traditional mediation process involves the community leader bringing the various parties together – i.e., the victim(s), the child in conflict with the law, the child's parents/guardians and others who belong to the family or social support system/community of the victim(s) and the child. They discuss what happened and how the victim(s) or indeed the family of the victim(s) can be compensated. The goal is to determine how peace and goodwill can be restored within the community. Usually, the child is present during the mediation process, except in cases of very young children (under 10-12 years). The outcome of traditional mediation is usually a fine or financial/material compensation – to be paid by the child's parents/guardians to the victim(s). Moreover, the child is required to offer an apology or is assigned some community work (e.g., clean or prepare the house for the next mediation meeting).[335]

5.6 Non-custodial Practices at the Pre-trial Stage

When diversion at an earlier stage is not deemed appropriate, the justice system should be able to choose from a range of non-custodial measures that prevent the child from being deprived of liberty.[336] Some non-custodial measures are specifically developed for the pre-trial stage, including cautioning, bail release, foster care, community supervision, curfew and

334 The chiefs/councillors of the village.

335 *Global Study Questionnaire,* Samoa (UNICEF); see also: UNICEF (2017), *op. cit.*

336 See: Yannick van den Brink & Bart Lubow, 'Pre-trial detention of children as a last resort? Strategies and challenges for reform in the Netherlands and the United States', Wendy O'Brien & Cédric Foussard (eds.), *Violence Against Children in the Criminal Justice System,* London, Routledge, 2019 (forthcoming).

electronic monitoring. Such bail release should particularly be considered when the child is a first offender and/or the child has been assessed not to pose a risk of re-offending.[337]

In **Northern Ireland**, the Bail Support Schemes are intended to support young people at risk of not complying with their bail conditions and thus also at risk of being remanded. This measure provides an individualised programme for the young person, involving their parents/carers. The programme agreed upon by the court usually involves access to training, education, employment and social skills programmes. It also involves access to health and substance abuse interventions, as well as support assisting the young person to attend court hearings[338]

Whereas these programmes of bail support may be particularly beneficial for disadvantaged children without strong family and community support,[339] there are other non-custodial measures alternative to pre-trial detention. For example, the court may consider conditional release back to the family, to residential care or foster care.[340] Community measures and more comprehensive programmes that combine individualised sets of educative interventions and treatment are equally valid alternatives to pre-trial detention.

Programmes aimed at pre-trial release and community alternatives have proven successful in **Mexico**. In a number of States, Adolescent Pretrial Services Units ('UMECA') have been established, tasked with pre-trial risk assessments before the initial hearing, and considered as 'best practice' in relation to reduce numbers of children in pre-trial detention.[341]

In cases when the assessment of a child's family situation does not allow for the child to be returned back into his/her family, **foster care** presents an opportunity to keep children away from formal custody. Although foster care is well-established in many countries, it is

337 Cf. CRC-Committee, *General Comment 10 (2007): Children's rights in juvenile justice,* CRC/C/GC/10, 24 April 2007, para. 94: 'There should be a discretion to release with or without conditions, such as reporting to a police station or probation officer, and the payment of monetary bail should generally not be a requirement.'

338 Louise Forde, Ursula Kilkelly & Deirdre Malone (2016), *op. cit.*, pp. 51-52.

339 In Kenya, *Bail and Bond Guidelines* have been issued in 2015, providing that where the accused person is a minor, the denial of bail or bond is considered not to be in the best interests of the child. In making a bail decision in the case of accused persons who are children, the court should consider alternatives to remand, cf. Silvia Randazzo, *Human Rights and deprivation of liberty in Kenya,* 2016, pp. 94-95.

340 'Conditional pre-trial release to parents/guardians of family members' and 'Pre-trial release to parents/guardians, family and community leaders/elders' are documented practices respectively in Thailand and Samoa (cf. UNICEF, 2017).

341 Doug Keillor, *Children in Prison:Excessive juvenile pretrial detention in Mexico City,* International Justice Consulting, p 47.

still very often not formally integrated in the criminal justice system. In fact, there is a lack of awareness about the crucial role foster care can play in efforts to prevent detention.

In **England and Wales** the practice of intensive fostering was introduced in 2008. It is *inter alia* used as a solution for children in contact with the justice system whose family environment has been assessed as having contributed to their criminal behaviour. The placement of the child in foster care can last from 6 months to 12 months. It can also be linked to support programmes for the child's family. In such a case, family therapy, counselling or parenting skills can begin to proactively address underlying issues leading to criminal behaviour.[342]

In **several African countries** that responded to the questionnaire, pre- and post-trial practices are described as involving the family environment. These practices hold the option to either release a child into foster care/family placement[343] or to their parents/a trustworthy person.[344] The family environment also appears to play an important role in **Asia**, since several countries mention the possibility to release the child to their family, parents or guardian,[345] a foster family or caregiver.[346] Moreover, placing the child into the care of village authorities may provide for another alternative to deprivation of liberty.[347] In any such context, mechanisms should be in place to ensure high quality of foster care, including training and supervision.

5.7 Reducing the Use of and the Time in Pre-trial Detention

In addition to the non-custodial solutions mentioned above, other measures should also be put in place so as to ensure a child spends as little time as possible in pre-trial detention. Where it cannot be avoided it should be applied only for the shortest appropriate period of time. Some strategies and promising practices (apart from the investment in alternatives) include for example:

- providing statutory time limits and their strict enforcement;
- prioritising cases of children in pre-trial detention by the judicial authorities;

342 British Association for Adoption & Fostering (BAAF), *Alternatives to custody. Developing specialist fostering for children in conflict with the law: The Alternatives to Custody project – Europe*, 2015.

343 *UN Global Study Questionnaire*, Benin (State Reply), Chad (State Reply), Madagascar (State Reply).

344 *UN Global Study Questionnaire*, Benin (State Reply), Burkina Faso (State Reply), Libya (UN Agency Report), Madagascar (State Reply), Mauritius (State Reply), Republic Congo (State Reply).

345 *UN Global Study Questionnaire*, Cambodia (UNICEF), Iraq (State Reply), Lao (UNICEF), Malaysia (UNICEF), Myanmar (UNICEF), Philippines (UNICEF), Vietnam (UNICEF).

346 *UN Global Study Questionnaire*, Cambodia (UNICEF), Iraq (State Reply).

347 *UN Global Study Questionnaire*, Lao (UNICEF).

- ensuring timely first-appearances that set pre-trial conditions and an automatic review of pre-trial detention every 14 days as a minimum;[348]
- ensuring adequate resources for child justice systems;
- avoiding trial of children in adult courts.[349]

Moreover, the effective provision of legal safeguards is of crucial importance. The right to legal assistance and the role of the defence lawyer are essential at this stage and can prevent unnecessary detention for children waiting for trial.[350]

5.8 Applying Non-custodial Solutions at the Trial Stage

There is a wide variety of non-custodial measures applicable at the stage of sentencing. The most common types are community supervision and community services, where in both cases programmes can include a plurality of different interventions.

With **community supervision** the young person is normally placed under the supervision of a probation officer/social worker. In addition, the child is usually required to attend a diverse range of programmes that can include training, education, social activities, reparation, counselling and mentoring. **Community services** are also widely available and applied either as a stand-alone option or as part of a more comprehensive rehabilitation programme.

Besides that, a variety of **non-custodial dispositions** can be provided, including warnings, reprimands, reparation of harm, supervision or surveillance orders. Several non-custodial dispositions can be applied simultaneously, while their implementation usually falls under the jurisdiction of the municipal/local authorities as well as local social and probation services. Inter-agency cooperation between the justice system and the child protection/welfare system thus plays a crucial role in ensuring the availability of programmes in the

348 Juvenile Justice Advocates International, *Children in pre-trial detention. Promoting stronger international time limits,* 2018, pp. 46-51.

349 The study includes a global survey on pre-trial detention for children, recommendations from international, regional and national human rights bodies, and two case studies conducted in Chihuahua State, Mexico and in Baltimore City, USA. Juvenile Justice Advocates International, *Children in pre-trial detention. Promoting stronger international time limits,* 2018, pp. 46-51; see also: Penal Reform International, *Model for Reform:Ten-point plan' to reduce pre-trial detention,* 2015, Available at https://www.penalreform.org/resource/ten-point-plan-reducing-pre-trial-detention/ (accessed 10 June 2019).

350 On the crucial role of the lawyer for children see also: the Defence for Children Guide, *Practical Guide for Lawyers: How to defend a child in conflict with the law?,* 2018, Available at http://www.mylawyermyrights.eu/wp-content/uploads/2016/05/PRACTICAL-GUIDE-FOR-LAWYERS.pdf (accessed 10 June 2019).

first place. Such cooperation is also needed to ensure that the judicial authorities are aware of these options.[351]

In **Thailand**, a rehabilitation plan that comprises various interventions is also at the centre of the alternative measure of 'temporary disposal of the case by the court'. Even for serious offences, the court may order a rehabilitation plan that contains conditions with which the child and his/her parents/guardians must comply. This plan can be developed through a restorative conference led by a lay judge, which includes the victim with his/her support, the offender with his/her parents/guardians, the community leader (and sometimes a social worker, psychologist and the prosecutor). The plan can include education, training, compensation to the victim, other measures and interventions that also address the family of the child. The programme can last between six months to approximately two years. It is also regularly monitored by a multi-disciplinary team. Completing the programme successfully then ultimately leads to the dismissal of the case.[352]

For children with complex behavioural problems and/or substance use issues, specific types of alternatives can be available, such as **care-based and therapeutic measures**.[353] The efficacy of addressing the factors that may have led to the offence is well proven and numerous studies have found Multisystemic Theraphy (MST) to be effective in reducing re-offending.[354] The estimated reduction in long-term reoffending as a result of MST ranges from 25% to 70%. Currently, the programme is well established in many jurisdictions in **North America**, the **UK**, **Australia** and **Europe**.[355]

351 The duration of the programme is agreed with the court. The agreed plan needs to be regularly monitored by a multi-disciplinary team, usually leading to the dismissal of the case if it is completed successfully. Some good examples are documented in East-Asia and the Pacific (Thailand and Samoa), as well as Europe (Estonia, Italy, Northern Ireland, the Netherlands, Spain). Cf. UNICEF (2017), *op. cit.*; Terre des Hommes Foundation, 'Lausanne in Hungary' (2018), *op. cit.*; Defence for Children International, *Protecting the Rights of Children in Conflict with the Law – Research on Alternatives to the Deprivation of Liberty in Eight Countries*, 2008.

352 A conferencing alternative is also documented in Samoa, where it is called 'pre-sentencing meeting at the trial stage'. Cf. UNICEF, *Diversion not detention: A study on diversion and other alternative measures for children in conflict with the law in East Asia and the Pacific*, 2017.

353 Marianne Moore, *Save money, protect society and realise youth potential. Improving youth justice systems in a time of economic crisis*, European Council for Juvenile Justice & International Juvenile Justice Observatory, 2013.

354 Cf. Peter Murphy, Anthony McGinness & Tom McDermott, Review of Effective Practice in Juvenile Justice: Report for the Minister for Juvenile Justice, Australia, Noetic Solutions, 2010, p.36. In the Netherlands, results from research about the effectiveness of MST interventions show that 85% of the programmes are successfully completed and 82% of the young people involved do not reoffend: Cf. Louise Forde, Ursula Kilkelly & Deirdre Malone (2016), *op. cit.*, p.40.

355 Cf. Peter Murphy, Anthony McGinness & Tom McDermott (2010), *op. cit.*, p.36

In the **Netherlands**, a multisystemic therapy (MST) intervention is used as a non-custodial measure for young offenders with complex behavioural problems. It involves both the young person and his/her family. The measure takes place at home and a therapist works together with the child and the family. The intention is to empower the entire household, while also working on strengthening close relationships in the wider community. This programme can be accompanied by the 'Tools4U' programme, developed for young offenders with cognitive issues. It teaches them how to use specific techniques in order to improve and strengthen their cognitive and social skills.[356]

Based on prior assessment of capacities and attitudes of the child and the community, the **involvement of the community** throughout the process is crucial for the successful implementation of any programme. It is also highly beneficial for bringing about a reduction in reoffending. Significantly it also promotes a sense of shared responsibility for the child's wellbeing within the community. Simultaneously it strengthens the child's a sense of responsibility towards the community.

In **Canada**, a promising Life-Plan Coaching Programme called PACT (Participation, Acknowledgement, Commitment and Transformation) has been introduced in order to assist young people between 12 and 18 years of age who have persistently reoffended. Developed in Toronto in 2012, PACT provides a community response to serious offences. Young people are usually referred to this programme as part of a probation order or bail conditions. They are assigned to eight community service projects to develop specific life-skills. These provide them with safe spaces to complete community service, obtain practical skills, build self-esteem and explore potential career paths, while also giving back to their communities in meaningful ways. The coaching is geared toward building capacity and empowering young people in that it is designed to give youth the confidence and vision to put their plans into action. It helps them with acknowledging the need to change their behaviour, while providing them with the necessary support and structure to realise their vision of a better life.[357]

356 Louise Forde, Ursula Kilkelly & Deirdre Malone (2016), *op. cit.*

357 Cf. Marianne Moore (2013), *op. cit.*, p.61

Practices in different countries show that any effective rehabilitation programme provided as non- custodial solutions needs to be:

- holistic, dynamic and participatory;[358]
- based on an integrated approach between various stakeholders in the justice, child welfare, probation and social services systems;[359]
- reliant on resources allocated at national and local level that guarantee an equal provision of services throughout the country;
- inclusive in that it involves families and communities through support and/or training as well as relationship building activities between the child and the family;
- designed to reduce stigmatisation, and
- committed to broaden a sense of ownership and shared responsibility.[360]

Community sanctions have been proven to have a positive effect even with serious and violent offenders, reducing reoffending by as much as 50%.[361] Furthermore, functional family therapy, meaning a family-focused programme that aims at reducing risk factors and enhancing protective factors, is also proven to be effective in significantly reducing reoffending.[362]

358 Séverine Jacomy-Vité, *Green paper on Child Friendly Justice: The Social reintegration of youth offenders as a key factor to prevent recidivism*, European Council on Juvenile Justice,2007, Available at https://www.oijj.org/doc/inf/Green_Paper_NGO_Section.pdf (accessed 10 June 2019).

359 Cf. Articles 1-2 of the Council of Europe Recommendation *Rec(2003)20* of the Committee of Ministers to Member states concerning new ways of dealing with juvenile delinquency and the role of child justice: 'the juvenile justice system should be seen as one component in a broader, community-based strategy for preventing juvenile delinquency, that takes account of the wider family, school, neighbourhood and peer group context within which offending occurs.'

360 Cf. Séverine Jacomy-Vité (2007), *op. cit.*; Marianne Moore (2013), *op. cit.*

361 Barry Goldson & John Muncie, 'Children's human rights and youth justice with integrity', Barry Goldson & John Muncie (2015), *op. cit.*; Marianne Moore (2013), *op. cit.*, pp. 8-9; Louise Forde, Ursula Kilkelly & Deirdre Malone (2016), *op. cit.* Once more, a promising example comes from Germany, where the introduction of community sanctions replacing short-term detention produced a significant reduction in young reoffending – even with medium-high risk offenders. Research conducted in 2003 showed that the reoffending rate for young people committed to short-term detention was 70% within 4 years, compared to less than 40% within 4 years for similar offences sentenced with educational community sanctions. (Cf. Scott H. Decker & Nerea Marteache, *International Handbook on Juvenile Justice*, Springer, 2017, pp. 314-315; Frieder Dünkel & Ineke Pruin, 'Community Sanctions and the Sanctioning Practice in Juvenile Justice Systems in Europe', Josine Junger-Tas & Frieder Dünkel (eds.), (2009), *op. cit.*, p.187.

362 Marianne Moore (2013), *op. cit.*, pp. 8-9; Louise Forde, Ursula Kilkelly & Deirdre Malone (2016), *op. cit.*, p.60, referring to the Scott W. Henggeler *et al.*, *Multisystemic treatment of antisocial behavior in children and adolescents*, New York, The Guildford Press,1998.

In **Vietnam**, community-based education is the most often used alternative to post-trial detention. The child is placed under the supervision and education of the local communes, wards, district administration or social organisations. They must fulfil obligations for education, employment and rehabilitation. This allows sentenced children to remain with their families. Since community level education is a non-custodial measure, the president of a local People's Committee has the authority to decide whether or not a child must participate. Before deciding the matter, the law requires that he/she organises a meeting with the local police chiefs, legal representatives, representatives of local organisations and the families of those who may be required to participate in the education. Within days of this meeting, the president issues a decision. The agencies charged with carrying out the education meet with the child to organise and implement a plan of action within a set time limit. Once a month these organisations must report to the local People's Committee on the progress of the child. When the child has finished the duration of his/her sentence, the People's Committee president issues a certificate.[363]

5.9 Developing Restorative Justice Approaches

Restorative justice is a form of alternative justice that can be applied at any stage of the proceedings. It can be used as a measure of diversion as well as a pre-trial and post-trial practice. It can either function as a stand-alone measure or in combination with other measures as part of a comprehensive probation/treatment programme.

There are many types of restorative justice practices with a multitude of projects developed and implemented worldwide. As an approach restorative justice typically includes practices such as victim-offender mediation, conferencing and circles. According to UN standards, 'a "restorative process" means any process in which the victim and the offender, and, where appropriate, any other individuals or community members affected by a crime, participate together actively in the resolution of matters arising from the crime, generally with the help of a facilitator.'[364] Restorative justice can be available at all stages of the proceedings. Children who come in contact with the law can be referred to the restorative justice

363 *Global Study Questionnaire,* Vietnam (UNICEF), based on UNICEF, *Diversion not Detention: A study on diversion and other alternative measures for children in conflict with the law in East Asia and the Pacific,* 2017, p. 62.

364 ECOSOC, *UN Economic and Social Council Resolution 2002/12: Basic principles on the use of restorative justice programmes in criminal matters,* E/RES/2002/12, 24 July 2002; ECOSOC, *UN Economic and Social Council Resolution2016/17: restorative justice in criminal matters,* E/2016/30, 26 July 2016. From a regional perspective, see also *EU Victims' Directive 2012/29*, Article 2.1(d).

services by the police, the prosecutor or the court. Central to this approach is a focus on dialogue and steps towards restoration of the harm caused. To achieve this, restorative justice welcomes the involvement of all the parties interested in the offence committed by a child, including the community, with the expectation to have a positive impact on the child's rehabilitation and reintegration, and to reduce/eliminate the risk victimisation and stigmatisation.[365] Significantly however, the rights of the child offender should always be protected without neglecting the needs of the victim (who may often be a child as well). Restorative justice is quite commonly used in **Asian**, **African**, **Oceanic** and **South American countries** and is often based on traditional values, customs and practices. This should be clearly recognised, considered and understood before it is applied.[366]

The Adolescent Attention Programme in **El Salvador** focuses on restorative practices such as conciliation and referral, repairing damages and avoiding confronting children who commit less serious crimes with the criminal justice system. In recent years, teachers have received training in order to understand the special needs of child offenders, who are referred to schools for the purpose of their continued education. Several initiatives aim to prevent violence against children as well as their participation in gangs. The focus of such initiatives is to provide vocational training and recreational spaces. Examples of the programmes in El Salvador is' City of Childhood and Adolescence' programme organised by the Institute for the Development of Children and Adolescents (ISNA). Every year approximately 10,000 children benefit from the Institute's programme.[367]

Restorative justice illustrates very well that when all parties concerned feel as if they are treated fairly and with trust, they experience genuine relief for being heard and grateful for having had possibility to express themselves in a safe and attentive environment.[368] In the

365 As recommended by the *UN Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice,* para 31.

366 Cf. Chris Cunneen & Barry Goldson, 'Restorative justice: A critical analysis', Barry Goldson & John Muncie (2015), *op. cit.*, pp. 137-156; Brunilda Pali & Silvia Randazzo, *Practical Guide on Implementing Restorative Justice with Children,* International Juvenile Justice Observatory, 2018.

367 *Global Study Questionnaire,* El Salvador (State Reply).

368 Stefaan Pleysier *et al.*, 'Restorative Justice and Adolescent Health', Andrew L. Cherry *et al.*, *International Handbook on Adolescent Health and Development,* The Public Health Response, 2017, p. 131; Paul McCold & Banjamin Wachtel, *Restorative policing experiment: The Bethlehem Pennsylvania police family group conferencing project,* Piperville (PA), Community Service Foundation, 1998; Allison Morris & Gabrielle Maxwell, 'The practice of family group conferences in New Zealand: Assessing the place, potential and pitfalls of restorative justice', Adam Crawford & Jo Goodey, *Integrating a victim perspective within criminal justice,* London, Routledge, 2000; Christa Pelikan & Thomas Trenczek, 'Victim offender mediation and restorative justice: The European landscape', Dennis Sullivan & Larry Tifft (eds.), *Handbook of restorative justice,* London, Routledge, 2008; Mark S. Umbreit *et al.*, 'Victim offender mediation: An evolving evidence-based practice'; Dennis Sullivan & Larry Tifft (2008) *op. cit.*, pp. 52-62.

case of children, the child is guided by skilled professionals towards an understanding of his/her act, its consequences and possible solutions that are restorative for all the parties involved. Children who were involved in conferences expressed appreciation for finally having some form of control over the process. The paradigm brought about by restorative justice practices therefore embodies a necessary shift in attitude from criminalisation (where a child is a passive recipient of a punishment for behaviour) towards a proactive process of 'responsabilisation', which is always proportional to the offence committed. Research has confirmed positive outcomes from restorative justice with regard to reducing reoffending. One of the most systematic assessments shows a 7% lower re-offending rate for restorative justice programmes compared to formal proceedings, with little variations between different samples (adults/children); particularly good results have been achieved when restorative justice is offered to serious offenders.[369]

369 James Bonta *et al.*, 'Restorative justice and recidivism: Promises made, promises kept?', Dennis Sullivan & Larry Tifft (eds.), *Handbook of restorative justice: A global perspective* (pp. 108–120). London, Routledge, reported by Stefaan Pleysier *et al.*, (2017), *op. cit.* Also, in Northern Ireland, it emerges quite clearly that restorative responses have more positive effects on young people than when they are handled within the formal criminal justice system. The reoffending rate for young people who participated in court youth conferences is 45.4%. Young people who participate in diversionary conferences reoffend at a rate of 29.4%. Conversely, reoffending rates for custodial institutions is 68.3% and 58.8% for probation orders (Stefaan Pleysier *et al.* (2017), *op. cit.*, p. 132).

Diversionary conferencing is available in **Ireland, Northern Ireland and Belgium** at different levels.[370] In **Ireland**, young people who have committed an offence can be referred to a restorative conference, without restrictions on the types of offences eligible (thereby also including serious offences). In this instance, the police have the discretionary power to refer cases. The police need to strike a balance between considering *public* interest in prosecution, while also protecting the best interests of the *child*. Only when the offender takes responsibility for the act and gives consent, a conference is held at the police station, facilitated by a trained police officer. The eligible participants are: the child's parents/guardians, other significant adults, representatives of the enforcement agencies (as well as child protection agencies), the victim with his/her family and/or supporters. Ultimately, the objective of the conference is to agree on a plan with which the child has to comply. If the plan is agreed upon the charge is dropped.

In **Northern Ireland**, petty offences are usually diverted at police level, while serious offences can be referred to conferencing at prosecutor level. At court level it is mandatory to refer young offenders, who admit guilt and gave their consent to participate in the conferencing process, to a so called 'court-ordered youth conference' (an alternative to detention at sentencing level).

In **Belgium**, the procedure at police level differs significantly from the countries above in that fulfilling the plan/agreement developed during the conference does not automatically have an impact on the charges. In terms of diversion or sentencing, this also depends on the level of satisfaction for the public interest. At the youth court level though, restorative disposals are prioritised over other measures. At every stage of the proceedings, youth judges can propose victim-offender mediation (VOM) or conferencing to young offenders.[371]

Practice shows that restorative justice works best with children when there is a legal basis, with clear referral systems in place. Moreover, all the stakeholders cooperating with this approach should always be informed at every stage. To best address children, restorative

370 For more details about restorative diversionary practices in Belgium and Northern Ireland see: Tim Chapman, *Protecting Rights, Restoring Respect and Strengthening Relationships: A European Model for Restorative Justice with Children and Young People,* International Juvenile Justice Observatory & European Council for Juvenile Justice, 2015.

371 Frieder Dünkel, Joanna Grzywa-Holten, Philip Horsfield & Andrea Păroşanu, 'Restorative Justice and Juvenile Offenders in Europe: Comparative overview', Frieder Dünkel, Philip Horsfield & Andrea Păroşanu (eds.), *European Research on Restorative Juvenile Justice,* International Juvenile Justice Observatory & European Council for Juvenile Justice, 2015.

justice services must also be available, accessible, safe and of high quality. Furthermore, involving mediators properly trained in children's rights and communication techniques is shown to lead to positive results. It is crucial that at every stage free consent should be obtained after all parties concerned have been provided with unbiased information. This ensures the prevalence of a child-sensitive approach that guarantees child participation in multiple ways. In order to ensure effective participation though, communication techniques must be arranged that consider the child's age and understanding. Throughout this process proportionality must be guaranteed. Finally, restorative justice works best when the community is involved at all stages.[372]

6. Treatment with Dignity, Rehabilitation and Social Reintegration

6.1 Adequate Treatment in Detention and Rehabilitation

This Study provides evidence of the negative impact on children of failures to prevent deprivation of liberty and of the lack of non-custodial measures, incompatible with existing child rights and criminal justice standards. Therefore, States should work towards reducing detention of children in administration of justice to an absolute minimum, keeping in mind that detention is only permitted as a measure of last resort. In situations, where deprivation of liberty of children is nevertheless unavoidable, respect for the child's rights while in detention remains paramount. Nothing in this section is intended to justify existing practices of deprivation of liberty of children, nevertheless, new approaches to improve their treatment shall be discussed.

Treatment for children in detention should be individualised and tailored to each child's specific needs, skills, social and familiar circumstances. Crucially, it should be developed together with the child as soon as possible after a first assessment, yet it should always be evaluated and, if needed, adapted regularly in the course of the child's detention.

An internationally compliant **model of treatment and intervention** for children in detention must be multi-disciplinary and holistic in nature. Importantly, it should always aim to create a safe environment for the child, while also addressing the diverse dimensions of a child's development. These dimensions include considering the child's psychological and emotional state. Treatment should also address the way a child thinks and behaves through cognitive behavioural strategies. The educational, social and relational dimensions are also

372 Brundilda Pali & Silvia Randazzo, *Practical Guide on Implementing Restorative Justice with Children*, International Juvenile Justice Observatory, 2018.

to be addressed head-on in any model selected.[373] Although several approaches towards treatment have been developed around the globe, some deserve particular attention due to the fact that they are the most commonly cited and used:

The **cognitive-behavioural model** consists of addressing factors that contributed to the offending. It does so by specifically working on the child's personal resilience, while also reinforcing the child's emotional ties and support networks. It is used to treat people who have committed serious offences, who seem to respond positively to individual therapy and interpersonal skills training that mix a variety of components.[374]

The **Risk-Need-Responsivity (RNR) Model** is considered a reference model – particularly for (young) people who have committed serious offences; it focuses on intervention by addressing risk-factors and support needs to prevent (re-)commission of offences.[375]

Moreover, **'strength-based' approaches** are steadily gaining ground. As an approach it addresses the child's integral personality, needs, strengths and broader socio-familial context and circumstances. Addressing these aspects aims to proactively guide children towards finding meaningful goals, thereby directly assisting their reintegration into the community.[376]

373 Francisco Legaz Cervantes, Juan José, Periago Morant & Amparo Pozo Martinez, 'Model of Psychosocial Intervention for Children Deprived of Liberty in a Juvenile Justice Framework: Efficiency Through International Standards', *Protecting Children against Torture in Detention: Global Solutions for a Global Problem* (2017), *op. cit.*, 2017, pp. 217-231.

374 Like modelling, role-playing, social problem solving; see also Joanna A. Koehler *et al.*, 'A systematic review and meta-analysis on the effects of young offender treatment programs in Europe', *Journal of Experimental Criminology,* Vol. 9(1), 2013; Cf. Francisco Legaz Cervantes *et al.* (2017), *op. cit.*, pp. 217-231; Séverine. Jacomy-Vité, *Green paper on Child Friendly Justice: The Social reintegration of youth offenders as a key factor to prevent recidivism,* European Council on Juvenile Justice, 2007, pp. 36-42, Available at https://www.oijj.org/doc/inf/Green_Paper_NGO_Section.pdf (accessed 10 June 2019); Mark W, Lipsey *et al.*, *Effective intervention for serious juvenile offenders: A synthesis of research,* US Department of Justice, 1998.

375 This model was introduced around the '90s in Canada and now is largely used with treatment of different categories of offenders in custody, including young offenders; see also Donald A. Andrews *et al.*, 'Classification for effective rehabilitation', *Criminal Justice and Behavior,* Vol. 17(1), 1990; Donald A. Andrews & C. Dowden, 'Risk principle of case classification in correctional treatment: A meta-analytic investigation', *International Journal of Offender Therapy and Comparative Criminology,* Vol. 50(1), 2006; Donald A. Andrews & James Bonta, *Risk-Need-Responsivity Model for Offenders Assessment and Rehabilitation,* Public Safety Canada, 2007; Donald A. Andrews & James Bonta, 'Rehabilitating Criminal Justice Policy and Practice', *Psychology, Public Policy and Law,* Vol. 16(1), 2010; UNODC, *Handbook on the prevention of recidivism and social reintegration of offenders,* 2013.

376 Risk-factors include characteristics of an individual, including his/her life circumstances, that are favourable to criminal activity. The combination of these factors is often the focus of rehabilitative treatment according to the RNR model (e.g. antisocial cognitions, substance abuse, poor parenting skills, etc.). On the other hand, the more 'positive' model – the so-called 'Good Lives model' – argues that a more appropriate holistic approach would include 'human needs' (e.g. positive needs such as friendship, enjoyable work, loving relationships, etc.). This model argues that these positive aspects should also be at the centre of rehabilitation treatments; see also Clare-Ann Fortune, 'The Good Lives Model: A strength-based approach for youth offenders', *Aggression and Violent Behevior,* Vol. 38, 2018; UNODC, *Handbook on the prevention of recidivism and social reintegration of offenders,* 2013; T. Ward *et al.*, 'The Good Lives Model and the Risk-Need-Responsivity model: A Critical Response to Andrews, Bonta, and Wormith', in *Criminal Justice and Behavior,* Vol. 39(1), 2011; Donald. A. Andrews, James. Bonta & J. Stephen Wormith, 'The risk-need-responsivity (RNR) model: Does Adding the Good Lives Model Contribute to Effective Crime Prevention?', Criminal Justice and Behavior, Vol. 38(7),2011.

An interesting example comes from **Louisiana, USA,** where a multi-faceted integrated treatment programme for child sexual offenders has been developed. This approach is theoretically based on cognitive-behavioural models, but integrates various forms of intervention. On the one hand, it entails a process that includes provisions of assessments, psychological/psychiatric treatment, education, pharmacological and skills-based methodologies. On the other hand, it also integrates family/group therapy and reintegration services, which includes a specific focus on re-entry intervention.[377]

Instrumental to a successful reintegration of children after release is the possibility to maintain close ties and **relationships with families and friends**. Some States have established measures to ensure more meaningful interaction between children deprived of liberty and their families, e.g. the creation of detached family meeting houses so that prisoners can stay with their families for a few days.[378] In other countries, arrangements have been put in place to allow young people to use internet services to stay in contact with their families.[379] In **Uruguay**, support is provided to parents, guardians and other family members who, for financial reasons, would otherwise not be able to visit the centres. This support comes from the administration of child detention facilities that includes a certain amount in the budget policy.[380]

To guarantee a positive environment in detention and a constructive relationship between children and staff, **multi-disciplinary staff training** has shown some promising results in reducing barriers. In such a training, the entire staff (ranging from the nurses to the prison officers) participate together.[381] What is more, in addition to reducing barriers, training the staff on the rights of the child has further led to the improvement of conditions within facilities.[382]

377 Lee A. Underwood *et al.*, 'Results from a Multi-modal Program Evaluation of a Four Year Statewide Juvenile Sex Offender Treatment and Reentry Program', *Journal of Prison Education and Reentry,* Vol. 2(2), 2015.

378 Republic of Korea: The Korea Correctional Service has built detached family meeting houses within prison facilities to allow inmates to stay for one night and two days with family members in order to maintain family relationships. These family meeting houses now operate in 41 facilities in 40 regions across the Republic of Korea, See: UNODC, *Introductory Handbook on the Prevention of Recidivism and Social Integration of Offenders,* Available at https://www.unodc.org/documents/justice-and-prison-reform/crimeprevention/Prevention_of_Recidivism_and_Social_Reintegration_12-55107_Ebook.pdf (accessed 10 June 2019).

379 Commissioner for Human Rights, *Positions on Children's Rights,* Strasbourg, Council of Europe, May 2010, p. 6; CPT, *Juveniles deprived of their liberty under criminal legislation: extract from the 24th General Report of the CPT,* Strasbourg, Council of Europe, 2015, para. 124.

380 Inter-American Commission on Human Rights Rapporteurship on the Rights of the Child, *Juvenile Justice and Human Rights in the Americas,* pp. 101-102, Available at http://www.oas.org/en/iachr/children/docs/pdf/juvenilejustice.pdf (accessed 10 June 2019).

381 In the UK, the 'Keppel Unit' (a specialised child detention facility in the north of England), has a multi-disciplinary team of professionals, which includes prison officers, teachers, psychologists, nurses and mental health workers. Before the unit opened, all these staff were trained together. This group training dismantled the barriers and suspicions between professions and a bond was formed between them. This is maintained through regular multi-disciplinary meetings every morning and afternoon. Cf. Penal Reform International & UK Aid, *Protecting children's rights in criminal justice systems: A training manual and reference point for professionals and policymakers,* 2013, Available at https://cdn.penalreform.org/wp-content/uploads/2013/11/Childrens-rights-training-manual-Final%C2%ADHR.pdf (accessed 10 June 2019).

382 See Turkey: one module of the Ardıç Programme was designed to train psychosocial personnel employed in Ministry of Justice establishments (psychologists, social workers and some teachers) in handling children with specific problems through anger management. The second module for administrators and staff members employed in child prisons, detention centre and education centres provided basic awareness of child rights.

The use of restorative justice *within* detention facilities has also shown promise for restoring relationship and reintegrating children who committed serious crimes. It notably shifts a detention facility from a space of punishment, to a place of care, treatment and rehabilitation. Although restorative justice in detention is at present by and large used on an experimental and localised level (and mostly only in adult prisons), interesting programmes for children have been reported *inter alia* from **Belgium**, **Germany**, **England and Wales**, and **Portugal**.[383]

During the last decade, a promising restorative practice has been implemented in the children statutory institutions of **Kenya**. Using a method called 'Participatory educational theatre', acting and performing become instruments helping children to address the various forms of violence they are exposed to. By putting on plays they express and deal with their oppression, abuse, mistreatment and neglect. In this way, children become active bearers of their claims to justice. Both the children and the audience are thus brought to reflect on what they see, which leads to a sense of shared responsibility crucial for change. Moreover, being confronted with a theatrical play also prompts the community to take action, become agents of social change and find long-term solutions. Additionally, participatory educational theatre also serves as a way to cope with traumas.[384]

Finally, multinational research on intervention programmes on children in contact with the justice system shows that treatment programmes have a positive effect on children in conflict with the law particularly when the interventions also address the child's immediate environment (family and community), not just the child's individual behaviour.[385]

6.2 Monitoring and Complaints Mechanisms

Independent expert review and continuous monitoring is vital to ensure that the human rights of children are upheld.[386] To this end, there are many forms of national and

383 See also Frieder Dünkel, Philip Horsfield & Andrea Păroşanu (eds.), *European Research on Restorative Juvenile Justice: Volume I,* International Juvenile Justice Observatory & European Council for Juvenile Justice, 2015; Tim Chapman, *Protecting Rights, Restoring Respect and Strengthening Relationships: A European Model for Restorative Justice with Children and Young People,* International Juvenile Justice Observatory & European Council for Juvenile Justice, 2015.

384 CESVI European Union, *Guidelines Manual on Juvenile Justice Best Practices: An Evidence-Based Approach to the Justice Reforms in Kenya,* 2016.

385 Séverine Jacomy-Vité, *Green paper on Child Friendly Justice: The Social reintegration of youth offenders as a key factor to prevent recidivism,* European Council on Juvenile Justice, 2007, Available at https://www.oijj.org/doc/inf/Green_Paper_NGO_Section.pdf (accessed 10 June 2910); Kirk. Heilbrun *et al.*, *Risk factors and intervention outcomes: Meta-analyses of juvenile offending,* Oxford, Oxford University Press, 2005; Lipsey, 'Juvenile Delinquency treatment: A meta-analytic inquiry into the variability effect', Thomas D. Cook *et al.*, *Meta-Analysis for Explanation,* New York, Russell Sage Foundation, 1992.

386 Barry Goldson & Ursula Kilkelly (2013), *op. cit.*, pp. 345-371; Ton Liefaard (2016), *op. cit.*, pp. 57-80.

international independent monitoring bodies worldwide. Many countries have more than one monitoring body in place. The duty to inspect conditions and treatment in child detention facilities usually falls to statutory inspection bodies. For instance, the Children's Commissioner in **New Zealand** is charged with undertaking inspections, the findings of which are then passed on to the Ombudsman and the judicial inspection bodies. In **Austria**, a judge (mandated by the president of the Youth Court), must visit the detention facility once a month to speak to the children, who were placed there by the Court. Civil society monitoring is also a valuable form of scrutiny. This is, for example, undertaken in **South Africa** by the Independent Correctional Centre Visitors (ICCVs).[387] Additionally, many countries worldwide have established independent National Preventive Mechanisms (NPMs) under the Optional Protocol to the UN Convention against Torture (OPCAT), mandated to visit all places of detention. These mechanisms are also responsible to deal with the issue of children deprived of liberty and issue specific reports on how to improve children's treatment in detention.[388] Other countries arrange for independent youth justice experts to undertake reviews of places of child detention. In such cases it is imperative that reports of such reviews are published and made publicly available in the interests of accountability, transparency and the public good.

Children have the right to raise issues both to the staff supervising them and the authorities running the detention facility itself. They should be able to do this without *any* reprisals. For more serious complaints, an independent complaint mechanism should be in place so as to conduct prompt and effective investigations. Some countries, such as **Slovenia**, have established *specialised administrative complaints mechanisms* for children deprived of liberty.[389] Positive practices have also emerged from the **MENA region**. Here, *independent national institutions* for the rights of the child and *safe reporting mechanisms* are being created and implemented to not only monitor child justice systems specifically, but also child rights as a whole.[390] Furthermore, most countries in this region are implementing *national child helplines* where violence against children can be reported.[391] They often do this with the help of civil society organisations. In 2010, the National Centre for Human

387 Similar to the UK's IMBs, South Africa has introduced ICCVs, who are trained members of the public often with no prior knowledge of the prison environment.

388 For guidance on monitoring see: Defence for Children International – Belgium, *Practical Guide - Monitoring places where children are deprived of liberty,* 2016; see also: European Network of Ombudspersons for Children, *ENOC Position Statement on 'The rights of children/young people in conflict with the law',* 2012.

389 Cf. CRC-Committee, *Second periodic report of Slovenia,* CRC/C/70/Add.19, 18 June 2003, para. 23, Available at https://undocs.org/CRC/C/70/Add.19 (accessed 31 August 2018).

390 Arab Republic of Egypt, *The comparative Arab report on implementing the recommendations of the UN Secretary General's study on violence against children, 2013,* Available at https://violenceagainstchildren.un.org/sites/violenceagainstchildren.un.org/files/documents/political_declarations/las_report_final_2012.pdf(accessed 10 June 2019).

391 See Jordan, Bahrain, Saudi Arabia, Sudan, Iraq, Palestine, Qatar, Lebanon, Morocco and Yemen: children receive psychological guidance services through child helplines and the use of websites.

Rights in **Jordan** (an independent human rights based institution) has established a specialised unit for children's rights, which can receive complaints from children as well as their representatives. The unit investigates complaints and follows up on them as well.[392] In **England**, the NGO Barnardo's has developed the Children's Advocacy Service which is placed in several penal institutions for young people who have committed offences across the country. The service provides young detainees with a free helpline that enables children to obtain support and be linked to other relevant professionals.[393] Similarly, the Howard League for Penal Reform provides a unique national legal team specialising in the rights and entitlements of children and young people in penal detention.[394]

When the rights of a detained child have been violated, non-Governmental organisations often play a crucial role in reporting these violations. About half of the surveyed countries permit child focused NGOs to bring cases before the court on behalf of victims. Particularly English-speaking countries in **Africa** have established particularly powerful mechanisms enabling support from NGOs. **South Africa** and **Kenya** are two noteworthy examples, where NGOs are allowed to bring cases of public interest before the court that either involve violations against the Bill of Rights or the Children's Act.[395]

6.3 Release and Reintegration into the Community

Providing children in detention with proper rehabilitation programmes, while promoting their physical and psychological integrity, is crucial for successful reintegration of the child into the community. Reintegration should however not be regarded as merely the final step necessitating the involvement of only a few professionals at the stage of a child's release. It is a process that involves all actors engaged in the protection of the child.[396] Cooperation between child detention facilities and civil society organisations should be fostered to provide appropriate education and vocational training to children in detention, ensuring that they do not leave the institution at an educational disadvantage. The representatives of agencies providing such services should be consulted and should have access to children while they are detained.

392 League of Arab States, *Contemporary Arab Report on Implementing the Recommendations of the UN Secretary-General's Study on Violence against Children*, 2012, p. 78.

393 Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice*, 2010, p. 92.

394 The Howard League for Penal Reform's website, Available at https://howardleague.org/legal-work/(accessed 7 August 2019).

395 Cf. Child Rights International Network (2016), *op. cit.*, p. 25; See: Ann Skelton 'Child Justice in South Africa: Application of International Instruments in the Constitutional Court' *International Journal on Children's Rights*, Vol. 26(3), 2018, pp. 391-422.

396 Séverine Jacomy-Vité, *Green paper on Child Friendly Justice: The Social reintegration of youth offenders as a key factor to prevent recidivism*, European Council on Juvenile Justice, 2007, Available at https://www.oijj.org/doc/inf/Green_Paper_NGO_Section.pdf (accessed 10 June 2910).

The child's reintegration into the community is therefore an issue for all children who enter in contact with the criminal justice system, including children who benefit from non-custodial measures. As soon as children experience detention, they not only have to come to terms with its impact on their development, but also face stigma within the community due to their past criminal behaviour and the fact that they were placed in an institution. All the staff within the justice system must work together with professionals who work 'outside' of the justice system, to guarantee a smooth and constructive return of the child back into the community. Important to consider in this regard is the impact release from police custody has on the child as well as their need for support in order to handle possible stigmatisation. However, reintegration services (when available) do not often cover this vital stage.[397]

A post-release programme is effective when preparing children for increased responsibility and freedom, facilitating their interaction within the community, working together with the child and the support systems, developing new resources and monitoring mechanisms and testing the abilities of the youth and the community to deal with each other productively. A few examples of early release and post-release programmes include:

- supervision and attendance centres,
- school attendance,
- vocational skill training,
- community service work,
- reparation,
- competency development programmes,
- treatment programmes for alcohol or drug dependence,
- mentoring programmes and
- gang resistance programmes.[398]

Additionally, besides serving as an option for diversion and treatment alternatives, restorative justice practices also have promising elements for preparing a child for release and a smooth reintegration back into society. Restorative justice within this context is a participatory form of justice where the child takes ownership of the experience in order to make sense of the offence and the harm it has done to victim(s). This engagement initiated within the confounds of the detention facility forms the basis from where lives can be rebuilt. What is more, it makes the return of the offender not just possible, but even desirable.

397 Séverine Jacomy-Vité, *Green paper on Child Friendly Justice: The Social reintegration of youth offenders as a key factor to prevent recidivism*, European Council on Juvenile Justice, 2007, Available at https://www.oijj.org/doc/inf/Green_Paper_NGO_Section.pdf (accessed 10 June 2910).

398 UNODC, *Handbook on the prevention of recidivism and social reintegration of offenders*, Criminal Justice Handbook Series, New York, 2013.

In **Australia and New Zealand,** the origins of restorative justice can partly be traced to John Braithwaite's 'Reintegrative Shaming' theory and in the participatory approach of **group/family conferencing**. Developed in New Zealand and introduced to law in The Children, Young Persons and Their Families Act (1989), this practice gathers family and significant adults from the community in decision-making processes that affect children in contact with the justice system. They focus on the restoration of harmony and quick reintegration of the child.[399]

7. Conclusions

- A comprehensive set of international human rights standards testifies to a strong legal and political commitment by the international community to limit and prevent the deprivation of liberty of children in the administration of justice. It is therefore encouraging to find that most countries have indeed introduced child justice legislation.
- However, in reality, systems are often dysfunctional, leading to a huge gap between the provisions of law and their implementation in practice.
- The dominant perception of children in conflict with the law disregards their status as children. Instead, policies and practice often still tend to focus on retribution and punishment rather than empowerment and rehabilitation – which is clearly contrary to international child rights law. Additionally, the child's agency and right to participate are widely ignored.
- Research clearly indicates that deprivation of liberty has severe and potentially permanent negative impacts on the wellbeing of children and therefore, by extension, also on society as a whole. Prevention of detention in the administration of justice should build also on lessons learned from other policies of deinstitutionalisation.
- Placing a child in detention as a measure of crime prevention, crime reduction and/or community safety is largely ineffective, cost-inefficient and even counterproductive.
- Repressive approaches to law enforcement designed to combat drug use, terrorism, organised crime and trade in small arms clearly have a negative impact on the prevention of child offending and deprivation of liberty.
- There is a correlation between lack of capacity and resources and over-reliance on arrest and detention, further exacerbated by lack of public awareness-raising, education and training of professionals on non-custodial, diversionary measures.

399 Murray Levine, 'The Family Group Conference in New Zealand Children, Young Persons and their Families Act of 1989: review and evaluation', *Behavioral Sciences & Law*, Vol. 18(4), 2000.

- The minimum age of criminal responsibility in several countries is strikingly below the standards set by the CRC-Committee, with some countries even considering further lowering. However, this stands in stark contrast to the global trend to increase the minimum age of criminal responsibility.
- Connected to this is the excessive criminalisation of child behaviour, including 'status offences', in some countries. This runs counter to the principle of prevention and reduction of deprivation of liberty.
- Discrimination in the justice system (including in detention practices) is widespread and remains inadequately addressed. Boys, children from disadvantaged background, migrant communities and ethnic minorities are over represented in detention.
- Shortage of human and economic resources as well as lack of training and supervision significantly contribute to the risk of corruption in the administration of justice.
- Insufficient investment is made in effective rehabilitation and reintegration programmes to counter reoffending, based on sound empirical research and impact assessment.
- Legislation and practices allowing the death penalty, life sentencing and the use of corporal punishment as a sentence persist in some countries. This is in direct violation of international child rights law.
- In some countries, the excessive length of the proceedings results in a violation of the principle of detention for the shortest appropriate period of time.
- Conditions in detention are unacceptably poor in the great majority of countries. Such conditions – including overcrowding; lack of separation between children and adults, girls and boys; systemic invasion of privacy; lack of psychological support for the child, including contact with his/her family and the outside world; insufficient access to and quality of education, health care, recreational and cultural activities while in detention – may amount to cruel and inhuman treatment.
- Despite strong recommendations for follow-up in the 2006 UN Study on Violence against Children, violence, corporal punishment, excessive restraint measures and indefinite solitary confinement continue to be widespread at various stages of deprivation of liberty in the administration of justice.
- Instruments for structured inter-agency cooperation to prevent detention remain underdeveloped or ineffective.
- Insufficient attention is paid to systematic evaluation of both the quality of programmes on prevention of crime committed by children and effective monitoring and complaint mechanisms accessible to children.

8. Recommendations

Prevent the detention of children by reducing their criminalisation:

1. Develop and implement a **National Strategy** aimed at replacing the detention of children in penal facilities with **non-custodial solutions** based upon broad consultation with experts, civil society and children themselves.
2. **Prevent excessive criminalisation** of conduct of young people by comprehensively reviewing and strengthening **child protection systems** with sufficient resources and capacities. In this regard, clear standards for **inter-agency cooperation** should be developed.
3. Establish effective programmes for primary prevention to tackle the root causes of crimes committed by children, by strengthening **parental support** and **assistance** for dysfunctional families, marginalised communities, addressing domestic violence and gender discrimination, socio-economic disparities and social exclusion, weak educational systems and unemployment among young people.
4. Allocate adequate resources to primary prevention, particularly including parental support, **family-strengthening** and **community-based programmes**.
5. **Abolish status offences** that criminalise children for acts that would be lawful if they were adults, offences criminalising behavioural issues based on perceptions of morality or tradition and decriminalise children in victimising situations, such as trafficked children or victims of sexual abuse.
6. **Raise the minimum age of criminal responsibility** at least to the age of 14 years, set a single minimum age for all criminal offences committed by children and under no circumstances reduce current minimum age limits.
7. Establish a **range of diversion mechanisms** available for all offences to prevent children from becoming involved in the formal criminal justice system and make **restorative justice mechanisms** widely available.
8. Ensure **staff to be adequately trained** to identify opportunities for application of diversionary measures and support of children throughout their implementation.
9. Establish specialised diversion schemes for **children with mental health needs** and **drug or alcohol dependency**.
10. Develop a **system for disaggregated data collection**, child justice statistics, analysis and reporting on the status of children deprived of liberty.

11. Actively promote and support **independent research**, evaluation and assessment of the impact of measures to prevent deprivation of liberty.
12. Review and comprehensively **strengthen child protection systems with sufficient resources and capacities**. In this regard, formalised standards for effective inter-agency cooperation between child protection, social services and the justice sector should be developed and implemented.

Avoid detention wherever possible in the administration of justice:

13. Legislate to ensure that all children who come into contact with the formal criminal justice system are managed within a **specialised child justice system**.
14. Ensure that **police custody of children should never last longer than 24 hours**.
15. **No child shall be held longer than 30 days** without formal charges being laid, and a final decision on the charges should be made within six months from the initial date of detention, failing which the child should be released.
16. Ensure legislation and practice to guarantee the **periodic review** of any ongoing detention of a child.
17. Develop **guidance for prosecutors and judges** for consistent consideration of non-custodial solutions and sentences, including the need to give explicit reasons for rejecting such measures.

Protect the rights of children deprived of liberty and ensure an approach aimed at empowerment and reintegration of children:

18. Ensure that all children deprived of liberty receive **appropriate care and treatment** in relation to their needs, provided by staff trained to work with children.
19. Ensure that **detained children are able to maintain regular contact with their family**, friends and other persons of trust.
20. Guarantee children the **highest attainable standard of health**, taking into account their specific needs, including for girls in detention.
21. Provide **quality education and training** for detained children without discrimination.
22. Ensure that detained children who are themselves parents receive **support in their parenting role.**

23. Make widely available measures such as **early release** and **post-release programmes** (including mentoring programmes, community service work and group/family conferencing).

Prohibit and eradicate all forms of violence against children in the administration of justice, in particular:

24. Ensure that prison sentences of children comply with the requirement of the **shortest appropriate period of time**.
25. **Prohibit the use of physical and psychological violence** as means of discipline in detention;
26. **Prohibit solitary confinement of children**.
27. **Restrict the use of restraint** of children to situations where a child poses an imminent and serious threat of injury to themselves or others and abolish all forms of restraint that deliberately impose pain on children.
28. Establish **special protection measures** for children exposed to particular risks of violence in the justice system, including LGBTI children, children from minorities and children with physical and mental disabilities.
29. Ensure compliance with staffing standards to **prevent all forms of violence** during all stages of proceedings.

Prohibit and eliminate discrimination of children in the administration of justice:

30. As part of the National Replacement Strategy, **address discrimination** within the criminal justice system, particularly on the basis of race, ethnicity, religion, political opinion, sex, gender identity, sexual orientation and disability.
31. Develop policies to **address the overrepresentation** of boys and of children from ethnic or racial minorities and from disadvantaged socio-economic groups in the criminal justice system.
32. Address and prevent the risk of **profiling of racial minorities**.
33. Make **diversion measures** available to all children in conflict with the law.
34. Ensure adequately **qualified staff** through inclusive recruitment policies, training and sensitisation.
35. Provide **effective access to interpretation and intercultural mediation**, and assist children from minority and indigenous backgrounds to better navigate the child justice system.

Ensure that children in contact with the justice system are met with processes designed to meet their specific needs:

36. Legislate and invest adequate resources to ensure that in relation to administration of justice, in all policies and decisions concerning children, their **best interests** are treated **as a primary consideration**.

37. Legislate and invest adequate resources to ensure that **all children** are guaranteed the **right to be heard** in all decisions concerning them and that **their views are given due weight** in accordance with their age and maturity.

38. Ensure that at all stages, children are provided with **information in a language they understand, access to legal assistance and legal aid and further support**, including psychosocial assistance, required to engage with proceedings that affect them.

39. Ensure all staff who come into contact with children in the criminal justice system receive **specialised training** on child justice and on how to work with children.

Provide effective safeguards and ensure accountability and redress for violations of children's rights in the administration of justice:

40. Ensure all children have **access to effective procedural safeguards** from the moment they come into contact with the criminal justice system, such as to understandable information, contact with family, legal assistance, and prompt appearance before an independent judge.

41. Ensure that **informal justice systems** applied to children **fully comply with human rights and child justice standards**.

42. Ensure **independent and effective monitoring of all places of detention of children** in the criminal justice system, including through National Preventive Mechanisms and children's ombudspersons, and that the results of monitoring visits and independent reviews are made available to the public in the interests of accountability, transparency and the public good.

43. Establish and maintain **effective, independent and confidential complaint mechanisms** accessible to all children at all stages in the criminal justice system.

44. Ensure **remedies for any violation of a child's rights** while they are in detention, including recognition of the violation, cessation, and reparation.

CHAPTER 10

CHILDREN LIVING IN PRISONS WITH THEIR PRIMARY CAREGIVERS

© Anne-Christine Poujoulat/AFP via Getty Images, an incarcerated mother and her child, who lives in prison since birth, in Marseille, France

Lolita and Diego's Story
Italy

"Lolita remembers all the little moments that happen [...] She understands and learns everything. She will not forget. If Lolita stays here longer, she will forget nothing", says her mother Jasmina.

Lolita (2,5 years) and her brother **Diego (under 1 year)** live with their 20-year-old mother Jasmina in a **women's prison in Turin, Italy.** Jasmina requested to be placed under house arrest, since she was still awaiting trial for a crime she committed 4 years ago. She wanted to make sure that her children do not grow up in prison. All three of them are living together in a prison cell on a special ward of the prison.

Observing her children grow up, Jasmina has noticed that living in prison clearly has an impact on them. Every night at the same time, a female prison guard will do her rounds – locking all the doors to the cells. For the rest of the night, the children are locked up without any possibility to go out. The longer they are in prison, the more Diego cries. They simply do not have enough recreational opportunities and moments of freedom. Sometimes, when they are locked up, Diego hands her his jacket. 'He is giving me his jacket. He wants me to put on his jacket. He is letting me know that he wants to go out.' But of course, that is not possible.

There is nothing more she wants for her children then their freedom. 'When Lolita leaves it will hurt me, but I will also be happy.'

Les Enfants en Prison, Directed by Rossella Schillaci, France, De Films en Aiguilles, Indyca, Arte France, 2016.

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1. Introduction

This chapter of the Global Study focuses on children who live with a detained or imprisoned primary caregiver – usually the mother, but at times also the father or other primary caregiver. These children are *de facto* deprived of their liberty, albeit indirectly. Statistical data on the prevalence of the phenomenon are limited and, in most cases, incomplete. However, even on a cautious estimation it may be presumed that the number of children worldwide who live in prison with a primary caregiver runs in the thousands. The estimated number based on the available data from the questionnaire replies to the Global Study and other sources is approximately **19,000 children in 2017.**

Number of Children living in Prison with their Primary Caregiver

Source: Responses to the Global Study questionnaires

The possibility for children to stay in prison[1] with a detained or imprisoned primary caregiver[2], and the restrictions placed on this practice in most jurisdictions, is a complex issue with profound implications for the wellbeing and development of the child. It is fraught with difficult considerations, beginning with the question of whether to permit the practice at all, as both the exposure of the child to deprivation of liberty and the separation of the child from a primary caregiver/mother have adverse consequences for the child. In the words of an insightful observer: 'The decision whether to allow a child to live in prison with her/his mother involves two unpalatable options: do you separate a child from her/his mother or have the child live in prison?'[3] Further crucial considerations, which typically need to be addressed on a case-by-case basis, relate to the overall life situation of the parents and children in question, the availability of non-custodial precautionary or punitive measures, possibilities for alternative care, the suitability of existing prison facilities to accommodate infants and young children, and an informed assessment of how cohabitation in prison or separation from the primary caregiver is likely to affect the child's emotional and developmental needs.

The applicable rules and associated practices in relation to these children differ widely from country to country and even at times within particular jurisdictions. There is no universal standard for how to administer and regulate the practice, and its scope, extent, rationale and possible benefits and/or adverse effects are not well documented. The present chapter seeks to compensate for this.[4] Moreover, the past decade has witnessed a remarkable upturn in the attention paid to the situation of children of prisoners generally. However, this mostly concerns children **separated** from parents by imprisonment and the complex emotional disturbances, loss, anxiety and stigmatisation, etc., that follow from this. Both at policy level, in judicial practice, and in the academic literature the specific situation of children living in prison (not due to any fault of their own, but because of the imprisonment of a parent), is a relatively neglected point of concern. There are, however, important exceptions to this rule, as will be further elaborated below. Moreover, there are a broad range of established legal standards that directly or indirectly apply to this situation. When these are properly

1 In this chapter, the term 'prison' applies primarily to correctional institutions, where primary caregivers serve a prison sentence. In many States, primary caregivers may also be allowed to keep their children in a remand prison, where they are held in pre-trial detention, either before a judgement by a court of first instance or during applied proceedings.

2 The use of the term 'primary caregiver' in this chapter refers primarily to the adult(s), who take on the primary responsibility of taken care of the child. This may be the child's biological parent/parents, or a foster parent and/or caregiver.

3 Oliver Robertson, 'Children Imprisoned by Circumstance', *Human Rights & Refugees Publications*, Quaker United Nations Office, 2008.

4 A more comprehensive record of findings and State practice as documented mostly on the basis of the UN Global Study Questionnaire is on file with the researchers and will be presented in further detail in a follow-up publication.

construed, a coherent framework for addressing the relevant issues can be established. A central aim of the chapter will therefore be to elaborate on this dimension.

The guiding principle informing the chapter is **a)** to consistently adopt a child rights-based perspective on the issues at hand and **b)** to view decisions and actions at each stage of the criminal justice process from the point of view of the affected children as rights holders and not merely circumstantial victims of their caregiver's encounter with the criminal justice system. This entails a sustained focus on the four general principles underlying the Convention on the Rights of the Child (CRC), particularly the best interests of the child as enshrined in Article 3, and on how this can be reconciled in practice with the requirements of the criminal justice system.

The chapter documents **positive, proactive practices in many regions of the world**. On this basis, there is considerable scope for a constructive sharing of experiences, policy adaptation, and improvement of the affected children's circumstances. The chapter will devote special attention to the gender dimension of the issue and will, on the basis of expert advice and concrete examples from different regions of the world, seek to articulate lessons learned. A particular focus will be on practices and experiences related to non-custodial solutions, from pre-trial to sentencing dispositions, as this clearly is one of the most obvious means by which to advance the underlying aim of the Global Study, namely to minimise the exposure of children to deprivation of liberty in any way, shape or form.

2. Framing the Analysis

2.1 Pathways and Factors Contributing to Deprivation of Liberty

Children co-residing in prisons with their primary caregiver are not deprived of their liberty as a consequence of their behaviour, nor because the State authority has chosen to deprive them of their liberty as a deterrent or means of controlling their behaviour or actions. The deprivation of these children's liberty is the result of decisions and actions by others, chiefly: the actions of their parent; the policy choices of government; and the sentencing choices of judges. Cross-cutting all of these is a failure by criminal justice systems and the governments designing them to recognise these children as rights holders and act to uphold their rights.

a. Actions of the Primary Caregiver

The prohibited behaviour of the primary caregiver is an obvious causal factor in the deprivation of liberty of co-resident children, but the State is also responsible for a range of policies and practices that result in the deprivation of liberty of these children, which in most cases is avoidable whilst still sanctioning the primary caregiver for criminal activity. An important consideration in this regard relates to gender.[5] Although it is not exclusively women with whom children are detained, this is overwhelmingly the case,[6] and therefore a close look at the patterns of offending among women – and the criminalisation of women – is useful in assessing and disrupting the pathways to these children's deprivation of liberty. Female prisoners constitute only a small proportion of the global prison population (typically between 2% and 9%), yet their numbers have been increasing at a significantly higher rate than the corresponding numbers pertaining to male prisoners.[7] According to the UN Office on Drugs and Crime (UNODC), the reason for this increase can be attributed in part to a tightening of criminal justice policies across the world, whereby more women are being imprisoned for petty offences. Tightened legislation for drug-related offences has also played a substantial role in the increasing number of female prisoners.[8] In addition, many

5 See also Chapter 8 on Gender Dimension.

6 Cf. Oliver Robertson (2008), *op. cit.*, pp. 17-18.

7 Roy Walmsley, *World Female Imprisonment List*, World Prison Brief, Institute for Criminal Policy Research, 4th ed., 2017, Available at https://www.prisonstudies.org/sites/default/files/resources/downloads/world_female_prison_4th_edn_v4_web.pdf (accessed 12 August 2019).

8 UNODC, *Handbook for Prison Managers and Policymakers on Women and Imprisonment*, Criminal Justice Handbook Series, New York, 2008.

imprisoned women are victims of discriminatory legislation and practices,[9] particularly in countries where legislation derives from certain interpretations of religious laws whereby women can be sent to prison for so-called moral crimes. As the UNODC highlights, the majority of female prisoners may not need to be in prison at all. Many are charged with low level and non-violent offences, and some are imprisoned because they are poor and not able to pay fines. They do not pose a risk to the public. Nevertheless, their imprisonment has a corollary effect on the number of children living in prison with a parent. This is relevant in considerations of proportionate sentencing, particularly if the impact on the child suffering deprivation of liberty is taken into account.

There is, furthermore, a global trend that women from minority groups, including racial, ethnic, religious, national and linguistic minorities as well as indigenous women, are disproportionately represented in the criminal justice system.[10] The UN Secretary-General's guidance note on racial discrimination and protection of minorities acknowledges that systemic discriminatory practices against minority groups are frequently reported in criminal justice processes.[11] The UNODC's guidance note on non-custodial measures for women offenders highlights the impact of intersectional discrimination on women in the criminal justice system.[12] This is relevant not only for understanding which children are more likely to be deprived of their liberty with a mother, but also in order to recognise State responsibility for ensuring that discrimination against a mother in law and practice is not the cause of the deprivation of liberty of any child.[13]

b. Policy Decisions by States

i. Policy on children residing with a primary caregiver in prison

Part of the child's pathway to deprivation of liberty in these circumstances rests on whether there is a policy or practice of allowing such deprivation of liberty. There is no universal standard on whether children should be detained with a primary caregiver and under what

9 Laurel Townhead, *Women in Prison and Children of Imprisoned Mothers: Recent Developments in the United Nations Human Rights System*, Quaker United Nations Office, April 2006.

10 There tends to be a significant over-representation of Roma/travellers and indigenous people who are detained both pre-trial and after sentencing, and an even greater over-representation of them in juvenile detention. In relation to Roma/travellers there is also a tendency to early marriage and child-bearing, which means that many of the juveniles in detention (both male and female) are parents. In addition to the issues around why the over-representation arises, there are the issues of the particular impact and challenges of incarceration for these individuals; a further issue is the possible impact on the children of the question whether the parent is an 'adult' or a 'juvenile'. See Rachel Brett, *Roma & Traveller Children with a Parent in Prison: A Follow-Up Report with Case Studies & Recommendations*, Children of Prisoners Europe, 2018.

11 United Nations, *Guidance Note of the Secretary-General: On Racial Discrimination and Protection of Minorities*, March 2013, para. 22.

12 UNODC, *Information note for criminal justice practitioners on non-custodial measures for women offenders*, 2015.

13 Daniel Cullen, *Children of Incarcerated Parents: Minorities in criminal justice systems*, Quaker United Nations Office, August 2016.

circumstances this is permissible. This is matched by a broad variation in State practice from jurisdictions where no children are allowed to reside with a caregiver in prison to those where they can reside up to a fairly advanced age.[14] In most countries where the practice is permitted, the applicable age limit falls between one and three years. In some places, it is even lower (for example six months in **Nicaragua** and nine months in **Hong Kong**) or mothers are allowed to keep their children with them during the breastfeeding period. In many countries, it is possible for the age limit to be extended so that children can remain with their caregivers in the absence of any other alternative. Such extensions usually do not go beyond the age of six, but despite these official limits, in practice older children also reside with their caregivers in prison in some countries. In **Pakistan** (where the age limit is six), children as old as ten have been recorded as living with their mothers in prison because there is no alternative care available,[15] and in **Afghanistan** prison policy allows children up to 18 years to remain in prison with their mother.[16]

Following the Day of General Discussion on children with imprisoned parents in 2011, the Committee on the Rights of the Child (CRC-Committee) concluded that given the range of national and individual circumstances, *individualised assessments are preferable to a global recommended age up to which children can reside in prison with a parent.*[17] This entails undertaking a thorough examination in each case of what is in the best interest of the child.

ii. Criminal justice and policing policy

While a State's policy on whether or not a child can reside in prison with a caregiver is of course the most obvious point of concern, criminal justice and policing policies also have a significant role in shaping the various pathways that contribute toa child's deprivation of liberty. As such, decisions regarding what activity is criminalised and what type of offender policing should be applied are immediately relevant. This is particularly true in light of the high proportion of women who are incarcerated for minor offences, as discussed above.

14 Oliver Robertson, *Collateral Convicts: Children of Incarcerated Parents, Recommendations and Good Practice from the UN Committee on the Rights of the Child Day of General Discussion 2011*, Quaker United Nations Office, 2012, pp. 74-76; see also replies to the UN Global Study Questionnaire below.

15 OHCHR, *Statement by Abdullah Khoso of the Society for the Protection of the Rights of the Child* (SPARC), 2011.

16 Rod Nordland, 'For More Than 300 Afghan Children, Many Older Than 5, Home Is Mother's Cellblock', *The New York Times*, 23 December 2017.

17 CRC-Committee, *Report and Recommendations of the Day of General Discussion on 'Children of Incarcerated Parents'*, 2011, paras. 15 & 37, Available at https://www.ohchr.org/Documents/HRBodies/CRC/Discussions/2011/DGD2011ReportAndRecommendations.pdf (accessed 12 August 2019).

iii. Sentencing options

Another policy area that has a critical role in determining whether a child will live in prison with a primary caregiver is the range of sentencing options. A further option between separating a child caregiver and depriving the child of liberty is possible if there are non-custodial sentences available. Non-custodial sentences can allow the State to sanction criminal behaviour by the caregiver while doing so in a way that does not result in the deprivation of liberty of the child. The UN Standard Minimum Rules for Non-Custodial Measures ('Tokyo Rules', 1990) list the following non-custodial sentencing dispositions in Rule 8(2):

a. verbal sanctions, such as admonition, reprimand and warning;

b. conditional discharge;

c. status penalties;

d. economic sanctions and monetary penalties, such as fines and day-fines;

e. confiscation or an expropriation order;

f. restitution to the victim or a compensation order;

g. suspended or deferred sentence;

h. probation and judicial supervision;

i. a community service order;

j. referral to an attendance centre;

k. house arrest;

l. any other mode of non-institutional treatment.

c. Sentencing decisions

While the impact of parental incarceration on a child is not a relevant factor in the determination of guilt, it is a relevant consideration in sentencing. There is little evidence that impact assessments on the rights of the child or the best interests of the child assessments are a routine part of sentencing a parent, even when they are the sole or primary caregiver.[18] In *S v M* 2007 the Constitutional Court of South Africa ruled that national courts must give specific consideration of the impact on the best interests of the child when sentencing a primary caregiver; if the possible imprisonment will be detrimental to

18 Cf. Oliver Robertson (2012), *op. cit.*, pp. 15-17.

the child, then the scales must tip in favour of a non-custodial sentence, unless the case is so serious that it would be entirely inappropriate. As detailed in the next sections below, the guidelines set up by this Court to establish such interests are highly valuable and may serve as a source of inspiration for other jurisdictions worldwide.

Chain of Decisions leading to the Child co-residing with its Primary Caregiver in Prison

2.2 Concerns Related to Early Childhood Psychological, Emotional and Social Developement

The question of whether infants and young children should live in prison with a primary caregiver, and if so the duration of this stay, remains controversial. Empirical findings suggest that in most cases it is in the best interests of an infant to live with the mother,[19] even if this means co-residing in prison, provided that the infant is safe.[20] Earlier studies point to the adverse impact of restricted access to varied stimuli on infant development.[21] More recent empirical data on infant children's development, however, suggest that young

19 See: John Bowlby, *Attachment and Loss: Loss Sadness and Depression,* Vol. 3, The Travistock Institute of Human Relations, New York, Basic Books, 1980; John Bowlby, *Attachment and Loss: Separation Anxiety and Anger,* Vol. 2, The Travistock Institute of Human Relations, New York, Basic Books, 1973; John Bowlby, *A Secure Base: Parent-Child Attachment and Healthy Human Development*, Basic Books, 1988; John Bowlby, *Attachment and Loss: Attachment*, Vol. 1, Basic Books, 1969.

20 See for example: Lorie S. Goshin, Mary W. Byrne & Barbara Blanchard-Lewis, 'Preschool outcomes of children who lived as infants in a prison nursery', *The Prison Journal*, Vol. 94(2), 2014, pp. 139-158; Mary W. Byrne, Lorie S. Goshin & Barbara Blanchard-Lewis, 'Maternal separations during the re-entry years for 100 infants raised in a prison nursery', *Family Court Review*, Vol. 50(1), 2012, pp. 77-90; Mary W. Byrne, Lorie S. Goshin & Sarah S. Joestl, 'Intergenerational transmission of attachment for infants raised in a prison nursery' *Attachment & Human Development*, Vol. 12(4), 2010, pp. 375-393; Jesús M. Jimenez & Jesús Palacios González, 'When home is in jail: Child development in Spanish penitentiary units', *Infant and Child Development*, Vol. 12(3), 2003, pp. 461-474; Alain Bouregba, 'L'enfant de moins de trois ans et son parent incarcéré', Benoit Bastard *et al.*, *L'enfant et son parent incarcéré,* pp. 49-57. See also: Françoise Dolto, 'Une journée particulière à Fleury-Mérogis: La visite de Françoise Dolto à la Maison d'Arrêt de Fleury-Mérogis, le 26 mars 1987', *Transitions 31: Enfants, Parents Lieux,* 1991, pp. 86-110; Gianni Biondi, *Infants in Prison,* Delfi Editore, 1995.

21 See, for example: Liza Catan, 'The Development of Young Children in HMP Mother and Baby Units', *HORPU Research Bulletin*, Vol. 26, 1988, pp. 9-12; Liza Catan, 'Infants with Mothers in Prison', Roger Shaw (ed.), *Prisoners' Children: What Are the Issues?,* London, Routledge, 1992.

children can be exposed to greater risks to their psychosocial development when separated from their imprisoned primary caregiver during the early months of their lives, than when co-residing with that parent in a prison nursery, particularly when multifaceted support networks for the child and the mother-child relationship are available.[22] In fact, the first year of an infant's existence is considered pivotal to mother-child bonding, which plays a crucial role in the child's developing a sense of self-confidence, security, trust and in how they form relationships later in life.[23] Similarly, it is generally acknowledged that maternal skills develop and are based on the infant's demands and early attachment experiences.[24] In addition, co-residence allows for the mother to breastfeed her infant, which is associated with multiple physical and mental health benefits for both mother and child.[25]

Prisons can expose those residing there to a world of confinement, ill-suited living conditions, inadequate hygiene, a lack of stimuli, and a subset of repetitive sensorial experiences linked to the prison world including doors slamming, keys jangling and industrial smells. Stress caused by physical, psychological or sensorial violence or by deprivation, separation, malnutrition or isolation, needs to be minimised, as it can adversely impact the cognitive and emotional development of infants. The child's psychomotor, cognitive and linguistic development requires **sensory-stimulating features** incorporated into the child's surroundings, with conditions promoting maximum freedom to move about and an open-door policy within the nursery area when possible. Good ventilation and access to natural light, child protection safety features (e.g. plugs, electrical appliances, doors) and noise reduction acoustics to minimise the sounds of the prison world as well as other children crying in the nursery setting are essential to children's well-being and safety. The latter are supported also when they can freely access open-air areas in prison and activities rooms with books and toys, and can be accompanied into the outside world and attend nursery schools.

Given that a child's welfare ultimately depends on the mother's welfare, with the mother transmitting her emotional state directly to the child, **multidisciplinary developmental support networks** engaging with the mother can enhance her sense of self as an individual

22 See: Mary W. Byrne, Lorie S. Goshin & Barbara Blanchard-Lewis (2014), *op. cit.*; Mary V. Byrne, Lorie S. Goshin & Barbara Blanchard-Lewis (2012), *op. cit.*; Mary W. Byrne, Lorie S. Goshin & Sarah S. Joestl (2010), *op. cit.*; Jesús M. Jimenez & Jesús Palacios González (2003), *op. cit.*, Oliver Robertson (2012), *op. cit.*

23 See: John Bowlby (1988), *op. cit.*; John Bowlby & Mary D. Salter Ainsworth, *Maternal care and mental health (Vol. 2),* World Health Organisation, 1951.

24 See for example: Serge Lebovici & Serge Stoléru, *Le nourrisson, la mère et le psychanalyste: les interactions précoces*, Bayard Editions-Centurion, 1990; Donald W. Winnicott, 'The Theory of the Parent-Infant Relationship', *International Journal of Psychoanalysis*, Vol. 41, 1960, pp. 585-595.

25 Centers for Disease Control and Prevention website, 'Breastfeeding', Available at https://www.cdc.gov/breastfeeding/ (accessed 17 August 2019); La leche league international (LLLI) website, 'Philosophy', Available at https://www.llli.org/about/philosophy/(accessed 17 August 2019); U.S. Department of Health & Human Services Office on Women's Health (OWH) website, 'Incredible facts about babies, breastmilk and breastfeeding', Available at https://www.womenshealth.gov/its-only-natural/addressing-breastfeeding-myths/incredible-facts (accessed 17 August 2019).

and her role as parent, with activities and programmes supporting this role and allowing her to meet her child's needs. Appropriate cultural and linguistic support can help minority/indigenous mothers and children, as well as foreign nationals and their children to feel less alienated. Imprisoned mothers in general need opportunities to engage with others to avoid isolation and need to participate in personal and professional development activities, with a support network caring for the child during these activities. Third parties, including staff and other prisoners within the nursery wing, not only can care for the child during these short absences, but also serve as protective factors by minimising the risk of a fusional mother-child relationship developing. Conversely, young children need to have opportunities to observe their mothers interacting with other adults, who in turn participate in stimulating the child's sensorial world. **Conditions promoting contact with other family members**, including siblings and other parental figures, through both short outings for the child and prison visits (preferably in special visits areas), can maximise the child's attachments. Support networks can, for example, help to organise these regular outings and identify those able to accompany the child on such outings; and even identify financial contributions for those with parental authority over the child.

A particularly delicate issue for children and their imprisoned primary caregivers is that of **separation once a child exceeds the maximum age limit for co-residence**, particularly for those with long terms of imprisonment. Separation can be a very traumatic experience for the child. It can be difficult and shocking also for confined parents, notably mothers, to transition from daily life with their children to seeing them only on rare occasions, especially when they are taken into social services. Support networks can help to identify accommodation possibilities for them, prepare their departure through incremental stays in the new premises, and facilitate meetings between mothers and child agents. Requests from the mother to extend the departure of the child for brief periods can entail a cross-agency decision with an evaluation of the child's best interests, examining such indicators as levels of attachment, motor and language skills, capacity for symbolic thought and assertiveness, while evaluating the potential for socialisation.

2.3 The Applicable International Legal Framework

The legal framework related to children's rights and related issues has evolved over the last decades and provides for a range of principles, norms, rules, standards and guidelines that in various ways address the situation of babies born to imprisoned mothers as well as children living in places of detention with their primary caregivers. The present section reviews this framework including both soft and hard law instruments at the universal or regional level. Accordingly, it inquires *under which conditions deprivation of liberty of these children is justified under international law, to what extent and under which conditions their deprivation of liberty is compatible with their best interests and other child rights principles.*

Since the adoption of the so-called International Bill of Human Rights, it has been recognised that everyone, including children, has the right to liberty as per Article 3 Universal Declaration of Human Rights (UDHRI) as well as Article 9 International Covenant on Civil and Political Rights (ICCPR). Special care and protection to children and mothers, particularly 'during a reasonable period before and after childbirth', are accorded as per Article 25(2) UDHR and Articles 10(2) and 10(3) International Covenant on Economic, Social and Cultural Rights (ICESCR). Additionally, arbitrary interference with an individual's private and family life is prohibited under Article 12 UDHR. The institution of family is entitled to 'the widest possible protection and assistance' under Article 10(1) ICESCR, 'by society and the State under Article 23(1) ICCPR. The Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) requires in Article 12(2) that States parties 'ensure to women appropriate services in connection with pregnancy, confinement and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation.' In the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the United Nations General Assembly in 1988, Principle 5(2) highlights that measures 'to protect the rights and special status of women, especially pregnant women and nursing mothers, children and juveniles' are not to be considered discriminatory, even if they would be subject to judicial or further official review. The CRPD also provides relevant standards applicable to children with disabilities, particularly as per Articles 3, 4, 5, 7, 13, 14, 19 and 23, as discussed in the cross-cutting chapter on children with disabilities.[26]

26 Cf. Chapter 7 on Children with Disabilities Deprived of Liberty.

The landmark and legally binding instrument is the Convention on the Rights of the Child (CRC) of 1989, which is relevant in many respects by providing comprehensibly for the care of all children, including children affected by parental detention or imprisonment. Quoting the UN Declaration of the Rights of the Child of 1959, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth' (Preamble). It further acknowledges that, 'in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration'. A number of human rights enshrined in the CRC have particular significance for babies and children with detained or imprisoned parents, including:

- the right to protection against discrimination, as per **Article 2 CRC**, which in paragraph 2 explicitly requires States to ensure that no children are discriminated or punished on the basis of the status or actions of their parents;
- the right to see children's best interests assessed and taken into account as a primary consideration in all actions or decisions concerning them, as per **Article 3 CRC**;
- the inherent right to life and the requirement to ensure to the maximum extent possible their survival and development, as per **Article 6 CRC**;
- the right to preserve children's identity, including nationality, name and family relations, as per **Article 8 CRC**;
- the right of those separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to their best interests, as per **Article 9(3) CRC**; paragraph 4 explicitly refers to children with detained or imprisoned parents when listing the possible reasons of separation;
- the right of children to express their views freely in all matters affecting them, with their view being given due weight in accordance with age and maturity, and to be heard in any judicial and administrative proceedings affecting them, as per **Article 12 CRC**;
- the right to protection of children's family life and privacy, as per **Article 16 CRC**;
- the right to protection from any physical or psychological harm or violence, as per **Article 19(1) CRC**;
- the right to special protection and assistance from the State when temporarily or permanently deprived of their family environment, as per **Article 20 CRC**;
- the right to a standard of living adequate for their physical, mental, spiritual, moral and social development, as per **Article 27(1) CRC**.

In addition, the rights and duties of parents to guide the education of their children are acknowledged in Article 5 CRC, while the principle that the responsibility of raising children and ensuring their development lies, primarily, with their parents, is enshrined in Article 18(1) CRC. As highlighted by the CRC-Committee, the development of a children's rights perspective throughout all levels of government (executive, legislative and the judiciary) is required for the effective implementation of the Convention and in the light of the four general principles enshrined in Articles 2, 3(1), 6 and 12 CRC.[27] The extent to which, and the conditions under which, deprivation of liberty of babies and children with imprisoned caregivers is compatible with these guiding principles and other child rights and standards warrants special attention, also in view of relevant soft law instruments.

- **The best interests of the child to be primarily considered** under Article 3(1) CRC is a dynamic concept requiring an assessment appropriate to the specific context.[28] It represents a fundamental value for vulnerable children and can – in its functions as a substantive right, an interpretative legal principle and a rule of procedure – help to guarantee the full and effective enjoyment of all the rights enshrined in the Convention and the holistic development of the child.[29] The CRC neither provides an exact definition nor expressly indicates how to determine the child's best interests, but it nonetheless requires that this must be the determining factor for specific actions, notably children's separation from parents against their will (under Article 9) and adoption (under Article 21), and that it must be a primary (but not the sole) consideration for all other actions affecting children, whether taken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies (under Article 3). In this regard, for the CRC-Committee '(a)ll law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests principle', including both actions directly affecting them as well as actions indirectly impacting on young children.[30] Importantly, among the elements to be taken into account when assessing and determining this principle, the CRC-Committee has included the child's situation of vulnerability, highlighting that '(t)he best interests of a child in a specific situation of vulnerability will not be the same as those of all the

27 CRC-Committee, *General Comment No. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, CRC/GC/2003/5, 27 November 2003, para. 12.

28 CRC-Committee, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC /C/GC/14, 29 May 2013, para. 1; CRC/GC/2003/5, *op. cit.*, para. 12; CRC-Committee, *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, para. 2.

29 Cf. CRC /C/GC/14, *op. cit.*, para. 4.

30 CRC-Committee, *General Comment No. 7 (2005): Implementing Child Rights in Early Childhood*, 20 September 2006, CRC/C/GC/7/Rev.1, para. 13(b).

children in the same vulnerable situation', so demanding authorities and decision-makers to consider the diverse kinds and degrees of vulnerability of each child, 'as each child is unique and each situation must be assessed according to the child's uniqueness', and so requiring to carry out an 'individualized assessment of each child's history from birth … with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process'.[31] Moreover, in criminal cases this principle has been deemed to apply to children affected by the situation of their parents or other primary caregivers in conflict with the law, also specifying that 'alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child or children'.[32] Several Bangkok Rules of 2010 refer to the need to take into account the best interests of children in all that concerns them, namely Rules 2(2), 3(2), 49, 52(1) and (3), 53(2), 64, 68 and 70. The UN Guidelines on Alternative Care of Children Without Parental Care of 2009 (paragraph 48) and the 'Nelson Mandela Rules'of 2015 (Rule 29) also reflect the principle.

- The guiding principle of **non-discrimination** under Article 2(2) CRC entails an obligation to safeguard children born and raised in prison from the discrimination, stigma, social rejection and shame which they generally face within their community. Specific standards to prevent stigmatisation have been provided in soft law instruments, including Rule 23(1) of the UN Standard Minimum Rules for the Treatment of Prisoners (SMR) (and Rule 28 of the revised version) whereby 'if a child is born in prison, this fact shall not be mentioned in the birth certificate'.[33] Paragraph 10 of the UN Guidelines for the Alternative Care of Children Without Parental Care states that '(s)pecial efforts should be made to tackle discrimination on the basis of any status of the child or parents … that can give rise to relinquishment, abandonment and/or removal of a child'. Bangkok Rule 49 and Nelson Mandela Rule 29(2) both provide that '[c]hildren in prison with a parent shall never be treated as prisoners.'
- In view of Article 6 CRC, safeguarding **child survival and development** necessitates comprehensive provisions and measures allowing children to 'grow up in a healthy and protected manner, free from fear and want, and to develop their personality, talents

31 Cf. CRC /C/GC/14, *op. cit.*, para. 76.

32 Cf. CRC /C/GC/14, *op. cit.*, paras. 28 & 69.

33 Cf. 'Mandela Rules', *op. cit.*, Rule 28. See Megan Bastick, 'Women in Prison: A Commentary to the Standard Minimum Rules for the Treatment of Prisoners', *Human Rights & Refugees Publications*, Quaker United Nations Office, 2005. These rules set out generally accepted good principle and practice in the treatment of prisoners and the management of institutions, but they devote limited attention to babies and children with detained or imprisoned parents.

and mental and physical abilities to their fullest potential consistent with their evolving capacities'.[34] Both living in prison with a primary caregiver and being separated from an imprisoned caregiver can violate the child's survival and development rights. The scale of violation depends on different factors, such as: whether it is the mother or the father who is imprisoned, how far the prison is situated from the child (in case the child lives outside of the prison), whether the other parent/caregiver can look after the child, and whether suitable alternative care is available. While some attention is given to these issues in the SMR, relevant improvements and supplementary standards are contained in its revised version (particularly Nelson Mandela Rules 29 and 45) as well as in the Bangkok Rules (especially Rules 49-51, 52).

- The general principle of **child participation** under Article 12 CRC entails the right of children affected by parental detention or imprisonment to be considered when decisions are made about their parents, to be consulted about separation from the parent, and to be heard when the opportunity of alternative care is deliberated – as very often State institutions become the child's caregiver. In order to be able to validate these rights, children must be informed (about the possibility of communicating either directly or through a representative, about the participants, about when, where and how the hearing will take place) and listened to by trained professionals.[35] It is therefore essential that States parties provide training 'for all professionals working with, and for, children, including [...], police, [...], caregivers, residential and prison officers, [...]'.[36] Certainly, the principle in question has to be calibrated to the age and maturity of the children and may not be applicable when they are younger than three years of age.[37] Paragraph 7 of the UN Guidelines for the Alternative Care of Children without Parental Care also refers to the significance of the child's views being taken into account.
- The child right to family environment has specific implications for children with a detained or imprisoned parent. Article 9(1) CRC requires States parties to ensure that they are not separated from their family against their will, except when competent authorities, subject to judicial review, find that separation is in their best interests. Under Article 16 CRC, '[n]o child shall be subjected to arbitrary or unlawful interference with her or his privacy, family, home or correspondence', and children have the right to seek protection of the law against such interference. Article 20(1) CRC requires States parties to ensure

34 Manfred Nowak, *Article 6 – The right to life, survival and development*, Leiden Boston, Martinus Nijhoff, 2005, p. 2.

35 On the five steps for the implementation of the child's right to be heard, cf. CRC/C/GC/12, *op. cit.*, paras. 41-47.

36 Cf. CRC/C/GC/12, *op. cit.*, para. 49.

37 Cf. CRC/C/GC/12, *op. cit.*,paras. 28-31.

continuity of care and to provide 'special protection and assistance' where children are temporarily or permanently removed from their family environment. This can be either an informal care whereby the other parent/caregiver, a relative or a friend looks after the child, or a formal care in a residential environment, under paragraph 29 of the UN Guidelines for the Alternative Care of Children without Parental Care. Importantly, when a child is separated from an imprisoned parent, Bangkok Rule 28 addresses the need for States to enhance the quality of the visiting experience in terms of both physical and social conditions.

Focusing on relevant regional instruments, the child rights legal framework in Africa provides a powerful set of norms and standards applicable to children with detained or imprisoned parents. The African Charter on Human and Peoples' Rights (ACHPR) of 1981 urges States parties to protect the 'physical and moral health' of the family, as a reservoir of 'morals and traditional values' of the community under Article 18(1), while providing for the protection of women's and children's rights under Article 18(3). Various declarations by the African Commission on Human and Peoples' Rights are aimed at finding common solutions to severe issues facing prisons in the region, such as the development of non-custodial solutions, including: the Kampala Declaration on Prison Conditions in Africa of 1996, the Kadoma Declaration on Community Service of 1997, and the Arusha Declaration on Good Prison Practice of 1999. Subsequent resolutions on the standards of prisons in Africa have led to the adoption of the Ouagadougou Declaration and Plan of Action on Accelerating Prison and Penal Reform in Africa of 2003. The Protocol to the African Charter on Human and Peoples' Rights on the Right of Women in Africa of 2003 requires States parties to ensure 'the right of pregnant or nursing women or women in detention by providing them with an environment which is suitable to their condition and the right to be treated with dignity' in Article 24. The Protocol prohibits all forms of violence against women in private and public as per Article 4(2)(a) as well as the imposition of death penalty on pregnant and nursing mothers as per Article 4(2)(j).

The most advanced regional binding instrument is the African Charter on the Rights and Welfare of the Child (ACRWC) of 1990, which contains a provision dealing with 'Children of Imprisoned Mothers'. This is the only human rights treaty specifically addressing the issue by requiring States parties, under Article 30, to:

> 'undertake to provide special treatment of expectant mothers and to mothers of infants and young children who have been accused or found guilty of infringing the penal law' and in particular:
>
> '(a) ensure that a non-custodial sentence will always be first considered when sentencing such mothers;

(b) establish and promote measures alternative to institutional confinement for the treatment of such mothers;

(c) establish special alternative institutions for holding such mothers;

(d) ensure that a mother shall not be imprisoned with her child;

(e) ensure that a death sentence shall not be imposed on such mothers;

(f) the essential aim of the penitentiary system will be the reformation, the integration of the mother to the family and social rehabilitation'.

In acknowledging the significance and lack of attention given to the issue of children affected by the detention or imprisonment of their parents/primary caregivers, the African Committee of Experts on the Rights and Welfare of the Child (ACERWC) has considered this provision when receiving reports from States parties to the treaty and has adopted the related General Comment No.1 (2013). This reinforces the understanding of Article 30 and elaborates on the legislation, policy and practice needed for full implementation. In paragraph 10 the scope of such provision is clarified as applicable to all sole or primary caregivers, including 'another family member such as a grand-parent or a foster parent', in view of the situation for many children that are orphaned or live separated from their parents in Africa. Article 30 and the envisaged 'special treatment' are understood to be applicable when primary carers are 'accused or found guilty of infringing the criminal law', thus encompassing all stages of criminal proceedings (beginning from the arrest and eventual conviction, through sentencing, imprisonment, release and reintegration). Emphasis is placed on the importance of 'an individualized, informed and qualitative approach' to treat these children in a way that is nuanced and based on actual information about their situation, so in compliance with Article 4 that safeguards the best interests of the child. This approach requires that States parties gather data about the affected children so as to develop effective policies and practices, but also that professionals, such as teachers and social workers, are trained to provide the necessary support, under paragraphs 14-16. Moreover, important implications of the four general principles of the ACRWC (non-discrimination, best interests, participation, and survival, protection and development) for the implementation of Article 30 are elaborated in paragraphs 18-21, 23-24, 25-29, 30-32. Necessary legal, policy and administrative steps for the implementation of Article 30 are indicated as well in paragraphs 36, 39, 40, 41, 46, 54, 58, 60-63.

Within the Council of Europe (CoE) framework, significant instruments, principles, standards, guidelines, and actions have been adopted to support member States in upholding the rights and needs of children with detained or imprisoned parents. It is generally recognised that while it is not desirable to have children living in adult places of detention, it is

nevertheless essential to consider the possible negative impact on children of separating them from an imprisoned parent.[38] This is highlighted already in paragraph 5 of the Parliamentary Assembly (PACE) Recommendation 1469 (2000) on Mothers and Babies in Prison, inviting States to take a range of basic actions. In setting out minimum requirements for the treatment and detention conditions of inmates, the European Prison Rules (EPR), as revised in 2006, broadly address the situation of infants staying with their imprisoned parents in Rules 36, 34 and 24.[39] Specifically, Rule 36 EPR makes the infants' best interests as the determining factor, without setting any upper limit for their age before that they have to be moved out of the prison, given the considerable cultural variations on what such limit should be and because the needs of individual infants vary very much. As emphasised in the 2018 revised commentary to the EPR, 'whether infants should be allowed to stay in prison with one of their parents and, if so, for how long, is a vexed question. Ideally, parents of infants should not be imprisoned but that is not always possible [...] However, the parental authority of the mother, if it has not been removed, should be recognised, as should that of the father'. Rule 36(1) EPR also emphasises that such infants should not be treated as prisoners, retaining all the rights of infants in free society. Rule 36(2) EPR addresses that nursery care (staffed by qualified persons) is to be provided for them when the parent is involved in prison activities. Special accommodation to protect infants' welfare is required under Rule 36(3) EPR. Additionally, Rule 34 EPR indicates that pregnant prisoners should be permitted to give birth outside the prison, otherwise the authorities should provide all necessary support and facilities. It also requires them to give particular attention to women's psychological, social, vocational and physical needs when making decisions about their detention, also giving access to special services for women prisoners who are victims of mental, physical or sexual abuse. Then, Rule 24 EPR addresses that 'arrangements for visits shall be such as to allow prisoners to maintain and develop family relationships in as normal a manner as possible'. Subsequent consensus on taking the special needs of women with babies in prison into consideration is expressed in the PACE Resolution 1663 (2009) on Women in Prison, which puts emphasis on human rights considerations particularly in paragraph 9.[40] A new tool to raise awareness and promote action by member States and

38 See Social, Health and Family Affairs Committee of the PACE, *Report 'Mothers and Babies in Prison'*, Doc. 8762, 9 June 2000: Summary, arguing the need of a new approach for those few mothers of young children who commit serious offences and represent a danger to the community, but also that the overwhelming majority of female offenders with young children should be managed in the community.

39 Council of Europe: Committee of Ministers, *Recommendation Rec(2006)2 of the Committee of Ministers to Member States on the European Prison Rules*, Rec(2006)2, 11 January 2006.

40 In Resolution 1663(2009), the Parliamentary Assembly (CoE) followed up the report *Women in prison* by the Social, Health and Family Affairs Committee, Doc. 11619 revised (23 June 2008), which also dealt with the situation of pregnant prisoners (pp. 18-20) as well as issues related to birth, breastfeeding and postnatal health (pp. 21-23). It also focused on the child's perspective by acknowledging that '[...] in most cases, the imprisonment of a woman can lead to the violation not only of her rights, but also of those of her children' (para. 45).

fostering shifts in how children of prisoners are seen and treated (directly or indirectly) is the CoE Committee of Ministers' Recommendation CM/Rec(2018)5 concerning children with imprisoned parents. It aims to ensure that children can maintain meaningful contact with their parents, also addressing the situation of 'infants in prison' with a parent (particularly in paragraphs 34-40, 44) and making explicit the relevance of children's rights to guidance on how to provide for and treat prisoners. CoE Member States are thus recommended to be guided in their legislation, policies and practice by the rules contained in the related Appendix, which also specifies underlying values and basic principles that apply to the situation of infants in prison. Significantly, these values refer to:

(1) children's rights and best interests as primary consideration,

(2) all rights enshrined in the CRC without discrimination and regardless of the legal status of parents,

(3) child's right to and need for emotional and continuing relationship with imprisoned parents,

(4) child-parent's need of support before, during and after detention/imprisonment,

(5) awareness-raising, cultural change and social integration to overcome prejudice and discrimination arising from the imprisonment of a parent.

Some of the principles and rights enshrined in the CRC are reinforced by regional instruments such as the European Convention of Human Rights (Article 8 echoing Article 16 CRC), the Charter of Fundamental Rights of the European Union (Article 24(2) echoing Article 3 CRC, Article 24(3) echoing Article 9(3) CRC, and Article 24(1) echoing Article 12 CRC), the Inter-American Convention of Human Rights (Article 19 recognising children's right to the measures of protection that their condition as minors requires from their family, society and the State), and the San Salvador Protocol (Article 15 requiring 'special care and assistance *to mothers during a reasonable period before and after childbirth*' and '*adequate nutrition for children at the nursing stage*', and Article 16 recognising the child right '*to grow under the protection and responsibility of his parents*' and that, '*save in exceptional, judicially-recognized circumstances, a child of young age ought not to be separated from his mother*', so echoing Article 9(1) CRC).

3. Implementation of the Legal Framework and Documentation of State Practice

The emerging practice concerning the deprivation of liberty of children living with a primary caregiver in prisonis addressed in two sub-sections. The first sub-section looks at the data and providesa quantitative determination of the prevalence of the practice in different regions of the world in relation to the actual numbers of children living in prison with a primary caregiver and the applicable age limits. The second sub-section contextualises the data through a qualitative analysis of the implementation of the applicable legal framework, as identified in section 2.3, in State practice. Attention is primarily devoted to *how the overarching principle of the best interests of the child is applied when aparent, notably the sole or main caregivers, is to be deprived of liberty*. Then, *how the safeguarding of child rights and interests is reconciled with the requirements of the criminal justice system* is explored by looking at each of the relevant stages (i.e. pre-trial decision-making and sentencing; admission/entryinto prison; detention or imprisonment; release and separation/reintegration into the community). Further details of the universal and regional applicable legal framework and a review of relevant case law and policy measures are provided in relation to each of these stages. On this basis, sections 4 and 5 extract a set of promising practices and specific recommendations.

3.1 The Data

The data available on children living with their parents prior to the Global Study questionnaire stem from a variety of sources. Some of them are official Government or prison authority sources, as for example in the case of **India**, where the number of children staying with their parents in prison is recorded in the annual prison statistics report released by the National Crime Records Bureau. For most other countries, however, official statistics are difficult to obtain, so that researchers primarily rely on news reports and data collected by local NGOs working on this issue. This explains why many of the numbers listed are approximations and sometimes only include numbers from some prisons in the country. The questionnaire asked respondents to provide snapshot data of the number of children living with their parents in prison on 26 June 2018 as well as annual figures for years 2008-2017.

Overall, estimates based on regression analysis (primarily Multiple Imputation by Chained Equations (MICE) with Predictive Mean Matching) and official data only put the number of children living in prison with their parents in the administration of justice at 19,000 in 2017.[41] If data extracted from alternative sources would be included, annual estimates increase to 28,000 children co-residing with their parents. While it is easier to track down numbers from some regions (South America and Europe, for example), the lack of data is evident in most other regions. In the case of Europe, it has been estimated that approximately 2 million children have a parent who is imprisoned. They are one of society's most vulnerable and marginalised groups of children requiring protection against exclusion and discrimination.[42]

3.2 The Safeguarding of Child Rights and Interests in the Criminal Justice Process

Following the 2011 Day of General Discussion, the CRC-Committee explicitly recommended States parties to ensure that 'the rights of children with a parent in prison are taken into account from the moment of the arrest of their parent(s) and by all actors involved in the process and at all its stages, including law enforcement, prison service professionals, and the judiciary'.[43] After looking at the issue of the implementation of the best interests of the childin this context, State practice is analysed in relation to the relevant stages involving primary caregivers but impacting on their dependents as well.

a. Upholding the Best Interest of the Child

Safeguarding children throughout the criminal justice system processing their parent entails, first and foremost, the application of the overarching principle. This is that **the best interests of the child should be taken into account in all decisions** concerning the detention or imprisonment of someone with child caring responsibilities, specifically at all points at which this could result in the *de facto* deprivation of liberty of a child.

41 For further information on the methodology, please refer to Chapter 2.

42 Council of Europe, *Council of Europe Strategy on the Rights of the Child 2016-2021,* March 2016, p. 25.

43 CRC-Committee, *Report and Recommendations of the Day of General Discussion on 'Children of Incarcerated Parents',* 30 September 2011, para. 31.

Age Limits for Children living in Prison with their Primary Caregivers (in years)

AGE

Congo (Republic of)	0
Philippines	1 m.
Jamaica	3 m.
Nicaragua	6 m.
Solomon Islands	6 m.
Vanuatu	6 m.
Bulgaria	1
Cyprus	1
Hungary	1
Ireland, Republic of	1
Japan	1
Lao PDR	1
North Macedonia	1
Malta	1
Romania	1
Samoa	1
Sweden	1
Thailand	1
Tunisia	1
Ethiopia	1.5
France	1.5
Iceland	1.5
Nigeria	1.5
Rep.of (South) Korea	1.5
Uganda	1.5
United Kingdom	1.5
Austria	2
Bosnia & Herzegovina	2
Brunei Darussalam	2
Burkina Faso	2
Chile	2
Cuba	2
Egypt	2
Finland	2
Honduras	2
Indonesia	2
Iran	2
Israel	2
Kuwait	2
Lebanon	2
Lesotho	2
Namibia	2
Nepal	2
New Zealand	2
Oman	2
Palestine	2
Qatar	2
Saudi Arabia	2
Sierra Leone	2
Slovenia	2
South Africa	2
South Sudan	2
Sudan	2
United Arab Emirates	2
Yemen	2
Albania	3
Algeria	3
Belgium	3
Benin	3
Cambodia	3
Colombia	3
Croatia	3
Czech Republic	3
Denmark	3
Ecuador	3
Estonia	3
Georgia	3
Germany	3
Greece	3
Hong Kong (China)	3
Iraq	3
Italy	3
Jordan	3
Kazakhstan	3
Lithuania	3
Madagascar	3
Malaysia	3
Mexico	3
Morocco	3
Pakistan	3
Papua New Guinea	3
Peru	3
Poland	3
Portugal	3
Russian Federation	3
Singapore	3
Spain	3
Switzerland	3
Taiwan	3
Tanzania	3
Ukraine	3
Uzbekistan	3
Venezuela	3
Vietnam	3
Argentina	4
Guatemala	4
Kenya	4
Latvia	4
Myanmar	4
Uruguay	4
Zambia	4
El Salvador	5
Mauritius	5
Sri Lanka	5
Bolivia	6
Canada	6
Fiji	6
India	6
Turkey	6
Brazil	7

OTHER

Afghanistan	in practice until 18 years old
Australia	depends on the region and type of residential facility; in South Australia co-residing is not allowed.
Botswana	while breastfeeding
Haiti	while breastfeeding
Kiribati	while breastfeeding
Luxembourg	no age limit - According to the law, "children who are too young to be separated"
Malawi	while breastfeeding
Netherlands	depends on the mother's sentence - Age limit varies between 6 months and 4 years
Norway	not allowed, but can be accommodated outside in special homes for mothers.
Slovakia	not possible
Eswatini	while breastfeeding
Tonga	case by case
Tuvalu	while breastfeeding
Zimbabwe	while breastfeeding

Source: Responses to the Global Studyquestionnaire, Law Library of Congress, COPE

Following the 2011 Day of General Discussion, the CRC-Committee has recommended States parties that 'measures be taken to ensure that children in such situations are protected from stigmatisation' and in this context 'decisions on whether the best interests of the child are better respected by having the child live with the incarcerated parent or outside the detention facility should always be made on an individual basis'.[44] States have been recommended to 'give due consideration to circumstances in which the best interests of the child may be better fulfilled by having him/her live with the incarcerated parent', especially taking into full account' the overall conditions of the incarceration context and particular need for parent-child contact during early childhood', and making such decisions 'with the option for judicial review', besides facilitating 'contacts with the parent living outside the detention facility and other family members'.[45] Moreover, decisions about the removal of financial and other support should occur on an individual basis with the best interests of the child(ren) as a primary consideration.[46] States' duty 'to ensure that a request for information or the sharing of information has no adverse consequences for the person(s) concerned while taking into account the best interests of the child' has been also acknowledged.[47]

Since 2005 the CRC-Committee has been requesting information on children living in prison with a parent from States parties to the CRC during the reporting process under Article 44 CRC.[48] In particular, it has regularly raised the issue of the impact of women's imprisonment on the fulfilment of their children's rights. Firstly, it has often recommended States that the child's best interests is carefully and independently considered by competent professionals (prior to and during the child's stay with a detained parent). Secondly, it should be taken into account in all sentencing and remand decisions concerning the primary or sole carer as well as decisions concerning the placement of the child.[49] Then the CRC-Committee has urged States to seek alternative measures to institutional confinement for pregnant women and mothers with young children, wherever possible, or to ensure the effective implementation of existing non-custodial measures for them.[50] It has expressed concern over the large number

44 CRC-Committee, *Report and Recommendations of the Day of General Discussion on 'Children of Incarcerated Parents'*, 30 September 2011, para 33.

45 Ibid., para. 37.

46 Ibid., para. 43.

47 Ibid., para. 44.

48 See: Working Group on Children of Incarcerated Parents database of relevant Concluding Observations from the UN Committee on the Rights of the Child, Available at http://www.crccip.com/all.php (accessed 12 August 2019).

49 CRC-Committee, Concluding Observations: Spain (2018), para. 30; Qatar (2017), para. 28; Mongolia (2017), para. 17(a); United Kingdom (2016), para. 54(b); Zimbabwe (2016), para. 55(c); Iraq (2015), para. 57(c); Chile (2015), paras. 26-27; Mauritius (2015), para 48; Uruguay (2015), para. 42(c); Hungary (2014), para. 43; India (2014), para. 60; Russia (2014), para. 48; Kuwait (2013), para. 32; Sudan (2010), para. 63(c); Thailand (2006), para. 48; Philippines (2005), para. 54.

50 CRC-Committee, Concluding Observations: Spain (2018), para. 30; Moldova (2017), para. 27(g); Zimbabwe (2016), para. 55(b); United Arab Emirates (2015), para. 52(c); Iraq (2015), para. 57(a); Eritrea (2015), para. 52(b); Uruguay (2015), para. 42(b); Sudan (2010), para. 63(b); Ethiopia (2006), para. 50; Hungary (2015), para. 43; Mexico (2015), para. 44; Russia (2014), para. 48; Burundi (2010), para. 63.

of children living in prison with a parent,[51] over the inadequacy of prison facilities as well as the lack of childcare services and deficiencies in sanitation.[52] Equally, it has raised its concern about the safety of children, including healthy growth and living conditions for early development in prison.[53] On the other hand, it has addressed the impact of separation through parental imprisonment on the realisation of the child's rights, as well as the necessity to develop and implement alternative care for children removed from prison and to allow them to maintain personal relations with the confined mothers.[54] It has even expressed concern at reports that the children of female prisoners executed following a sentence of death have remained in prison after the execution of their mothers.[55] Some UN Special Procedures have raised further concerns about the human rights situation of imprisoned women and their own children in relation to conditions of detention, such as access to healthcare[56] or appropriate staffing,[57] and in relation to the child leaving the prison.[58]

The significance of devoting greater attention to the serious impact of parental detention and imprisonment or other sentences imposed upon parents has been addressed by other UN bodies. Following positive initiatives undertaken by the High Commissioner for Human Rights and the Human Rights Council,[59] the General Assembly has particularly done so in recent years by calling upon all States 'to respect and protect the rights of [such] children' and '[t]o identify and promote good practices in relation to [their] needs and physical,

51 CRC-Committee, Concluding Observations: Bolivia (2009), para. 65; Nepal (2005), para. 52; Iran (2005), para. 51; Ethiopia (2006), para. 49.

52 CRC-Committee, Concluding Observations: Malawi (2017), para. 31; Samoa (2016), para. 38; Iraq (2015), para. 56; Bangladesh (2015), para. 50; Uruguay (2015), paras. 41; Brazil (2015), para. 49; Russia (2014), para. 47; Zambia (2016), para. 64(h); Belgium (2010), para. 76.

53 CRC-Committee, Concluding Observations: Moldova (2017), para. 27(g); Zimbabwe (2016), paras. 54-55(a); Eritrea (2015), para. 51(a); Ethiopia (2015), para. 72(c); Mexico (20159, paras. 43-44; Iran (2016), para. 65-66, and (2005), paras. 51-52; Myanmar (2012), para. 71; Cambodia (2011), para. 63; Burundi (2010), para. 62; Sudan (2010), paras. 62-63(a); Bolivia (2009), para. 65; Saudi Arabia (2006), para. 69; Thailand (2006), para. 48; Nepal (2005), paras. 51-52; Philippines (2005), para. 53.

54 CRC-Committee: Concluding Observations: Haiti (2016), para. 43(c); Bolivia (2009), para. 66; Saudi Arabia (2006), para. 70; Thailand (2006), para. 48; Philippines (2005), para. 54; Nepal (2005), para. 52.

55 CRC-Committee, Concluding Observations: Sudan (2010), para. 63 (d), (e).

56 See: Communications to and from Governments: *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Paul Hunt. Addendum: Summary of communications sent to and replies received from Governments and other actors, December 2004-December 2005,* E/CN.4/2006/48/Add.1, 2005, para. 61 (Syrian Arab Republic); *Report of the Special Rapporteur on Torture, and other Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak: Mission to Georgia,* E/CN.4/2006/6/Add.3, 2006, para. 52.

57 See: *Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda. Addendum: Mission to Lebanon (7 to 16 February 2005)*, E/CN.4/2006/62/Add.3, 2006, para. 49; Cf. E/CN.4/2006/6/Add.3, *op. cit.*, para. 54; *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk. Addendum: Mission to the Russian Federation*, E/CN.4/2006/61/Add.2, 2006, Recommendations.

58 *Report of the Special Rapporteur on violence against women, its causes and consequences, Yakin Ertürk. Addendum: Mission to Afghanistan,* E/CN.4/2006/61/Add.5, 2006, para. 85 recommending the establishment of 'transit houses' for women released from detention and their children.

59 See: Human Rights Council, *Summary of the full-day meeting on the rights of the child, Report of the UN High Commissioner for Human Rights*, A/HCR/21/31, 26 June 2012; Human Rights Council, *Summary of the panel discussion on the human rights of children of parents sentenced to the death penalty or executed: Report of the UN High Commissioner for Human Rights*, A/HRC/25/33, 18 December 2013; Human Rights Council, *Rights of the Child*, Res. 7/29, 2008, para. 33 (a) & (b).

emotional, social and psychological development', also urging 'to provide the assistance and support these children may require'.[60]

The best interests principle is echoed in further international instruments, but its application can vary according to the region and country concerned. Importantly, in the African context it has been specifically elaborated by the ACERWC in reading Article 30 ACRWC through the lens of Article 4(1) ACRWC, following on from the landmark decision of the South African Constitutional Court, *S v M* 2007. It has been understood as confirming that '[t]he best interests of the child must be the primary consideration in relation to all actions that may affect children whose parents are in conflict with the law, whether directly or indirectly, in accordance with Article 4', and also that 'States should create and implement laws/policies to ensure this at all stages of judicial and administrative decision-making during the criminal justice process, including arrest, pre-trial measures, trial and sentencing, imprisonment, release and reintegration into the family and community'.[61] For the ACERWC, compliance with this further requires States parties to have in place 'procedural guarantees' aimed at safeguarding the best interests of the child. Its recommendations specified the need for:

(a) priority of non-custodial sentences for expectant prisoners or those with children,

(b) legislation ensuring to safeguard expectant prisoners or those with children in case of custodial sentences,

(c) legislative and administrative mechanisms ensuring judicial review of decisions for a child to live with her/his imprisoned mother or caregiver,

(d) the inclusion of the consideration of the child's views, and

(e) legislative and administrative measures guaranteeing regular, direct contacts between such children and their parents and caregivers.[62]

Notably, in the European context the basic principle enshrined in paragraph 1 of the Appendix to CoE Recommendation CM/Rec(2018)5 enunciates that '(c)hildren with imprisoned parents shall be treated with respect for their human rights and with due regard for their particular situation and needs. These children shall be provided with the opportunity for their views to be heard, directly or indirectly, in relation to decisions which may affect them. Measures

60 See, for example: UN General Assembly, *Human Rights in the Administration of Justice*, A/RES/ 71/188, 2016, para. 28; UN General Assembly, *The Rights of the Child*, A/RES/68/147, 2014, paras. 56 (a), (b), & 57.

61 African Committee of Experts on the Rights and Welfare of the Child (ACERWC), *General Comment No. 1 on Article 30 of the ACRWC: Children of Incarcerated and Imprisoned Parents and Primary Caregivers*, 8 November 2013, para. 23.

62 Ibid., para. 24.

that ensure child protection, including respect for the child's best interests, family life and privacy shall be integral to this, as shall be the measures which support the role of the imprisoned parent from the start of detention and after release'.

b. Non-Custodial Approaches Minimising the Child-Parent Separation

i. Related universal/regional rules, standards and guidelines

As elaborated in the CRC-Committee's report on the 2011 Day of General Discussion, '(i)n sentencing parent(s) and primary caregivers, non-custodial sentences should, wherever possible, be issued in lieu of custodial sentences, including in the pre-trial and trial phase', and be 'made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child(ren)'.[63] Likewise, paragraph 48 of the UN Guidelines for the Alternative Care of Children Without Parental Care underlines that '(w)hen the child's sole or main carer may be the subject of deprivation of liberty as a result of preventive detention or sentencing decisions, **non-custodial remand measures and sentences** should be taken in appropriate cases wherever possible, the best interests of the child being given due consideration'. Among the principles of the Kyiv Declaration on Women's Health in Prison (2009), paragraph 4.2 formulates that **'(t)he imprisonment of pregnant women and women with young children should be reduced to a minimum** and only considered when all other alternatives are found to be unavailable or are unsuitable', and also that 'if children are involved, the best interest of the children must be the main and determining factor in decisions regarding women's imprisonment, including putting the needs of the children first when considering whether and for how long the children should stay with their mother in prison'.

The policy that alternative approaches minimising the separation between the mother and her child should be considered is supported also in the Bangkok Rules. Rule 2(2) envisages the possibility of a reasonable **suspension of detention** among the arrangements to be allowed to women with caretaking responsibilities for children, taking into account their best interests – specific consideration of non-custodial measures is also provided. Rule 58 indicates that, in view of Tokyo Rule 2(3), women offenders must not be separated from their families and communities 'without **due consideration being given to their backgrounds and family ties**'. Accordingly, ways of managing women who commit offences such as 'diversionary measures and pre-trial and sentencing alternatives' must 'be implemented wherever appropriate and possible'. Furthermore, Rule 64 enshrines the principle that non-

63 CRC-Committee (2011), *op. cit.*, para. 30, drawing inspiration from the Constitutional Court of South Africa Judgment in *S v M.*, CCT 52/06, 2007.

custodial sentences 'shall be preferred where possible and appropriate' for pregnant women and women with dependent children.[64] Nonetheless, under Rule 61, '(w)hen sentencing women offenders, courts shall have the power to consider **mitigating factors** such as lack of criminal history and relative non-severity and nature of the criminal conduct, in the light of women's caretaking responsibilities and typical backgrounds'.

The UN Human Rights Council has called upon States to give **priority to non-custodial measures** when sentencing or deciding on pre-trial detention for a pregnant women or a child's sole or primary caregivers or legal guardians, bearing in mind the gravity of the offence and after taking into account the best interests of the child. It has also called upon States to **recognise, promote and protect the rights of the child** affected by parental detention and imprisonment – particularly 'the right to have their best interests included as an important consideration in decisions relating to one or both of their parent's involvement with the criminal justice system, as well as the right not to be discriminated against because of the actions or alleged actions of one or both of their parent's'.[65] The UN General Assembly has adopted similar resolutions over the last decade, especially calling upon all States 'to respect and protect the rights of [such] children' and '[t]o identify and promote good practices in relation to **the needs and physical, emotional, social and psychological development** of [such] babies and children'.[66] Moreover, the 2015 UN Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, which expand to 'children of incarcerated parents' the protection provided for 'children in contact with the justice system' (para. 6 (c)), echo a similar view: '[m]indful of the fact that arrests and investigations are situations in which violence against children can occur, Member States are urged, … [t]o ensure that, when a parent, legal guardian or caregiver is arrested, the child's best interests, care and other needs are taken into account' (para. 34 (l)).

In recognising that the situation of children with convicted parents requires special treatment, the ACERWC has framed the application of Article 30(1)(a) ACRWC (on the consideration of non-custodial sentence) as based on the **guidelines** set out in the *S v M*

64 In addition, the 'Bangkok Rules' (Rule 64) calls for considering custodial sentences 'when the offence is serious or violent or the woman represents a continuing danger, and after taking into account the best interests of the child or children, while ensuring that appropriate provision has been made for the care of such children'.

65 See, for example: *Human Rights Council, Human rights in the administration of justice*, including juvenile justice, A/HRC/RES/30/7, 2015, Preamble; Human Rights Council, *Rights of the child*, A/HRC/19/37, 2012, para. 69 (a) & (d); *Human Rights Council, Human Rights in the administration of justice, in particular juvenile justice*, A/HRC/10/2, 2009, Preamble & para. 13; Human Rights Council, *Rights of the child*, A/HRC/7/29, 2008, para. 33 (a) & (b).

66 See, for example: GA Res. 71/188 (2016) on human rights in the administration of justice, Preamble; GA Res. 71/177 (2016) on the rights of the child, para. 29; GA Res. 68/147 (2014) on the rights of the child, para. 56 (a), (b); GA Res. 63/241 (2008) on the rights of the child, para. 47 (a), (b).

judgment. It has actually quoted the South African Constitutional Court and highlighted that the implementation of Article 30 requires States parties to review their sentencing procedure and to reform it accordingly so that:

(a) the sentencing court should find out **whether a convicted person is a primary caregiver** whenever there are indications that this might be so;

(b) the court should also **ascertain the effect on the children concerned** of a custodial sentence if such a sentence is being considered;

(c) if the appropriate sentence is clearly custodial and the convicted person is a primary caregiver, the court must apply its mind to whether it is necessary to take steps to ensure that the **children will be adequately cared** for while the caregiver is incarcerated;

(d) if the appropriate sentence is clearly non-custodial, the court must determine the appropriate sentence, **bearing in mind the best interests of the child**;

(e) if there is a range of appropriate sentences, the court must **use the principle of the best interests of the child as an important guide** in deciding which sentence to impose.[67]

The ACERWC has also addressed that 'Article 30 should not be interpreted as allowing for convicted parents/primary caregivers to evade accountability for their offences', and therefore States parties 'must ensure that **judicial officers are equipped to be able to weigh the best interests of the child** versus the gravity of the offence and public security when considering the incarceration of a mother/parent'.[68] Regarding the implementation of Article 30(1)(b) ACRWC, the required establishment of **alternatives to pre-trial detention** must take into account that 'childcare responsibilities may be an indication that alleged offenders are unlikely to abscond and that pre-trial detention is therefore less likely to be necessary'.[69] In view of the fact that 'many States have established ways to secure the attendance of accused persons without resorting to detention' (e.g. bail and using summons procedures and written notices to appear at court), these measures should be given priority over detaining a charged person when the latter is the parent-primary caregiver of a child.[70] On the other hand, by prescribing States parties to ensure '**a mother shall not be imprisoned with her**

67 Cf. ACERWC, General Comment No. 1 (2013), *op. cit.*, para. 36. See also para. 40 on the 'appropriate alternative care' to be ensured to the child, which could be informal with existing family or in formal institutions, foster care or even adoption, in line with Article 25 ACRWC and the *UN Guidelines for the Alternative Care of Children Without Parental Care.*

68 ACERWC, General Comment No. 1 (2013), *op. cit.*, para. 39.

69 Ibid., para. 41.

70 Ibid., para. 46.

child', Article 30(1)(d) ACRWC reflects the significance placed in the Charter for children to grow up in a 'family environment in an atmosphere of happiness, love and understanding', and strengthens States parties' obligation to afford non-custodial measures in pre- and post- trial phases for pregnant women and/or caregivers.[71] Concerning the implementation of Article 30(1)(e) ACRWC requiring States parties to ensure that **a death sentence is not imposed on pregnant women or mothers of young children**, those still retaining the death penalty should observe the UN Safeguards Guaranteeing Protection of the Rights of those Facing the Death Penalty.[72]

A relevant principle is enshrined in paragraph 2 of the Appendix to CoE's Recommendation CM/Rec(2018)5, which enunciates that '[w]here a custodial sentence is being contemplated, **the rights and best interests of any affected children should be taken into consideration** and **alternatives to detention be used** as far as possible and appropriate, especially in the case of a parent who is a primary caregiver'. Earlier, the European Committee for the Prevention of Torture (CPT) has recommended that, where possible, 'alternatives to detention should be imposed in respect of pregnant girls and young mothers' to avoid the situations where children are living in detention.[73]

In view of the gender-differentiation faced by women and adolescents deprived of liberty, the advantages of applying non-custodial preventive measures in the pre-trial stage, and the effects of custody on persons under their care, the Inter-American Commission on Human Rights (IACHR) has urged States 'to adopt a gender perspective in the design, implementation, and follow-up on legislative and political reforms to reduce the use of pre-trial detention', particularly encouraging the use of non-custodial measures and prioritising the funding and establishment of mechanisms for their implementation and follow-up.[74] Regarding the determination of alternative measures, States should promote 'the comprehensive adoption of a gender perspective and, where appropriate, an approach that takes into account **the best interests of the child** and the special protection required by persons belonging to groups at special risk, such as people with disabilities and older persons.'[75] Specifically, judicial authorities should consider **various elements in ordering such measures**:

71 Ibid., para. 54.

72 Ibid., para. 58.

73 Council of Europe, *24th General Report on the CPT (1 August 2013-31 December 2014)*, January 2015, para. 117.

74 Inter-American Commission on Human Rights (IACHR), *Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas*, 2017, para. 202.

75 Ibid., para. 203.

(a) women's unique and historically disadvantaged position in society,

(b) their history of prior victimisation,

(c) absence of aggravating factors in the commission of an offense, and

(d) differentiated and incremental impact of custodial measures on persons under their care.

As earlier indicated by the IACHR, 'in accordance with the best interests of the child, judicial authorities should apply the criteria of necessity, proportionality, and reasonableness more strictly when they consider ordering the pretrial detention of people who are responsible for children and adolescents.'[76] Accordingly, the imprisonment of women who are mothers, pregnant or have persons at special risk under their care should be deemed 'a measure of last resort', whereas non-custodial measures enabling them to provide for their dependents should have priority.[77] The IACHR has also highlighted that 'the rupture of protective ties caused by women's incarceration leaves the persons under their care vulnerable to poverty, marginalization, and neglect, which can, in turn, have **long-term consequences**, such as involvement in criminal organizations or even institutionalization.'[78]

ii. Practice guided by courts

In various regional contexts the application of non-custodial remand measures and sentences is acknowledged in view of the child's best interests in pre-trial and trial procedures involving a parent or someone with child caring responsibilities. Alternative precautionary or punitive options often include house arrest, bail, deferred or suspended sentence, community service or probation order.

Judicial practice has firstly emerged in **South Africa**, when the Constitutional Court decided one of the leading cases on sentencing of primary caregivers.[79] It decided house arrest, community service and suspended the prison sentence of the appellant who was a mother and sole caregiver of three minor children (aged 8, 12 and 16), taking into account the impact of her imprisonment on child development (specifically, loss of home and community, disruption in school routines and transportation, and potential separation from their siblings). It ruled that, besides the necessary weighing up and balancing of ordinary considerations (namely,

76 IACHR, *Report on the Use of Pretrial Detention in the Americas*, 2013, para. 216.

77 IACHR, *Report on Measures Aimed at Reducing the Use of Pretrial Detention in the Americas*, 2017, para. 203, also citing: IACHR, Report on the Use of Pretrial Detention in the Americas, para. 216; IACHR, *Violence, Children and Organized Crime*, OEA/Ser.L/V/II. Doc. 40/2015, 2015, para. 481.

78 Ibid., para. 201.

79 Constitutional Court of South Africa, *M v The State*, Case CCT 53/06) [2007] ZACC 18; 2008 (3) SA 232 (CC), 26 September 2007.

the nature of the offence, the personal circumstances of the accused and the interests of the community, para. 10), the best interests of the child must be taken into account as a separate consideration, rather than as one of the personal circumstances of the accused (para. 18), when sentencing a primary carer of minor children. In particular, '[a] truly child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved', as the application of 'a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned' (para. 24). Viewing the consideration of the best interests of the child as a pretext allowing parents to escape the otherwise just consequences of their own misconduct is 'a mischaracterization' of the issues at stake (para. 34). In fact, 'it is not the sentencing of the primary caregiver in and of itself that threatens to violate the interests of the children. It is 'the imposition of the sentence without paying appropriate attention to the need to have special regard for the children's interests that threatens to do so' (para. 35). For the Court (para. 33), 'focused and informed attention needs to be given to the interests of children at appropriate moments in the sentencing process', and insofar as the practice of sentencing courts may fail to balance adequately all the varied interests involved, 'proper regard for constitutional requirements necessitates a degree of change in judicial mindset', and the sentence least damaging to the child's interests should be selected from the available legitimate options. A five-step consideration was therefore elaborated to assist courts in making such decisions (para. 36), to promote 'uniformity of principle, consistency of treatment and individualization of outcome'.

The *S v M* judgment has impacted sentencing procedures of **South African** courts, and its approach has been applied in at least seventeen (mostly appeal) judgments.[80] Moreover, in *MS v S (Centre for Child Law as Amicus Curiae)* 2011, in an extensive dissent, Khampepe J expressed her view that the approach elaborated in the *S v M* judgment should nevertheless be applied if a primary caregiver is the main, but not the sole, caregiver.[81] Indeed, the majority judgment in favour of the custodial sentence was deemed a setback by South African child

80 See Ann Skelton & Lynn Mansfield-Barry, 'Developments in South African law regarding the sentencing of primary caregivers', *European Journal of Parental Imprisonment*, 2015, pp. 14-15. In several subsequent fraud or theft cases entailing the sentencing of primary caregivers (mothers), such as *S v Londe* 2011 and *S v Ranhoha* 2012, the sentences were set aside, or the sentencing procedure was sent back to the lower court to give the child's best interests proper attention, or the sentences were reduced on appeal. In *Piater v S* 2014, *S v Chetty* 2013 and *S v EB* 2010, in which the appellants were found to be co-parenting with their partners in the same household, the courts differentiated between the sentencing of primary caregivers and the sentencing of co-parents, in line with the reasoning of the Constitutional Court in *MS v S (Centre for Child Law as Amicus Curiae)* 2011.

81 *MS v S (Centre for Child Law as Amicus Curiae)* 2011 (2) SACR 88 (CC).

law academics.[82] Unfortunately, where the primary caregiver's role can be fulfilled by a co-caregiver, a custodial sentence will not be mitigated. Nonetheless, the *S v M* judgment has even had implications 'beyond sentencing cases', namely in the bail procedure.[83]

Practice on courts' consideration of the best interests of the child in sentencing caregivers has also emerged in **Malawi**. In the past a stringent view was expressed by national courts,[84] but recently child-care responsibilities have been considered in several decisions on whether to incarcerate primary caregivers. In *Dickson and Another v Republic* 2007, the High Court affirmed that 'one compelling factor for the grant of bail is the plight of this baby who is in custody with the applicant as her mother and in my judgment, the best interest of the child requires that the mother be released on bail'. In *Alasoni v Republic* 2015, the High Court affirmed that the best interests of the child, who lived with the applicant in prison, required her release on bail, pending confirmation of sentence. In *Republic v Keke* 2013, the High Court specified that, in the consideration of the offender, attention must be paid to gender and that, for example, a custodial sentence should be reduced in case of a pregnant woman. In *Republic v Jeke* 2008, the High Court decided to reduce the sentence on humanitarian grounds in view that the applicant was 'still a young woman of about 20 years and she has a young child to look after'.

It must be noticed that the approach of looking at children as a 'circumstance' concerning the accused/offender has been criticised by arguing that courts sentencing primary caregivers must apply *a child-centred approach*, which entails an extra element to the responsibilities of the concerned court over and above the traditional sentencing approach.[85] In a 2015 case (*Republic v Masauko*) the State of **Malawi** raised concerns about the impact of imprisonment on the defendant's children.[86] The High Court considered the

82 Ann Skelton and Morgan Courtenay, 'The Impact of Children's Rights on Criminal Justice', *South African Journal of Criminal Justice* 25 (1), 2012, p. 180. For instance, in *S v Peterson* 2008, the court found that the accused being a primary caregiver represents an exceptional circumstance that may give reasons for a release on bail under the Criminal Procedure Act. Although the concerned accused was found not to be a primary caregiver, the court ensured that the child was adequately cared for. This thus expanded the principle of considering the best interests of the child notwithstanding the accused not being a primary caregiver (paras. 180-181). In another case of 2015, the Durban High Court ordered the immediate release from custody of a breast-feeding mother who was arrested and being held awaiting trial on an assault charge and who claimed her five-month-old child's right to be fed and properly cared for pending a formal bail application.

83 Ann Skelton and Lynn Mansfield Barry (2015), *op. cit.*

84 Chikondi Chijozi & Nyasha Chingore, 'Considering The Best Interests of the Child in Decisions on Incarceration of Care-Givers in Malawi', *Goal 16 of the Sustainable Development Goals: Perspectives from Judges and Lawyers in Southern Africa on Promoting Rule of Law and Equal Access to Justice*, Southern Africa Litigation Centre (SALC), Judiciary of Malawi, National Association of Women Judges and Magistrates of Botswana (NAWABO), 2016, p. 117, citing *Republic v Cosmas and Others*, Criminal Case No. 53 of 2000, [2001] MWHC 11, 20 March 2001, and *Gadama v Republic*, Misc Criminal Application No. 145 of 2001, [2001] MWHC 46, 02 October 2001.

85 See *M v S* (2007), *op. cit.*, in particular the arguments presented by the Centre for Child Law, University of Pretoria, which was admitted as *amicus curiae*.

86 Of particular concern to the State was the accused's youngest child who was one-year-old and still breastfeeding.

best interests of four children who would have been separated from their mother and primary caregiver, who was accused of killing her epileptic son and appeared to have been under immense mental and emotional stress. Although it decided on a custodial sentence, the court affirmed that the law well provides that *unweaned* children be received in prison and provided necessities at public expense. However, the needs of the other *weaned* children still have to be considered as well: the fact that their mother is a convict does not take away their right to know her as a parent, which is enshrined in section 23(3) of the Constitution, and they should be allowed to continue a relationship with her. Significantly, the court was guided by section 321J of the Criminal Procedure and Evidence Act of Malawi, which permits to request any reports that may aid in sentencing. Pre-sentencing reports can be also ordered to enable a court to inquire into the circumstances of the person being sentenced, including whether they are the primary caregiver of any child and the impact their incarceration would have on the latter. However, scholars have criticised that it is not clear 'to what extent these pre-sentencing reports are used, particularly in the lower courts where most women interface with the legal system'. Accordingly, a need for presiding officers able to gain enough information to advance their jurisprudence, also looking at relevant international and regional standards such as the ACERWC's *General Comment No.1* and comparative law from the Southern Africa region, has been highlighted.[87]

Relevant jurisprudence exists across Oceania as well. In **Australia**, Queensland, in *R v Chong* 2008, the trial judge recognised breastfeeding of a small child as a substantial fact relevant to the sentencing outcome, and so re-opened the sentence on the basis that there had been a 'clear factual error of substance' (namely, the respondent would be unable to breastfeed her child while in custody); then the judge maintained the original sentence but allowed parole to commence from the day of the sentence.[88] On appeal the judge upheld the decision, considering that breastfeeding was a 'relevant circumstance' and recognising that the degree of hardship to the respondent's children would be exceptional; the sentence imposed was within the trial judge's sentencing discretion. In **Fiji**, the High Court has been willing to consider the best interests of the child principle in bail proceedings for a parent in certain circumstances. For example, in *Devi v The State* 2003,[89] the High Court confirmed the application of Articles 3 and 9 CRC and held that the care of dependents is a relevant consideration in the grant or refusal of bail.

87 Cf. Chikondi Chijozi & Nyasha Chingore (2016), *op. cit.*, p.119.

88 Supreme Court of Queensland, *R v Chong; ex parte Attorney-General (Qld) [2008]QCA 22*, 22 February 2008.

89 The High Court of Fiji, *Devi v The State*, [2003] FJHC 47. See also The High Court of Fiji, *Yuen v The State*, [2004] FJHC 247.

As far as the pre-trial stage is specifically concerned, a recent decision of the Supreme Federal Court in **Brazil** has integrated the best interests of the child principle when evaluating the application of non-custodialmeasures.[90] On 20 February 2018, the Second Chamber of this court decided (by a majority vote) to grant collective *habeas corpus* to all women and teenagers in pre-trial detention who are pregnant, with children up to twelve years of age or who are in charge of people with disabilities, and to substitute preventive detention for house arrest of females in such situation throughout the national territory, without prejudice to the application of alternative precautionary measures. It determined that, at the time of arrest, every woman and adolescent must be examined to verify if she is pregnant, and consequently, if house arrest applies immediately; likewise, these measures must be observed when conducting custody hearings. But they are not applicable to violent crimes or serious threats against their children 'or, also, highly exceptional situations'. Brazilian lower courts are required to provide grounds for denial (of house arrest) and inform the Supreme Tribunal of their decision; also the presidents of state and federal courts are required to report within thirty days any arrests of pregnant women and mothers of young children.[91] The IACHR welcomed such decision as in compliance with its own recommendation on the matter and in protection of women against the violence featuring the context of deprivation of liberty in the countries of the region. For Commissioner Margarette Macaulay, its implementation can result in the reduction of high rates of preventive detention of women in Brazil,[92] with positive effects also on the rights of children of imprisoned mothers, who 'have the same right to grow and be cared for in a safe and favourable environment for their development, as other children do'.[93]

Another issue arises as to whether the perspective of the child is considered by the ECtHR in cases concerning the family life of imprisoned parents, when balancing the interests at stake, and besides the perspectives of the prisoner or the prison authorities. It must be noticed that, while a child may lodge a complaint with the Court as per Article 34 ECHR (even when the child is not entitled to bring an action before national courts), in practice it is one or both parents who act on behalf of the child or who are the only claimants in cases regarding restrictions on family units or visits, and solely in a few cases children have been co-complainants before the ECtHR. Emblematic is *Kleuver v Norway* 2002, in which the

90 Supreme Federal Court, *Judgment of Habeas Corpus No. 143.641/SP,* 20 February 2018.

91 Officials have estimated that such decision could result in the release of around 15,000 women and teenagers. See Andrea Carvalho, 'Pregnant Women Will No Longer Await Trial in Brazilian Jails', *Human Rights Watch*, 2018.

92 The situation is of around 4,500 women and adolescents deprived of liberty in Brazil. According to the data released in 2017 by the National Penitentiary Department (DEPEN), 74% of incarcerated women have at least one son or daughter and 49% of women's prisons do not have reserved or adequate spaces to respond to the needs of pregnant women, with new-borns or infants.

93 IACHR Press Release 2018, Available at https://www.oas.org/en/iachr/media_center/PReleases/2018/049.asp (accessed 19 August 2019).

claim was brought by a mother on remand for drug smuggling in **Norway** and her newborn baby, but which only dealt with the situation of the 'first applicant', whereas the 'second applicant' was not deemed as having a distinct argument on his own merits. The mother claimed that her parental rights were violated when her son was removed after birth to a nearby child-care centre and then, following her conviction, to the maternal grandmother living in the Netherlands. For the ECtHR, Article 8 ECHR was not breached and, rather, the mother's responsibility in separating herself from her baby by committing a criminal offence strongly affected its assessment. In view of such context, a greater awareness of children's complaints by the ECtHR has been advocated.[94] In this vein, lawyers can play a basic role in taking the perspective of children in matters that only indirectly concern them.[95]

Some evidence of practice across Europe indicates that when a parent with dependent children is at risk of a custodial sentence, domestic courts are expected to acquire information about them and weigh the potentially affected children's rights under Article 8 ECHR against the seriousness of the parent's offence. In **England and Wales**, these two aspects were considered in two early cases. In *R (on the application of Stokes) v Gwent Magistrates Court* 2001, a mother of four children aged 16, 15, 6 and 9 months, was committed to prison for twelve days suspended on payment of £5 per week for outstanding fines and compensation orders, as at judicial review the High Court deemed the magistrates' decision as abnormal, highlighting that they had to inquire whether the proposed interference with the children's right to respect for their family life was proportionate to the need which made it legitimate. In *R (on the application of P and Q) v Secretary of State for the Home Department* 2001, in which two mothers challenged the rigid application of the prison rule that infants had to leave the Mother and Baby Unit at the age of 18 months, Lord Justice Phillips of the Court of Appeal affirmed that, if the passing of a custodial sentence involves the separation of a mother from her very young child or, indeed, from any of her children, then the court is bound 'to carry out the balancing exercise' before deciding that the seriousness of the offence justifies such separation, and 'if the court does not have sufficient information about the likely consequences of the compulsory separation, it must … ask for more'.[96] This principle was restated in other cases before the High Court

94 Lucy Gampell & Peter Scharff-Smith (eds.), *Children of Imprisoned Parents*, The Danish Institute for Human Rights, European Network for Children of Imprisoned Parents, University of Ulster and Bambinisenzasbarre, 2011, p. 57.

95 Later the CRC-Committee expressed concern 'that the continued relation of a child to his/her parent in prison is not sufficiently supported', also recommending 'that the right of a child to live with his/her parents be adequately considered in cases of deportation of a parent and that prison authorities facilitate the visiting arrangements of a child with his or her imprisoned parent' (Concluding Observations: Norway, 2010, paras. 32-33).

96 England and Wales Court of Appeal, *R (on the application of P and Q) v Secretary of State for the Home Department*, Case No: C/2001/1114 & C/2001/1110, 20 July 2001. In particular see paras. 65 & 79.

and the Court of Appeal: *R v Bishop* 2011,[97] *R (on the application of Amanda Aldous) v Dartford Magistrates' Court* 2011,[98] and *R v Petherick* 2012.[99] In the latter, Lord Justice Hughes sharply affirmed that' the sentencing of a defendant inevitably engages not only her own Article 8 family life but also that of her family and that includes (but is not limited to) any dependent child or children.'

Some research examined to what extent, if at all, the required 'balancing exercise' appears to be carried out in English criminal courts, and whether they comply with the Human Rights Act and, accordingly, with the ECHR.[100] The examined seventy-five cases of mothers convicted of imprisonable offences, however, revealed no evidence of any explicit consideration of the child's rights under Article 8 ECHR, rather sometimes citing 'the effect on children' when reducing the sentence, or sometimes quoting 'sentencing guidelines' when imposing immediate custody; a big variation in the extent to which the care of dependent children appeared to be considered in sentencing was actually found.[101] Nonetheless, the fact that the defendant was caring for a child was usually regarded as a mitigating factor (such as in *R v McClue* 2010). The expected large degree of inconsistency in judicial attitudes and practice in the field, due to the absence of clearly defined procedures on how the 'balancing exercise' should be carried out, has led to recommend that sentencing remarks should explicitly articulate what information has been obtained about the affected children (such as age and relevant health/welfare/disability status) and what balancing exercise has been conducted to decide the imprisonment of the parent.[102] Further research undertaken with twenty judges from the Crown Court of England and Wales, has even found that – despite criminal courts being expected to consider the impact on dependent children when sentencing mothers – such requirement is 'unknown, misunderstood and misapplied in many cases, and a possible reason for this is the poor or non-existent communications channels within the judiciary and magistracy'.[103] This has

97 England and Wales Court of Appeal, *R v Bishop (Wayne Steven)*, Case No. 201102123/A3, 27 May 2011.

98 England and Wales High Court, R (on the application of Amanda Aldous) v Dartford Magistrates' Court [2011] EWHC 1919 Admin.

99 England and Wales Court of Appeal (Criminal Division), *R v Petherick* [2012] EWCA Crim 2214.

100 Rona Epstein, 'Mothers in Prison: The Sentencing of Mothers and the Rights of the Child', *Coventry Law Journal Special Issue: Research Report*, 2012.

101 Ibid., p. 24.

102 Ibid., p. 17.

103 Shona Minson, 'Evidence on the sentencing of mothers for the All Party Parliamentary Group Inquiry into the Sentencing of Women', *Paper, Centre for Criminology*, University of Oxford, 2017, pp. 2-4, highlighting some *factors* that influence such lack of consideration: 1. Inconsistent judicial view on the relevance of dependents as a factor in mitigation; 2. Limited and at times incorrect judicial understanding of the guidelines and case law which set out the court duties in relation to considering dependents in sentencing decisions; 3. Common misconceptions hindered a judge's willingness to make appropriate enquiries about children and to properly understand how their mothers' sentence would affect them.

led to recommend the adoption of 'a guideline on the sentencing of primary carers' which should include a direction that in such circumstances 'a pre-sentence report' is obtained and 'a presumption against a custodial sentence' is applied. As reported in another study exploring the impact of motherhood as a mitigating influence on sentencing decisions in England and Wales, 'discretion in the application of mitigation leads to inter and intra judge inconsistency. Personal factors including knowledge and experience influence a judge's use of pre-sentence reports. The defendants' sentence was more likely to be mitigated by motherhood if the judge had considered a pre-sentence report, regardless of whether the judge agreed with the recommendations of the report'.[104]

iii. State practice

The monitoring on the status of implementation of Article 30 ACRWC shows that the ACERWC has generally recommended States parties to make reference and use of *General Comment No. 1* in order to be guided on the protection of children whose primary caregivers are in conflict with the law, but also has specifically and increasingly paid attention to the safeguarding of such children through the prioritised use of non-custodial measures for their caregivers or expectant mothers, or through the postponement of the beginning of an imprisonment term of a pregnant woman or mother with an infant, or at least the provision of separate facilities/special buildings for them and the introduction of open prisons.[105] Notably, the need to apply non-custodial measures (including 'diversion') and raise more awareness in today's society has been recently seen as requiring the establishment of training programmes for criminal justice officials (including prison personnel) as well as for persons working with or for these children (such as social workers, psychologists, teachers), concerning all rights and principles enshrined in the CRC.[106] In this regard, some of the surveyed **African countries** illustrate relevant aspects. In **Tunisia** a woman who is primary caregiver is eligible for home detention.[107] In **Burkina Faso** judicial authorities can take into account the situation of being a primary caregiver in the sentencing process,[108] or in **Chad** the court's assessment considers the best interests of the child and the maintenance of

104 Shona Minson, 'Mitigating Motherhood: A study on the impact of motherhood on sentencing decisions in England and Wales', *Report, Howard League for Penal Reform,* 2016n p. 2; 'Child or family impact statements' to be offered to the court have been suggested as a tool reflecting on both the likely impact of the sentencing of a parent on the dependent child and the child's views, see Tânia Loureiro, *Child and family impact assessments in court: implications for policy and practice,* Edinburgh, Families Outside, 2009.

105 See ACERWC, Concluding Observations and Recommendations: Burkina Faso (2017), at 7; Eritrea (2017), para. 26; Sierra Leone (2017), para. 31; Union des Comores (2017), para. 28; Ghana (2016), para. 39; Algeria (2015), para. 39; Gabon (2015), para. 48; Madagascar (2015), para. 46; Zimbabwe (2015), para. 46; Liberia (2014), at 13; Guinea (2014), para. 44; Sudan (2013), at 7; Senegal (2011), at 6.

106 As highlighted in a Global Study regional consultation about States in Middle East, North Africa and Gulf Region, in Tunis, November 2018.

107 UN Global Study Questionnaire, Tunisia (NGO Reply).

108 UN Global Study Questionnaire, Burkina Faso (State Reply).

the parent in prison.[109] Postponement of the beginning of a prison term for a pregnant woman until a certain number of months after delivery can be decided in **Algeria**, **Eritrea** and **Chad** (twenty four, six, and three months respectively).[110] Similarly, postponement may be decided for a convicted parent in the interest of the minor child if the other spouse is being imprisoned in **Algeria**, **Chad** and **Egypt**. Co-habitation in prison is not generally allowed in the **Republic of Congo**, and cases of parents held in custody or prison with their children receive 'special or privileged treatment' in order to shorten the child's stay; if possible, a mother can be released on bail for the child, or be granted provisional liberty or parole, otherwise the child could be placed in the care of the father or other family member, or temporarily in a public nursery or community centre, with regular contact with the imprisoned mother.[111]

Relevant non-custodial approaches have been identified (only for females) also in some of the surveyed countries in the **Middle East and Asia**. For instance, **Cambodia's** Ministry of Justice guidelines provide that if a woman is pregnant or has children and no suitable alternative care arrangements are available, pre-trial detention should not be imposed unless absolutely necessary.[112] **Indian** courts consider the situation of convicted persons and/or their family at the sentencing stage, and women are to be given preference at the time of granting bail.[113] Some **Malaysian** courts have instead considered family difficulties and hardship in the context of sentencing by concluding that the effect of a conviction on the accused's family is not automatically a mitigating factor.[114] Furthermore, there are directions by the Indian Supreme Court to consider pregnancy as a condition for granting bail or parole so that she may deliver outside the prison as far as possible. In **Uzbekistan** convicted women who are pregnant or have children under three years of age can enjoy 'ancillary rights' connected to the prison director's resolution on the fulfilment of their sentence, namely the right to reside outside the prison, the right to place their children in a nursery located within the penal institution while serving their sentence and to visit them during leisure time, and the right to leave the prison to make arrangements for their children.[115] Common cases for suspending the imprisonment of a woman (at the discretion

109 UN Global Study Questionnaire, Chad (State Reply).

110 Algeria's Law 04-05/2005, Article 16 (6) (7) & Article 17; Eritrea's Criminal Procedure Code (2015), Article 158 (2).

111 UN Global Study Questionnaire, Congo (State Reply).

112 UN Global Study Questionnaire, Cambodia (UN Agencies Reply), citing the Cambodian League for the Promotion and Defence of Human Rights, 'Mothers Behind Bars', 2015, p. 17.

113 Criminal Procedure Code, Section 437(1)(ii). Global Study Questionnaire, India (NGO Reply).

114 UN Global Study Questionnaire, Malaysia (UN Agencies Reply), citing MohdHashim [1961] MLJ 186, and Amir Hamzah [2003] 2 AMR 626.

115 UN Global Study Questionnaire, Uzbekistan (State Reply): Criminal Code, Articles 131-132.

and by order of the judge) can include: during pregnancy (in **Vietnam**, **Lao PDR**, **Palestine**) and after childbirth for a certain period (up to six months in **Iran** or one year and half in **Lao PDR** or one year in **Uzbekistan**), during the breast–feeding until the infant reaches the age of two (in **Iran**) or three years (in **Vietnam** and **Uzbekistan**).[116] The execution can be postponed for one of the spouses until the other is released if they have not been imprisoned before and if they have a minor not more than fifteen years old and have a known residence (in **Palestine**), or if both parents are sentenced for less than a year and have no previous records and if they have a child up to thirteen years (in **Yemen**).[117]

As far as **Oceania** is concerned, in some Pacific countries, courts may defer a prison sentence for 'up to three months on humanitarian grounds' and this could be argued to apply to a caregiver (in **Samoa**),[118] or courts can allow for a plea in mitigation[119] and this could include the fact that the parents are caregivers (in **Tonga**).[120] Bail may be granted where both parents are in custody and there are no arrangements for the care of children of tender years because it is in their best interests not to be separated (in **Fiji**).[121] Federal States and territories of **Australia** also regulate the matter in a way that courts can or must consider the possible effect of a sentence upon any dependents of the defendant.[122] In Western Australia and South Australia it is at the discretion of the court,[123] whereas in the Australian Capital Territory it is a requirement.[124] In the Northern Territory no guidelines are provided, but authorities have considered non-custodial measures such as 'home detention' to allow parents-caregivers to keep their family together and to care for their children. In Tasmania, where a pre-sentence report is requested by a court any special needs of an offender can be taken into account; depending on the offence, parents are eligible to a number of

116 UN Global Study Questionnaire, (UN Agencies Replies): Vietnam, Criminal Code of 2005, Articles 67-68, Lao PDR, Criminal Procedure Law of 2012, Article 242; Iran, PPC Articles 501, 523, Executive Regulations of State Prisons and Security and Corrective Measures and Organisation (Article 69, Note 1). UN Global Study Questionnaire, (State Replies): Palestine, Code of Criminal Procedure 3/2001, Articles 402 and 405; Uzbekistan, Code of Criminal Procedure, Article 553 except for dangerous recidivist or grave offences.

117 UN Global Study Questionnaire, Palestine (State Reply): Code of Criminal Procedure No. 3/2001, Article 405; Yemen (NGO Reply): Act 130/1994, Article 501.

118 UN Global Study Questionnaire, Samoa (UN Agencies Reply). See Sentencing Act 2016, Section 63, but there are no express considerations for a court in the Sentencing Act 2016 or Community Justice Act 2008 when sentencing a parent or caregiver. A pregnant prisoner is nonetheless allowed to maternity leave for six to eight weeks when she delivers; then she has a choice whether to bring the baby in prison or separate from the baby, without interference from the Prison and Correction Services.

119 UN Global Study Questionnaire, Tonga (UN Agencies Reply), citing the Tonga Magistrates Bench Book 2004, at 154 (M1).

120 UN Global Study Questionnaire, Tonga (UN Agencies Reply), citing *R v Motulalo* [2000] 311 Tonga LR (CA), pp. 313-314.

121 UN Global Study Questionnaire, Fiji (UN Agencies Reply), adding that each case must turn on its own facts and excluding situations where the parents are accused of abusing or neglecting their children or where other public interest considerations or the parents' conduct can justify a refusal of bail.

122 UN Global Study Questionnaire, Australia (State Reply).

123 See Sentencing Act 2017, section 11(5) and section 69, which repealed Criminal Law (Sentencing) Act 1958 section 10(1)(n).

124 Section 33(1), Crimes (Sentencing) Act 2005.

non-custodial options including suspended sentences, community service orders, deferred sentencing, home detention, and the Court Mandated Drug Diversion programme has been expanded. In Queensland, the principles that a court must have regard to *inter alia* include that imprisonment is a last resort decision and that a sentence permitting a person to remain in the community is preferable;[125] consideration of family hardship or caregiving duties[126] should not overwhelm other matters also relevant to sentencing, including the purposes for which sentences are imposed; a court may also take into account that a person sentenced for an offence committed whilst they were under eighteen years of age has parental responsibilities.

Within the **Inter-American system**, in relation to pre-trial detention decisions, a range of administrative and legislative efforts to incorporate a gender perspective has recently concerned:

(1) the safeguarding of the rights of women deprived of liberty and special protection for pregnant women and mothers (in **Brazil**, **Colombia**, **Mexico**);[127] and

(2) the prioritisation of non-custodial remand measures for pregnant women and mothers with children and persons with disabilities under their care, taking into account the situation of special risk and the impact on dependents (in **Brazil**, **Colombia**, **Costa Rica**, **Ecuador**, **Peru**, **Mexico**, **Nicaragua**).[128]

125 Section 9, Penalties and Sentences Act 1992.

126 But see *R v Chong*, *op. cit.*, which recognised that the hardship endured by a family because of a parent's imprisonment is relevant to determine an appropriate sentence.

127 See: Mexico's Federal Criminal Justice Enforcement Law, 16 June 2016, Articles 1 and 6; Colombia's Law 1709/2014 'amending a number of articles contained in Law 65/1993, Law 599/2000, and Law 50 of 1985, as well as introducing other provisions'; Brazil's Information from the Public Defender Service of São Paulo, *'Atendimiento ás pessoas presas provisoriamente na Cidade de São Paulo'*, November 2016. See also Superior Council of the Office of the Public Defender of the State of São Paulo, CSDP Resolution 297, 8 May 2014, Article 4, providing that a gender perspective should be adopted in conducting interviews.

128 See: Brazil's Law 13.257/2016 amending the Code of Criminal Procedure (Early Childhood Statute), Article 318, paras. IV & V; Colombia's Code of Criminal Procedure, Article 314 (modified by Article 27 of Law 1.142/2007); Costa Rica's Law 9271/2014 'Electronic Monitoring Mechanisms in Criminal Matters'; Ecuador's Comprehensive Organic Criminal Code, 10 August 2014, Article 522; Peru's Legislative Decree 1322/2017 on personal electronic surveillance, Article 5(2); Mexico's Federal Code of Criminal Procedure, 18 June 2016, Article 166(3); Nicaragua's Code of Criminal Procedure, Article 176.

Notably, the IACHR has suggested the main challenges for effectively implementing a related law early adopted in **Argentina**:

(1) lack of follow-up on the application of house arrest, resulting in a large number of re-confined women,

(2) consideration of socio-economic status as the primary factor in ordering house arrest, and

(3) the requirement of electronic mechanisms for its application, which are used as an added control device.[129]

Moreover, with regard to foreign women who are pregnant or detained with their children, without a domicile, neither strong ties or ties in the country, it can be extremely difficult for them to obtain house arrest in the absence of legislative provisions, which could thus require broad judicial interpretations and consideration of their conditions of vulnerability in order to avoid decisions involving any type of discrimination.

In relation to sentencing decisions, non-custodial punitive options can be provided, sometimes including teenage mothers, as well as pregnant adolescents and women.[130] For instance, in **Argentina** pregnant women, mothers with children younger than five years of age (or with caring responsibilities for persons with disabilities) are eligible for home detention, which in actual practice is granted in accord to the child's best interests and is extended to mothers with older children, to fathers, and/or to other concerned parties. Nevertheless, a 'co-residence program' exists in the federal system and many children still reside in prison with their mothers.[131] In **Colombia** pregnant adolescents or young women lactating or having children below three years of age are eligible for home detention and electronic monitoring. In **El Salvador** adolescent mothers are eligible for the imposition of rules of conduct, community service order or probation, and the access to the 'Program of Measures in Open Environment' as executed by the Salvadoran Institute for Children and Adolescents. In **Mexico** a pregnant adolescent, a teenage mother who is the sole or primary caregiver of her child, or a teenage mother of a child with a disability are also eligible to non-custodial sanctions.

129 IACHR Report on Measures Aimed at Reducing the Use of Pre-trial Detention in the Americas, 2017, para. 214 referring to Law 26.472/2009.

130 See: Argentina's Law 26.472/2009, Article 1 amending both Penal Code (Law 11.179), Article 10, and Prison Sentence Enforcement Law No. 24.660/1996, Article 32; Colombia's Penitentiary and Prison Code (Law 65/1993); El Salvador's Juvenile Criminal Code, Article 8; Mexico's LNSIJPA (*Ley Nacional del Sistema Integral de Justicia Penal para Adolescentes*), Article 148.

131 From research published in 2013 (*Women In Prison In Argentina: Causes, Conditions, And Consequences*, p. 32), a survey indicated that this might be partly due to lack of awareness of such alternative measure, but also that 23.53% of women with children did not ask for house arrest prior to incarceration, whereas 76.47% of women requested it but were denied it. Among these, 6% indicated that the location of their residence was the reason for denial, while 33% indicated that the judge decision on house arrest was not the best alternative for them, and 60% indicated other reasons for denials. Emphasis was put on the fact that it was difficult for poor women to take advantage of such a law due to their lack of means to maintain a house and provide for their children without being able to work outside.

In Europe, several national laws require or allow judicial authorities to take into account (*inter alia* and to different extents) the personal and family situation, including the child caring responsibilities or the condition of pregnancy, of an accused or convicted parent when choosing or executing the sentence.[132] Surveyed **European countries** have not generally shared information about national laws and policies in favour of the use of non-custodial remand measures for parents of dependent children. A few examples are nonetheless noteworthy. In **Lithuania**, the law indicates that arrest shall not be imposed upon pregnant women and may not be imposed upon persons raising a child under the age of three taking into consideration the interests of the child.[133] In **Italy**, the law indicates the exceptional nature of precautionary custody for parents of children aged six years or younger and, instead, in case of necessity the application of house arrest at their own residence, another private residence, a place of care or assistance, or at specific 'protected family houses' if instituted.[134] The provision of such structures to assist the children and protect the child-parent relationship has nonetheless faced challenges in implementation, particularly because financial coverage to set them up is not guaranteed under the law and an endemic scarcity of financial resources features the local authorities that should promote them.[135]

When choosing the sentence, non-custodial punitive options for a parent of a dependent child are provided in several national jurisdictions (in **Austria**, **Czech Republic**, **Denmark**, **Georgia**, **France**, **Lithuania**, **Portugal**, **Ukraine**).[136] For instance, in **France**, the judge can pronounce a suspended sentence on probation, community service order, social and judicial supervision, or even a sentence of imprisonment accompanied *ab initio* by measures alleviating the penalty (e.g. outside placement, semi-liberty, conditional release, or release under electronic surveillance).

Likewise, adjustments of the execution of a prison sentence for a parent can be decided, including the application of a non-custodial measure under certain conditions, especially depending on the length of the sentence, the situation of the prisoner, and the age of the

132 UN Global Study Questionnaire, Austria (State Reply); Belgium (State Reply); Czech Republic (State Reply); Denmark (State Reply); Georgia (State Reply); Greece (State Reply); Estonia (State Reply); France (State Reply); Lithuania (State Reply); Portugal (State Reply); Switzerland (Sate Reply); Italy (NGO Reply, Antigone); Russian Federation (State Reply); Serbia.

133 UN Global Study Questionnaire, Lithuania (State Reply): Criminal Code, Article 49(6).

134 Italy's Law 62/2011, Article 1 (1)(2) modifying Code of Criminal Procedure (Article 275(4) and Article 284(1)), and Article 3 modifying Penitentiary Law (Article 47-*ter*).

135 Italy's Law 62/2011, Article 4 establishing that the Minister of Justice has to identify, with his own decree, the typological characteristics of the 'protected family houses', also stipulating suitable agreements 'without new charges for the public finance'. Only two 'protected family homes' exist with the support of private donations, in Milan and Rome.

136 UN Global Study Questionnaire, (State Replies): Austria, Czech Republic, Denmark, Georgia,France, Lithuania, Portugal, Ukraine.

child (in **France**, **Italy**, **Greece**, **Ukraine**, **Denmark**). For instance, in **Italy** home detention can be granted under specific (strict) conditions in case of a child younger than ten years.[137] Or, in **Greece** mothers of children under eight years of age and serving an imprisonment of up to ten years are allowed to serve the sentence or the remainder of it in their home, taking into account the child's best interests, unless serving in a prison facility is judged as absolutely necessary to prevent the commitment of similar crimes.[138]

In addition, the enforcement of a custodial sentence can be regulated in a way to prevent the case where a parent would live in prison with a dependent child, by allowing deferment/suspension or postponement until a certain period of time, or implementation in an open environment, in various jurisdictions (in **Croatia**, **Czech Republic**, **Denmark**, **Finland**, **Italy**, **France**, **Georgia**, **Russian Federation**, **Ukraine**).[139] For example, in the **Czech Republic** it can be interrupted up to one year of the child's age and during this time the mother can request for a replacement in the special department.[140] In **Finland** it can be postponed for a pregnant person until she has recovered from delivery, on medical grounds;[141] or it can be postponed for other than health-related reasons and with the sentenced person's consent if such delay could materially decrease the losses or difficulties resulting from immediate enforcement.[142] In **Georgia** it can be postponed for a pregnant woman or during one year after delivery.[143] In **Denmark** it can be postponed also if it is assumed that a potential childcare service for the child will be available in the foreseeable future.[144]

In a few countries such as **Scotland** a presumption against short-term custodial sentences is established, which can require judges to explain why a short custodial sentence is necessary should they choose this course of action. Likewise, if a convicted parent is sentenced to prison for up to six months, the full sentence can be served with an electronic foot shackle at the personal residence (in **Denmark**).[145]

137 Italy: Law 40/2001, Article 3 introducing Article 147-*quinquies* (Code of Criminal Procedure) on special home detention. Law 62/2011, Article 3(1) modifying Article 47-*ter* (1)(a) (Penitentiary Law 354/1975) on home detention for humanitarian purposes; and Article 3(2) modifying Article 47-*quinques* (1) (Law 354/1975) on special form of home detention, applicable also in execution of long-term penalties, but under strict conditions.

138 UN Global Study Questionnaire, Greece (State Reply): Article 56(2), Criminal Code, as modified and replaced by Article 20 of Law 4356/2015.

139 UN Global Study Questionnaire, (State Replies): France, Russian Federation, Croatia, Ukraine, Denmark, Georgia.

140 UN Global Study Questionnaire,Czech Republic (State Reply).

141 UN Global Study Questionnaire, Finland (State Reply): Imprisonment Act 767/2005.

142 UN Global Study Questionnaire, Finland (State Reply): if his/her close relative or another close person or to his/her employer or another party to whom his/her work input is especially necessary.

143 UN Global Study Questionnaire, Georgia (State Reply): Criminal Procedure Code.

144 UN Global Study Questionnaire, Denmark (State Reply).

145 UN Global Study Questionnaire, Denmark (State Reply).

c. Children's admission/entry into prison with a charged or convicted parent

i. Related universal/regional rules, standards and guidelines

Taking into account of **the best interests of children in all that concerns them** is explicitly required in Bangkok Rules dealing with the entry phase of the parent concerned. Under Rule 2(2), '(p)rior to or on admission, women with caretaking responsibilities for children shall be permitted to make arrangements for those children, including the possibility of a reasonable suspension of detention, taking into account the best interests of the children'. Under Rule 3(2), '(a)ll information relating to the children's identity shall be kept confidential, and the use of such information shall always comply with the requirement to take into account the best interests of the children'. As for the **registration**, Rule 3(1) establishes to record personal details of the children of a woman being admitted to prison, including, without prejudicing her rights, at least the names of the children, their ages and, if not accompanying the mother, their location and custody or guardianship status. As for the **allocation**, Rule 4 requires that women prisoners are to be assigned, 'to the extent possible, to prisons close to their home or place of social rehabilitation, taking account of their caretaking responsibilities, as well as the individual woman's preference and the availability of appropriate programmes and services'. The significance of **living in prison when it is in the childs' best interests** is expressly addressed in Bangkok Rule 49 whereby 'decisions to allow children to stay with their mothers in prison shall be based on the best interests of the children'. Likewise, the Nelson Mandela Rule 29(1) provides that 'a decision to allow a child to stay with his or her parent in prison shall be based on the best interests of the child concerned'. In this regard, the UN Human Rights Council has recalled that 'the best interests of the child should also be a primary consideration in relation to the question of whether and how long children of imprisoned mothers should stay with them in prison', and has emphasised 'the responsibility of the State to provide adequate care for women in prison and their children'.[146]

The basic principle enshrined in paragraph 5 of the Appendix to the CoE's Recommendation CM/Rec(2018)5 enunciates that 'the prison administration shall endeavour to collect and collate relevant information at entry regarding the children of those detained'. Paragraph 35 acknowledges the **child's right to an official name and an identity**, with a registration and a birth certificate not mentioning the mother's imprisonment, so avoiding stigmatisation. Subsequent paragraph 36 enunciates that the decision that an infant stay in prison with any parent needs to be considered 'only when it is in the best interests of the infant

146 Cf. A/HRC/10/2, *op. cit.*, Preamble.

concerned and in accordance with national law', on a case-by-case basis. It has been explained that **fundamentally important considerations** in assessing the best interests of each infant include the emotional and physical well-being of the child and the developing of a strong early attachment to the mother as well as the possibilities for breastfeeding. The recommendation is that **only infants** should live in closed prisons with their parents, although some older children live in such prisons.[147] This echoes the CPT's view and the EPR whereby the child's welfare and best interests should be the governing principles in deciding whether children should remain with imprisoned parents. For the CPT, the immediate removal of newborn infants from their mothers should be considered inhuman and degrading treatment, and a mother and her baby should be allowed to stay together for at least a certain period.[148]

ii. State practice

Most of the surveyed States allow children to stay in prison with one of their parents/primary caregivers.[149] Most of the national laws establish specific age limits for a child's admission into a place of detention (between 1 and 3, but sometimes extending to 6 years of age) and place restrictions on the length of permissible stay. Some use diverse or further indicators for making such determinations. Various trends have been identified across regions, as detailed hereafter.

In some countries the decision to allow a child to live in prison with a primary caregiver only rests with the holders of parental authority, eventually the competent authorities are immediately informed, unless there is a judicial procedure to decide differently on the legal guardianship of the child.[150] In many other countries the child's stay is possible only upon the request of the mother and the authorisation of judicial/social/prison authorities, either

147 Council of Europe, *Recommendation CM/Rec (2018) 5 of the Committee of Ministers to member State concerning Children with imprisoned Parents*, 4 April 2018, p. 13.

148 CPT, *Factsheet on Women in Prison*, 2018, p. 5, citing Luxembourg: 1993 visit (para. 44), Czech Republic: 2014 visit (para. 82).

149 Exceptions include, for instance, Lao PDR (UN Agencies Reply); Republic of Congo (State Reply); Sao Tome Principe (State Reply); and Norway.

150 UN Global Study Questionnaire, Uzbekistan (State Reply); Albania (State Reply); Italy (NGO Reply, Antigone); Portugal (State Reply and Ombudsperson Reply); France (State Reply and NHRI Reply).

separately or jointly.[151] National laws can establish the provisionally detained or imprisoned persons' right to have their child with them in prison.[152]

Some States have confirmed that, operating on the premise that children must only stay with their detained mother in exceptional situations and are not allowed to live in prison unless there is no other solution, the existence of any viable alternatives is first checked, such as the child's father or any other family members or foster family who are able to give the level of care that is needed.[153]

However, the criteria underlying the decision vary in State practice and do not always formally include an assessment and determination of the child's welfare and best interests. Questionnaire responses do not always clearly indicate which are the essential considerations in the given evaluations. Some countries explicitly refer to such principle in law or in practice,[154] even to certain rights of the child,[155] and/or to further indicators such as breastfeeding needs, the lack of alternative child-care solutions, the suitability of prison accommodation for the child's development, the child's health, the protection of the child's safety, the full parental responsibility, the abilities to exercise parenthood, the length of the sentence, the parent-child relationship and attitude before entering the prison,[156] in addition to the parents' wishes and the child's age as primary factors.[157] Reasons for rejection may also include the fact that, prior to entering a correction centre, a mother

151 UN Global Study Questionnaire, Canada (State Reply); El Salvador (State Reply); Mexico (State Reply); Honduras (NMP Reply); Brazil (NMP Reply and NGS Reply, DCI); Argentina (NGO and NHRIs Replies); Benin (State Reply); Burkina Faso (State Reply); South Sudan (State Reply); Tanzania (State Reply); Tunisia (State Reply); Chad (State Reply); Madagascar (State Reply); India (NGO Reply); Sri Lanka (State Reply); Malaysia (UN Agencies Reply); Myanmar (UN Agencies Reply); Cambodia (UN Agencies Reply); Iran (UN Agencies Reply); Austria (State Reply); Belgium (State Reply); Bosnia Herzegovina (State Reply); Croatia (State Reply); Czech Republic (State Reply); Denmark (State Reply); Estonia (State Reply); Finland (State Reply); Georgia (State Reply); Greece (State Reply); Ireland (State Reply); Lithuania (State Reply); Spain (State Reply); Netherlands (State Reply); Slovenia (State Reply); Sweden (State Reply); Switzerland (State Reply); Ukraine (State Reply); Lebanon (State Reply); Palestine (State Reply); Fiji (UN Agencies Reply); Samoa (UN Agencies Reply).

152 UN Global Study Questionnaire, Denmark (State Reply): Law on Enforcement of Criminal Sentences, section 54; Ministerial Order 852 of 28 June 2017, sections 16-18, on visits etc. to persons serving a sentence or secure detention in the institutions of Kriminalforsorgen; and Ministerial Order 869 of 25 June 2018, sections 54 & 55, on remand prison.

153 UN Global Study Questionnaire, Netherlands (State Reply); France (State Reply).

154 UN Global Study Questionnaire, Tanzania (State Reply); Tunisia (NGO Reply); Sri Lanka (State Reply); Myanmar (UN Agencies Reply); Albania (State Reply); Belgium (State Reply); Denmark (State Reply); Estonia (State Reply); Finland (State Reply); France (State Reply); Germany (State Reply); Georgia (State Reply); Greece (State Reply); Ireland (State Reply); Netherlands (State Reply); Portugal (State Reply); Spain (State Reply); Switzerland (State Reply); Sweden (State Reply); Australia (State Reply).

155 UN Global Study Questionnaire, South Sudan (State Reply); El Salvador (State Reply); Mexico (State Reply); Honduras (NMP Reply).

156 UN Global Study Questionnaire, Chad (State Reply); Madagascar (State Reply); Benin (State Reply); Burkina Faso (State Reply); Argentina (NGO Reply); Canada (State Reply); Austria (State Reply); Czech Republic (State Reply); Croatia (UN Agencies Reply); Denmark (State Reply); Finland (State Reply); France (State Reply); Greece (State Reply); Lithuania (State Reply); Netherlands (State Reply); Portugal (State and Ombudsperson Replies); Slovenia (State Reply); Spain (State Reply); Yemen (NGO Reply); Lebanon (State Reply); Tonga (UN Agencies Reply); Australia (State Reply).

157 UN Global Study Questionnaire, Brazil (NMP Reply); Iran (UN Agencies Reply); Vietnam (UN Agencies Reply); Malaysia (UN Agencies Reply); Cambodia (UN Agencies Reply); Italy (NGO Reply, Antigone).

did not participate in a child's raising and education process, or the fact that a child's father raises, looks after and cares for the child and his parental authority was not restricted.[158]

States that allow children to co-reside in prison with their fathers

Out of 92 countries that submitted a response to the Global Study questionnaire, only 8 clearly indicated that, in certain circumstances, children can co-reside with their father in prison.

Source: Responses to Global Study Questionnaire

158 UN Global Study Questionnaire, Lithuania (State Reply): the decision-making may be also suspended for one month due to the lack of vacancies.

The possibility to keep children in prison is often set up only for mothers.[159] In a few countries also fathers, or fathers and mothers jointly, can have such possibility, but this is put into effect on a case-by-case basis and in practice male institutions can be unsuitable.[160] Moreover, in some countries the child can stay in prison only if born while the mother is serving her sentence, meaning that a child cannot be subsequently placed in prison.[161] In other countries children can be allowed to stay regardless of the place/moment of birth, so including those born either before or during the parent's imprisonment.[162] In this context, some legal efforts to avoid discrimination against children as caused by parents' imprisonment have been undertaken. For example, in some States of the **Middle East**, **North Africa** and **Gulf Region**, the case of a child born in prison is not mentioned in the child's identity card or in any other administrative documents.[163]

The review process is not always provided and varies in the surveyed State practice. There may be a possibility for the mother to complain against the relevant decision of prison/judicial authorities within a certain period of time.[164] Or it may concern the child protection services' monitoring of the child's wellbeing and reconsideration of the child's placement in a detention environment, following prison officials' information or even the other parent or family members' request for a change of parental responsibility and designation of a provisional guardian.[165] Where a review is not formally established, attention may be also given to the risks to compromise the child's safety, even for lack of space in the penitentiary establishments.[166]

159 UN Global Study Questionnaire, Honduras, (NMP Reply); El Salvador (State Reply); India (NGO Reply); Sri Lanka (State Reply); Uzbekistan (State Reply); Czech Republic (State Reply); Lithuania (State Reply); Greece (State Reply); Ireland (State Reply); Scotland (State Reply); Yemen (NGO Reply); Lebanon (State Reply); Tonga (UN Agencies Reply); Fiji (UN Agencies Reply). Also Kenya and Uganda under their specific Prison Acts.

160 UN Global Study Questionnaire, (State Replies): Belgium, Denmark, Germany, Finland, Spain (only in 'Mixed/Family Modules'), Sweden, Palestine. Italy (in a minimum-security institution under exceptional circumstances, see Law 62/2011, Article 1(3) introducing Article 285bis Code of Criminal Procedure). Bolivia according to the UN Human Rights Committee (2013).

161 UN Global Study Questionnaire, South Sudan (State Reply); El Salvador (State Reply); Honduras (NMP Reply); Mexico (NHRIs and NMP Replies); Philippines (UN Agencies Reply); Croatia (State Reply); Slovenia (State Reply).

162 UN Global Study Questionnaire, Benin (State Reply); Chad (State Reply); South Sudan (State Reply); Madagascar (State Reply); Mauritius (State Reply): only in exceptional cases are young children allowed to stay in prison; Colombia (State Reply); Canada (State Reply); Belgium (State Reply); Czech Republic (State Reply); Denmark (State Reply); Estonia (State Reply); Finland (State Reply); Germany (State Reply); Portugal (State Reply); Yemen (NGO Reply); Lebanon (State Reply); Tonga (UN Agencies Reply); Samoa (UN Agencies Reply).

163 As highlighted in a UN Global Study regional consultation in Tunis, November 2018.

164 UN Global Study Questionnaire, Tunisia (NGO Reply); Burkina Faso (State Reply); Canada (State Reply); El Salvador (State Reply); Argentina (NGO Reply, DCI), Brazil (NPM Reply and NGO Reply, DCI); Albania (State Reply); Czech Republic (State Reply); Germany (State Reply); Ireland (State Reply); Lithuania (State Reply); Australia (State Reply).

165 UN Global Study Questionnaire, Canada (State Reply); Albania (State Reply); Denmark (State Reply); Finland (State Reply); Germany (State Reply); Lithuania (State Reply); Netherlands (State Reply); Portugal (Ombudsperson and State Replies).

166 UN Global Study Questionnaire, France (State and NHRI Replies), Belgium (State Reply); Palestine (State Reply).

Finally, the expected remaining sentencing time of the parent (e.g. fewer than six or twelve months left) can affect the child's stay beyond specific age limits.[167] An extension may be also authorised under particular circumstances if it is in the child's best interests, sometimes at the mother's request.[168]

d. Children Living with a Detained or Imprisoned Parent

i. Related universal/regional rules, standards and guidelines

Paragraph 48 of the UN Guidelines for the Alternative Care of Children Without Parental Care urges States to make the 'best efforts to ensure that children remaining in custody with their parent benefit from **adequate care and protection**, while guaranteeing their own **status as free individuals** and access to activities in the community'. Rule 45(2) also confirms that '(t)he prohibition of the use of solitary confinement and similar measures in cases involving women and children, … continues to apply', in line with Bangkok Rule 22. The significance of giving these children **the best care** is particularly addressed in the Bangkok Rules: 'children in prison with their mothers shall never be treated as prisoners' (Rule 49, equally to Nelson Mandela Rule 29(2)); women with infants in prison must be given 'the maximum possible opportunities to spend time with their children' (Rule 50); children must be 'provided with ongoing health-care services' and their development must be 'monitored by specialists, in collaboration with community health services' (Rule 51(1)); the environment for the children's upbringing must be 'as close as possible to that of a child outside prison' in the community (Rule 51(2)). Likewise, the Nelson Mandela Rule 29(1) specifies that 'where children are allowed to remain in prison with a parent, provision shall be made for: (a) Internal or external childcare facilities staffed by qualified persons, where the children shall be placed when they are not in the care of their parent; (b) Child-specific health-care services, including health screenings upon admission and ongoing monitoring of their development by specialists.'

Special accommodation in women's institutions is required 'for all necessary pre-natal and post-natal care and treatment' and '[a]rrangements shall be made wherever practicable for children to be born in a hospital outside the institution' (Rule 23(1) SMR). In cases nursing infants are permitted to stay in the institution with their mothers, 'a nursery staffed by qualified persons' is to be provided, and when the infants are not in their mothers' care they are to be placed in the nursery (Rule 23(2) SMR). Various Bangkok Rules supplement

167 UN Global Study Questionnaire, Uzbekistan (State Reply); Austria (State Reply); Russia Federation (State Reply).

168 UN Global Study Questionnaire, Honduras (NMP Reply); South Sudan (State Reply); Tunisia (NGO Reply); Myanmar (UN Agencies Reply); Malaysia (UN Agencies Reply); Denmark (State Reply); Finland (State Reply); France (State and NHRI Replies).

these standards. Women prisoners are also to receive advice on their health and diet and '[a]dequate and timely food, a healthy environment and regular exercise opportunities shall be provided free of charge for pregnant women, babies, children and breastfeeding mothers' (Bangkok Rule 48(1)). Breastfeeding is not to be discouraged unless explicit health reasons exist (Bangkok Rule 48(2)). Women prisoners are to 'have facilities and materials required to meet women's specific hygiene needs, including … a regular supply of water to be made available for the personal care of children and women, in particular women … who are pregnant, breastfeeding or menstruating' (Bangkok Rule 5). Women prisoners are to receive a health screening on entering the prison (Bangkok Rule 6). Children who accompany a woman prisoner are also to undergo a health screening, 'preferably by a child health specialist, to determine any treatment and medical needs. Suitable health care, at least equivalent to that in the community, shall be provided' (Bangkok Rule 9).

During custody, **prison staff** has to 'demonstrate competence, professionalism and sensitivity' and 'preserve respect and dignity' when searching children living in prison with mothers as well as children visiting prisoners (Bangkok Rule 21). Moreover, all staff assigned to work with women prisoners is to receive training relating to their gender-specific needs and human rights (Bangkok Rule 33(1)). Basic training is to be provided for prison staff working in female prisons on the main issues relating to women's health, besides first aid and basic medicine (Bangkok Rule 33(2)). Prison staff must also be trained on child development and basic child health care, in order to be able to respond appropriately if needed and in times of emergencies (Bangkok Rule 33(3)).

Incarcerated pregnant women, women with infants, and breastfeeding mothers are not to be punished by close confinement or disciplinary segregation (Bangkok Rule 22). **Disciplinary sanctions** for women prisoners 'shall not include a prohibition of family contact, especially with children' (Bangkok Rule 23). The use of restraints is prohibited on women during birth and immediately after birth (Bangkok Rule 24). Other rules concern contacts with the outside world[169] as well as visits involving children.[170] The need to enable women inmates' participation in prison activities is also addressed, referring to a **flexible prison regime** responding to the needs of pregnant women, nursing mothers and women with children, for instance by providing child care facilities or arrangements, as well as 'appropriate programs' for these women (Bangkok Rule 42(2)(3)).

169 Rule 26 supplements rules 37-39 SMR and calls for encouraging and facilitating, by all reasonable means, women prisoners' contact with their families, including their children, their children's guardians and legal representatives.

170 Rule 28 requires that visits involving children are to take place in an environment conducive to a positive experience, including regarding staff attitudes, also allowing open contact between mother and child. Visits entailing extended contact with children should be encouraged, where possible.

In one of the workshops within the 13th Congress on the Prevention of Crime and the Treatment of Offenders in 2015, the question on 'what successful measures have been taken with regard to pregnant women, women with babies and children in prison, and custody and care of children of imprisoned mothers (outside prison)' was considered.[171] The **Asia and Pacific regional** preparatory meeting acknowledged that in several countries prison administrations were faced with challenges concerning pregnant women or women with small children, as well as foreign-national women prisoners.[172] During the discussion of the workshop, Member States were encouraged 'to minimize the use of imprisonment' and, if this is unavoidable, 'to provide services such as nurseries, mother-child units, nursing care and formal education for the children of women prisoners, and cooperation with relevant organizations, including NGOs, the private sector and the community', exchanging good practices in cooperation with UNODC, UNICEF and OHCHR.[173]

In the **African context**, focusing on the implementation of Article 30(1)(c) ACRWC, the establishment of '**special alternative institutions**' for mothers living in prison with their children is required to serve the exceptional circumstances when non-custodial measures cannot be considered and it is in a child's best interests to remain with the mother-primary caregiver. Such institutions must focus on realising children's rights.[174] Emphasis has been put on that 'States parties have the same obligations to respect, protect and fulfil their rights as they do to any other child in their jurisdiction', and that NHRIs and other independent monitoring bodies should be encouraged to monitor the treatment and conditions of these children. Furthermore, no child should remain in prison following the release, execution or death of the parents-caregivers.[175] In considering Article 30 ACRWC in light of Article 3 ACRWC, the African Committee has quoted Justice Sachs in *S v M* 2007 (para. 18), namely that a child 'cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them [...] the sins and traumas of fathers and mothers should not be visited on their children'. Children with detained or imprisoned parents are therefore seen as having **equal rights** to all other children, which should not be affected owing to their parent's status. Preventing discrimination requires States parties' measures that provide such children with the **equivalent services** that the others receive

171 UN General Assembly, *Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015: Discussion guide*, A/CONF.222/PM.1, 2013, para. 83(k).

172 UN General Assembly, *Report of the Asia and Pacific Regional Preparatory Meeting for the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, held in Bangkok from 22 to 24 January 2014*, A/CONF.222/RPM.1/1, 2014, para. 15.

173 UN General Assembly, *Report of the Thirteenth United Nations Congress on Crime Prevention and Criminal Justice, Doha, 12-19 April 2015, A/CONF.222/17, 2015*, para. 169 (i) & (j).

174 ACERWC, General Comment No. 1 (2013), *op. cit.*, paras. 50-51.

175 Ibid., para. 55.

in the community, for instance in relation to their rights to education and healthcare. Any restriction of access to services for children just because of their parents/primary caregivers' detention or imprisonment is deemed to amount to a form of discrimination against them.[176] In considering Article 30 ACRWC in view of Article 4(2) ACRWC, the African Committee has addressed the opportunity for children living with imprisoned parents **to participate in judicial or administrative proceedings affecting them** provided they are capable of communicating their views. For instance, 'parole boards should take the views of a child into account when considering parole of a parent/primary caregiver'.[177] In reading Article 30 ACRWC in view of Article 5 ACRWC, the African Committee has undertaken a holistic view of the **child's right to survival, protection and development**, which encompasses food, health, shelter, education and an adequate standard of living, noting that children living in prison with their parents/primary caregivers frequently experience serious violations of such right due to their living conditions or lack of birth registration or lack of access to health and education facilities, besides the risk of suffering violence at the hands of detainees or prison employees.[178] States parties have been therefore recommended to ensure the protection and realisation of the right concerned by implementing relevant Bangkok Rules, such as Rule 49 and Rule 51.

Notably, babies or children with imprisoned mothers were specifically considered in a report of the Special Rapporteur on Prisons and Conditions of Detention in Africa in 2012, which finally recommended courts to seriously consider handing down non-custodial sentences to expectant and nursing mothers, and States to explore the use of alternative modes of punishment (like community work) but also to ensure prisoners' opportunity to maintain and develop links with families and the outside world.[179]

In the **European context**, the situations of pregnant mothers and infants staying with their imprisoned parents are broadly addressed in EPR 36, 34 and 24 (2006). CoE's member States have been subsequently called on to ensure that 'pre-trial conditions are as favourable as possible' when alternative measures to remand in custody are not possible, and that '**prisons must be as flexible as possible**' when restrictions adversely affect the prisoners'

176 ACERWC, General Comment No. 1 (2013), *op. cit.*, paras. 18-21. For the Committee, 'States Parties should undertake the following measures: (a) where expectant mothers are facing criminal charges or have been condemned to custodial sentence, arrangement for temporary release, parole or suspended sentence (for minor or casual offences) should be made to enable expectant accused or prisoners to deliver outside the remand or prison facilities; (b) where birth occurs in remand or prison facilities, States Parties should ensure that they shall be registered in the local birth registration office; and (c) there should be no mention of remand or prison as place of birthon a child's birth records. Only the locality shall be mentioned in the child's birth records' (para. 21). Certain of these measures are in line with those elaborated by the Indian Supreme Court in *R.D. Updhyaya v State of AP* 2006.

177 ACERWC, General Comment No. 1 (2013), *op. cit.*, paras. 30-32.

178 Ibid., paras. 25-29.

179 Report of the Special Rapporteur on Prisons and Conditions of Detention in Africa, 9-22 October 2012: 14-15, (f) (i).

families, such as restrictions on visits and place of detention (PACE's Resolution 1663 (2009) on Women in Prison, para. 9.1). States have been requested to ensure that 'prison regimes and facilities are flexible enough to meet the requirements of pregnant women, breast-feeding mothers and prisoners whose children are with them' (para. 9.3). States have been called to guarantee that 'children staying in prisons with their mothers are given access to crèches outside the prison, offering them opportunities for socialisation with other children and alleviating the detrimental social effects of imprisonment on their personal development' (para. 9.5).

When the situation of children living with a parent in detention cannot be avoided, the **minimum standards for the ante-natal, post-natal and child care** have been outlined by the CPT:[180] the governing principle must be **the welfare of the child**, which entails in particular that 'any ante and post natal care provided in custody should be equivalent to that available in the outside community', and that the treatment of babies and young children in custodial settings should be **supervised by specialists in social work and child development**, with the aim to produce 'a child-centred environment, free from the visible trappings of incarceration, such as uniforms and jangling keys'.[181]

The imprisoned mothers' need to be provided with pre-natal and post-natal health care, support and information to ensure **the child's right to the highest attainable standard of health**, which may mean visits by health professionals in prison or the infants being taken out to community services, is recognised in paragraph 34 of Recommendation CM/Rec(2018)5. As addressed by the CPT, breastfeeding mothers should be provided with supplementary food according to existing guidelines for this category of women.[182] Regarding the **conditions and treatment of infants** in prison with parents, Recommendation CM/Rec(2018)5 emphasises in paragraph 36 that they should not be treated as prisoners and should enjoy the **same rights** and (as far as possible) the **same freedoms and opportunities** as other children. For the CPT, the equivalent of a nursery or kindergarten should also be provided, along with specialised staff.[183] The need of **child-friendly arrangements and facilities** for the care of infants in prison is underlined in paragraph 37, ensuring that the **best interests and safety** of young people are protected, and that their **welfare and healthy development** is promoted to the greatest extent possible. How the space is arranged may be country-specific, whereas **minimum standards** to be respected and maintained include hygiene, ventilation, light, a

180 CPT, *Factsheet on Women in Prison*, 2018, pp. 5-6.

181 CPT, *10th General Report on the CPT's activities: covering the period 1 January to 31 December 1999,* Strasbourg, 18 August 2000, para. 29.

182 Cf. *Factsheet on Women in Prison* (2018), *op. cit.* p. 5, citing Romania: 2014 visit, para. 99.

183 Cf. *Factsheet on Women in Prison* (2018), *op. cit.*, p. 6 citing the 3rd General Report on the CPT's activities, para. 66.

child friendly atmosphere, utilities for taking care of infants (changing diapers; heating meals, toys, etc.) and appropriate furniture.[184] In this regard, infants should have **access to services** as similar to those in the community as far as possible, they should be able to **access the outside world** and attend **nursery schools**, and to ensure **contact with family members** living outside the prison, unless it is not in the child's best interests.[185] The **staff** working with, and for, children and their imprisoned parents is also addressed in paragraphs 46-48.

ii. Practice guided by court

Some evidence of court practice in different regions, which explicitly addresses the care and adequate conditions of the children staying in prisons with their parent/primary caregiver, is noteworthy. In **India**, as per the guidelines laid down by the Supreme Court in the *R.D. Upadhyay v State of Andhra Pradesh and Others,* children are to be provided immunisation facilities, toys, and a crèche/play school facilities, preferably situated outside the prison but within the prison premises.[186] Moreover, as per the Bombay High Court orders passed in Suo Moto PIL 107/2014 on children of women prisoners,[187] a panel of doctors including a gynaecologist and a paediatrician are to visit the prison once a week to look into health care needs of pregnant, lactating women and children in prison. In **Canada**, in a case taken on behalf of two babies born in a prison, where they were separated from their mothers as the only existing Mother and Baby Unit in the province had been shut down, the Supreme Court of British Columbia ruled that closing this facility violated the rights of mothers and their own babies, ordering to reopen such facility.[188] In relation to **Ukraine**, the ECtHR, by relying on international standards and its own jurisprudence as well as stressing that the governing principle in all cases must be the child's best interests, has emphasised the authorities' obligation to create adequate conditions for these interests to be acknowledged in practice, including also in prison.[189] It found violations of the right to personal integrity under Article 3 ECHR in respect of both a mother and her newborn baby due to the physical conditions of detention andthe inadequate medical care to the infant.

184 CM/Rec (2018)5, Explanatory memorandum, *op. cit.*, p. 13.

185 Likewise, see: *Factsheet on Women in Prison* (2018), *op. cit.*, p. 6; Rule 36 EPR.

186 Prison manual and further relevant regulations were in fact supposed to be amended within three months from the Supreme Court's ruling, in order to comply with its guidelines.

187 Bombay *High Court, High Court on its own Motion v The State of Maharashtra & Ors.*, Suo Moto Public Interest Litigation N. 107/2014, where Prayas (TISS) was appointed as Amicus Curiae.

188 Supreme Court of British Columbia, *Inglis v British Columbia* (Minister of Public Safety) 2013 BCSC 2309.

189 European Court of Human Rights, *Korneykova and Korneykov v Ukraine*, Appl. No. 56660/12, paras. 129-132 of the judgment of 24 March 2016.

iii. State practice

A general finding of the survey is that eligible children are not always placed in adequate prison facilities (e.g. mother-child units or other special accommodation for pre-natal and natal care and treatment) and that arrangements conducive to their early development and growth are not consistently made (e.g. access to crèche-type facilities, preferably in the community). There is great variation in regional and national practices in this regard. Programmes for psychological and emotional support both to the children and their imprisoned parents are also commonly needed.

In some countries of **Africa and the Middle East** children generally live in the same habitat as their detained or imprisoned mothers without special facilities,[190] while in other countries children can be held in a special wing of the prison, at times with staffed nursery or day-carecentre, where some medical, nutritional, educational and recreational services can be provided.[191] In some States critical living conditions in detention places *de facto* risk to make these children deprived of liberty, especially where they are not offered play areas and are not allowed to leave the prison from time to time in order to establish contact with the outside world and prepare for the reintegration process into the society in cooperation with NGOs.[192] In **some Asian countries**, and not in all national prisons, children may be housed with their imprisoned mothers in separate buildings/units, with certain child care services,[193] at times with access to a day-care centre or nursery within the prison premises.[194] But more needs to be done in terms of creation of play areas, allowing children to go out for a few hours every day to a play school, use of audio-visual aids to help them understand the outside world, excursion trips to a park or recreational facilities, etc.[195] In **other Asian countries** very limited information is available on the prison facilities where children and mothers stay together with other detainees and are exposed to an indoor climate that is not suitable, or it is unclear whether existing regulations have been implemented.[196] In countries of these three regions, responsibility for the child's protection lies mostly with

190 UN Global Study Questionnaire, Benin (State Reply); South Sudan (State Reply); Burkina Faso (State Reply); Chad (State Reply); Madagascar (State Reply); Mali (State Reply); Sierra Leone (State Reply); Yemen (NGO Reply).

191 UN Global Study Questionnaire, Mauritius (State Reply); Tanzania (State Reply); Tunisia (NGO Reply); Palestine (State Reply).

192 As highlighted during a UN Global Study regional consultation about States in Middle East, North Africa and Gulf Region, in Tunis, November 2018.

193 UN Global Study Questionnaire, India (NGO Reply); Sri Lanka (State Reply); Vietnam (UN Agencies Reply); Iran (UN Agencies Reply). Singapore and Brunei Darussalam also allow such practice, see 'A comparative Study of Treatment of Prisoners and Non-Custodial Measures in ASEAN", TIJ, pp. 1-13 & 8-12.

194 UN Global Study Questionnaire, Cambodia (UN Agencies Reply); Uzbekistan (State Reply).

195 UN Global Study Questionnaire, India (NGO Reply).

196 UN Global Study Questionnaire, Benin (State Reply); Philippines (UN Agencies Reply); Malaysia (UN Agencies Reply); Myanmar (UN Agencies Reply).

prison authorities, at times along with social welfare authorities, at times also together with judicial authorities,[197] or basic necessities can be under the responsibility of the mother. In all these cases or even where children are not officially cared for by the State (and no budget is granted to them in prison), NGOs or other private associations may intervene to ensure their protection and at times are the only ones providing aid in the form of food donations, medicines tailored to the child's needs, recreation or educational programmes.[198]

In the **Oceania context**, a different (and better) situation is indicated about the facilities and the services provided by federal States and territories of **Australia**.[199] In New South Wales children can be accommodated with their mothers in a 'purpose-built minimum-security facility' adjacent to a correctional centre, on a full time or occasional residence basis, with access to health care services in the community, a range of education and leisure activities, a playground on site and green areas, and mothers are responsible for their nutritional needs but are supported to develop budgets and meal plans. In Northern Territory children can be accommodated in a 'purpose-built MCU cottage' in the female sector of a correctional centre, which will remain unlocked at all times forany emergency situations, with access to health care, internal and external play areas, and nutrition plans. In Queensland children can be accommodated in specific units of the residential part of the prisons, with basic cooking facilities, safety gates and cells large enough to accommodate cots and toddler beds, and with a child-care plan to be developed prior the child entering the facility. In Tasmania the 'mother and baby program' operates in a semi-independent living environment, with a childcare plan to be developed within 14 days of the child arriving at the prison, addressing the child's health, safety and developmental needs, and mothers are responsible for their nutritional needs. In Victoria dedicated 'mother and children units' are available at two prisons, and children are able to attend programmes and services in the community such as playgroup, kindergarten or childcare.[200] In Western Australia children can live with mothers in 'community style houses' of a minimum security prison, or they can reside in 'cottage style houses' of a maximum security prison, with play and recreational areas and dedicated manager family services; for juvenile female detainees, mothers and children can be housed in a special precinct. Conversely, in some Pacific Islands very limited information is available on the prison facilities where infants

197 UN Global Study Questionnaire, Burkina Faso (State Reply); Mauritius (State Reply); Mali (State Reply); Tanzania (State Reply); Tunisia (NGO Reply); Palestine (State Reply); India (NGO Reply); Malaysia (UN Agencies Reply); Iran (UN Agencies Reply).

198 UN Global Study Questionnaire, Benin (State Reply); Madagascar (State Reply); Mauritius (State Reply); Yemen (NGO Reply); Cambodia (UN Agencies Reply).

199 UN Global Study Questionnaire, Australia (State Reply).

200 Programmes to assist mothers in improving their parenting skills or enhancing their confidence as parents are available to all mothers, with prioritised access to mothers with their children living with them in custody.

and mothers stay together.[201] The Minister of Prisons and Corrections and the Commissioner of Prisons are responsible for the child's protection.[202] Arrangements are required for the provision of medical and related services, including support services for infants and mothers in prison,[203] or regulations may be made to provide for arrangements for them 'consistent with the rights and obligations of CEDAW and the CRC, and in particular the rights of mothers to feed and care for their infant children whilst in prison'.[204]

Considerable variation exists regarding the types of special mother-child facilities sheltering them in many European countries.[205] The questionnaire responses document that a range of specifically designed units/wards/departments/pavilions is provided for mothers with dependent children and for pregnant women, either on remand or convicted, only inside a certain number of nationallow-security (open) penitentiary institutions or close detention centres. They can have a staffed nursery for the care and assistance of infants or young children, and other adapted infrastructures with necessary equipment for them, with or without outdoor spaces, providing secure surroundings for the child and the mother-to-be. In a few **European countries,** theoretically a child could be accommodated also with the imprisoned father, but this is difficult to be realised due to special building and staffing requirements in male institutions.[206] In a few other countries this is actually possible.[207] Moreover, there can be 'mixed/family modules' (where the child share the couple when both parents are in prison) or 'dependent units' (small homes for inmates and their daughters in a semi-liberty regime), besides 'external mothers' units' (architectural models far from the penitentiary centres, with a vocation to integrate into the community).[208] Inmates can be allowed to cohabit with a fellow imprisoned inmate if the couple had a relationship before being sentenced, and with non-sentenced spouses at more relaxed 'family houses' of open prisons or 'halfway houses' (i.e. houses where prisoners who are soon to be released are housed).[209] Responsibility for the child's safety and protection generally lies with prison and probation services and authorities,[210] at times along with the vigilance of the children's

201 UN Global Study Questionnaire, Tonga (UN Agencies Reply).

202 UN Global Study Questionnaire, (UN Agencies Replies): Fiji, Samoa.

203 UN Global Study Questionnaire, Fiji (UN Agencies Reply).

204 UN Global Study Questionnaire, Samoa (UN Agencies Reply).

205 UN Global Study Questionnaire, (State Replies): Austria, Albania, Belgium, Bosnia Herzegovina, Croatia, Czech Republic, Denmark, Germany, Ireland, Italy, France, Finland, Greece, Netherlands, Spain, Sweden, Portugal, Slovenia, Lithuania, Estonia, Georgia, Ukraine, Russian Federation, and United Kingdom.

206 UN Global Study Questionnaire, (State Replies): Belgium, Germany, and Sweden.

207 UN Global Study Questionnaire, (State Replies): Finland, Denmark.

208 UN Global Study Questionnaire, Spain (State Reply).

209 In Denmark, according to previous research.

210 UN Global Study Questionnaire, (State Replies): Austria, Albania, Bosnia Herzegovina, Ireland, Sweden, Denmark, Georgia, Ukraine, and Russia Federation.

prosecutor's office and the penitentiary surveillance court,[211] or at times along with child welfare authorities who regularly monitor and evaluate the child's wellbeing and placement and can recommend or decide their removal under valid grounds.[212] The parent is usually responsible for the child's care and nutrition, rest, leisure and play activities during the day, at times with the support of available kindergartens and with the supervision of municipal social services, or even psychological and medical services if appropriate.[213] Children healthcare is generally granted by the postnatal clinic and municipal or national health system, sometimes under agreements with healthcare institutions, through the regular intervention of professionals in prison or at the hospital.[214] Encounters of the child outside that of the penitentiary are promoted, so establishing relationships with people other than those in detention, and for this purpose penitentiary institutions with a mother-child space have made various partnership agreements.[215]

In North America, the participation in the **Canadian** institutional mother-child programme at the federal level includes a full-time or part-time residency in a living unit, using a private family visit unit location, which is a house or apartment style accommodation with other approved inmates. The provincial child welfare agency retains authority for the child's protection.[216] In **Central and South America**, pregnant or nursing women can stay with their children in special sectors or pavilions separated from the rest of the prison population.[217] Nurseries can be installed in modules close to the mothers, dietary care and necessary healthcare for children are provided, small recreation spaces can be available, day-care and pre-school education can be provided inside or outside. The involvement of organisations for children is allowed in these detention units, facilitating the conditions to maintain contact with the mothers. The prison staff can undergo trainings, workshops can be offered

211 UN Global Study Questionnaire, Spain (State Reply); Italy (NGO Reply, Antigone).

212 UN Global Study Questionnaire, (State Replies): Netherlands, Germany, Finland, Croatia.

213 UN Global Study Questionnaire, Austria (State Reply); Croatia (UN Agencies Reply); Georgia (State Reply); Greece (State Reply); Denmark (State Reply); Portugal (State and Ombudsperson Replies).

214 UN Global Study Questionnaire, Albania (State Reply); Denmark (State Reply); Finland (State Reply); Italy (NGO Reply); Estonia (State Reply); France (State Reply); Georgia (State Reply); Lithuania (State Reply); Slovenia (State Reply); Ukraine (State Reply); and Sweden (State Reply).

215 For instance, in Belgium, France and Italy.

216 UN Global Study Questionnaire, Canada (State Reply). Previous research also highlighted that children up to twelve years old can live with their imprisoned mothers on weekends and holidays in certain minimum- or medium-security prisons (Cf. Oliver Robertson (2008), *op. cit.*, p. 29). Nonetheless, the increasing rate of pre-trial detention and imprisonment of women, Aboriginal people, and foreign-born persons in Canada (AvaniBabooram, 'The changing profile of adults in custody 2006/2007', *Juristat* Statistics Canada Catalogue, Vol. 28(10), 2008; Howard Sapers, *Annual Report of the Office of the Correctional Investigator, 2012-2013*, Office of the Correctional Investigator of Canada, 2013), many of whom are parents, can entail that the size of the affected population of children is likely growing, see Amanda V. Mc Cormick, Hayli A. Miller & Glen B. Paddock, *In the Best Interests of the Child: Strategies for Recognizing and Supporting Canada's At-Risk Population of Children with Incarcerated Parents*, University of the Fraser Valley, 2014.

217 UN Global Study Questionnaire, El Salvador (State Reply); Honduras (NPM Reply); Mexico (State and NHRI Replies), Argentina (State and NHRI Replies), Chile (NHRI Reply); Colombia (State Reply); and Brazil (NPM Reply).

to mothers, and a professional escort can be provided for the children and families.[218] Responsibility for the child's protection generally lies with prison administrative authorities along with judicial authorities. In some of these countries adolescent mothers have the right to remain with their babies in detention places suitable for them and to receive from the competent authorities supplies and services necessary for their development.[219] However national practice is not homogeneous: legal provisions are not fully implemented, in some facilities situations of overcrowding and absence of free spaces predominate, in others better conditions exist with equipped installations.[220]

The monitoring of the State practice on the status of implementation of Article 30 ACRWC shows that the ACERWC has increasingly paid attention to the protection of children when only custodial punishments are feasible for their parents/primary caregivers, recommending to ensure that children are provided with appropriate services and respect of their rights (particularly access to food, medication, education and healthy environment, basic healthcare and sanitation facilities), also under a comprehensive legislation to be adopted, but also urging to promote them amongst duty bearers (including those involved in justice processes, judicial officials, and prison authorities), and advocating to provide special treatment to expectant women and mothers/caregivers of infants (including separated bedrooms) throughout arrest, conviction, sentencing, imprisonment and reintegration phases of the criminal justice process.[221]

218 UN Global Study Questionnaire, Argentina (State Reply).

219 UN Global Study Questionnaire, Mexico (State and NHRI Replies), Colombia (State Reply).

220 UN Global Study Questionnaire, Brazil (NGO Reply, DCI), Argentina (NHRI Reply and NGO Reply, DCI). On the large numbers of children living with their convicted parents, see also: UN Human Rights Committee, Concluding Observations: Bolivia (2013), CCPR/C/BOL/CO/3, para. 20; A/HRC/WG.6/20/BOL/2, 2014, para. 36; A/HRC/WG.6/20/BOL/3, 2014, paras. 8, 10, 20, 44 & 45; A/HRC/WG.6/20/BOL/1, 2014, paras. 139-141.

221 See ACERWC, Concluding Observations and Recommendations: Burkina Faso (2017), p. 7; Chad (2017), para. 34; Sierra Leone (2017), para. 31; Union des Comores (2017), para. 28; Algeria (2015), para. 39; Gabon (2015), para. 48; Lesotho (2015), paras. 53-54; Madagascar (2015), para. 46; Namibia (2015), para. 42; Ethiopia (2014), para. 35; Kenya (2014), para. 49; Mozambique (2014), para. 33.

e. Separation from a Parent after a Priod Spent Together in Prison

i. Related universal/regional rules, standards and guidelines

States are encouraged to 'take into account **the best interests of the child** when deciding whether to remove children born in prison and children living in prison with a parent', and to treat such removal 'in the same way as other instances where separation is considered', under paragraph 48 of the UN Guidelines for the Alternative Care of Children Without Parental Care. In terms of **promoting family reintegration**, paragraph 82 stresses that 'States should pay special attention to ensuring that children in alternative care because of parental imprisonment or prolonged hospitalisation have the opportunity to maintain contact with their parents and receive any necessary counselling and support in that regard'.

Certain Bangkok Rules deal with **sensitive arrangements for children to return to care in the community**. Rule 52(1) requires to base decisions as to when a child is to be separated from the mother 'on individual assessments and the best interests of the child within the scope of relevant national laws'. Rule 52(2) calls for undertaking with sensitivity the removal of the child from prison, 'only when alternative care arrangements for the child have been identified' and, 'in the case of foreign-national prisoners, in consultation with consular officials'. Rule 52(3) specifies that, after children are separated from their mothers and placed with family or relatives or in other alternative care, women prisoners are to be given the maximum possible opportunity and facilities to meet with their children, when it is in their best interests and when public safety is not compromised. Furthermore, if a child living with a non-resident foreign-national woman prisoner is to be removed from prison, Rule 53(2) calls for giving consideration to the child relocation to the home country, taking into account the best interests of the child and in consultation with the mother.

Depending on the age and maturity of the child concerned, **respect for the views of the child** should also shape the separation and placement processes. The CRC-Committee has expressed concern that 'children are not often heard in the separation and placement processes' and that 'decision-making processes do not attach enough weight to children as partners even though these decisions have a far-reaching impact on the child's life and future'.[222] In view of Article 12 CRC, it has recommended that 'all stakeholders continue and strengthen their efforts to take into consideration the views of the child and facilitate their participation in all matters affecting them within the evaluation, separation and placement process, in the out-of-home care and during the transition process': children should be heard throughout the protection measure process, before making the decision, while it

222 CRC-Committee, *Day of General Discussion on Children without Parental Care*, CRC/C/153, 2005, para. 663.

is implemented and also after its implementation. For this purpose, the establishment of a 'special mechanism which values children as partners' has been recommended; one model to ensure consideration of the child's view has been identified in 'the family group conferencing'; in addition, States parties' regular review of the extent to which children's views are taken into account and of their impact on policy-making and court decisions and on programme implementation has been recommended.[223]

In the African context, Article 30(1)(f) ACRWC – which requires States parties to have a prison system essentially aimed at the 'reformation, the integration of the mother to the family and social rehabilitation' – has been seen as entailing basic implications for law, policy and training on how to take care of children with imprisoned parents, especially concerning how **regular mutual contacts** can be ensured if it is in the child's best interests.[224]

In the **European context**, CoE's member States have been called to ensure that 'in situations where babies and young children in prison with their mother have to be separated from her, this is done gradually, so that the process is as painless and non-threatening as possible'.[225] The issue of separation and transition to the community is also addressed in CoE's Recommendation CM/Rec(2018)5. Decisions about separating infants from their imprisoned parents must be made on an **individual basis** and **in the best interests of the child** under paragraph 38. **Sensitivity** is demanded in arranging such transition and for ongoing contact to be facilitated with the imprisoned parent under paragraphs 39 and 40.[226] Infants transitioning to life outside the prison have a vital need to be supported to the highest extent possible by the State or other agencies, including the provision of appropriate alternative care. The importance of **through-care** to help children and parents to adjust to their new situation is also acknowledged, which relies on **partnership and cooperation between agencies** to ensure that children directly, or indirectly through support to their parents, receive appropriate support.[227] In particular, prison authorities, in co-operation with probation and/or social welfare services, local community groups and civil society organisations, shall design and implement **pre- and post-release reintegration programmes**, which consider the needs of prisoners resuming their parental role in the community, under paragraph 44.

223 CRC-Committee, *Day of General Discussion on Children without Parental Care*, CRC/C/153, 2005, para. 664.

224 ACERWC, General Comment No. 1 (2013), *op. cit.*, paras. 60-63.

225 Council of Europe, Parliamentary Assembly, *Women in Prison*, Resolution 1663 (2009), 28 April 2009, para. 9.4.

226 Likewise, see CPT, *Factsheet on Women in Prison*, 2018, at 6 citing the 3rd General Report on the CPT's activities, para. 66, and Russian Federation: 2001 visit, para. 89.

227 Cf. CM/Rec(2018)5, *op. cit.*, p. 15.

ii. State practice

The questionnaire replies document that some work has been carried out on the issue of separation of children from imprisoned parents, thus children's departure from the detention centres, in a number of States. Besides the age limits imposed on co-habitation, the decision generally pertains to the competent prison or judicial authorities and childwelfare services, either separately or jointly, at times after assessing suitability conditions of the designated adult/family and related social environment.[228] In cases where a child has a physical disability or another factor (intellectual disability or other), the child maybe transferred to a specialised institution with the mother's consent.[229] With the consent of the convicted parent, or by a decision of a custody and guardian agency, the child is generally given to the father or other relatives as a matter of first priority, but if this is not possible judicial or administrative (or a few times political) authorities intervene to provide alternative care (e.g. foster family, childcare institution, training school for residential care, orphanage) until the parent's release. However, the child's best interests are not consistently considered and assessed in the surveyed State practice[230] and a regular review of the chosen alternative care options is not rigorously undertaken. In some countries there are no explicit policies for preparing separation, despite the severe impact on the individuals concerned.[231] In several countries a plan for the child's transfer out of prison is nonetheless prepared in view of the risks and needs of the child, and its implementation is gradual, beginning well before the departure.[232] This plan is normally done in cooperation with the mother in prison. Support to both mother and child is provided in some countries according to available means, including through counselling on the psychological and emotional effects of the separation and enrolment in social programmes, and may be done in cooperation with social welfare

228 UN Global Study Questionnaire, Burkina Faso (State Reply); Chad (State Reply); Madagascar (State Reply); South Africa (State Reply); Sierra Leone (State Reply); Tanzania (State Reply); Tunisia (NGO Reply); Argentina (NGO Reply and State Reply); Brazil (NPM Reply); El Salvador (State Reply); Honduras (NPM Reply); Mexico (State, NHRI and NPM Replies); Cambodia (UN Agencies Reply); India (NGO Reply); Iran (UN Agencies Reply); Lao DPR (UN Agencies Reply); Malaysia (UN Agencies Reply); Myanmar (UN Agencies Reply); Sri Lanka (State Reply); Philippines (UN Agencies Reply); Vietnam (UN Agencies Reply); Thailand (UN Agencies Reply in regional consultation in Bangkok, May 2018); Austria (State Reply); Bosnia Herzegovina (State Reply); Croatia (State Reply); Czech Republic (State Reply); Denmark (State Reply); France (State Reply); Georgia (State Reply); Greece (State Reply); Ireland (State Reply); Lithuania (State Reply); Netherlands (State Reply); Russian Federation (State Reply); Slovenia (State Reply); Spain (State Reply); Sweden (State Reply); Switzerland (State Reply); Yemen (NGO Reply); Australia (State Reply); Samoa (UN Agencies Reply); Tonga (UN Agencies Reply).

229 UN Global Study Questionnaire, Uzbekistan (State Reply).

230 UN Global Study Questionnaire, South Africa (State Reply); Mexico (State Reply); India (NGO Reply); Austria (State Reply); Denmark (State Reply); Estonia (State Reply); Georgia (State Reply); Ireland (State Reply); Palestine (State Reply).

231 UN Global Study Questionnaire, Brazil (NGO Reply, DCI); Honduras (NPM Reply); Croatia (UN Agencies Reply).

232 UN Global Study Questionnaire, Sierra Leone (State Reply); South Africa (State Reply); Canada (State Reply); Argentina (NHRI Reply); Mexico (State Reply); Uzbekistan (State Reply); Albania (State Reply); Czech Republic (State Reply); Ireland (State Reply); Estonia (State Reply); France (NHRI Reply); Georgia (State Reply); Monaco (State Reply); Portugal (State and Ombudsperson Replies): Slovenia (State Reply); Palestine (State Reply).

institutions, educators, child protection authorities, and NGOs.[233] In some States, the contributions of governments are confined to providing some programmes of alternative care; yet, the civil society plays a significant role through programmes for the protection and support of children, especially with regard to raising awareness of the community to avoid social discrimination, which is one of the most delicate issues children face after they leave detention centres and can be fully integrated.[234] However, the maintenance of personal contact and relationship with imprisoned primary caregivers is not uniformly safeguarded; for instance, visits may be only infrequently allowed, each time up to a maximum of one hour, with possibilities to see and talk to each other (via telephone) without touch or hug.[235]

The monitoring of the State practice on the status of implementation of Article 30 ACRWC shows that the ACERWC has addressed the issue of separation a few times, recommending to give psychosocial support for the children (also in case of family reunification programmes) as well as encouraging to ensure that they receive education, health care and other social welfare services if they are placed in residential care facilities, or recommending to provide family based alternative care (rather than orphanages) once they are removed from prison, but also to facilitate visits insofar as it does not contradict the best interests of the child.[236]

233 UN Global Study Questionnaire, Burkina Faso (State Reply); Chad (State Reply); Madagascar (State Reply); Mauritius (State Reply); Sierra Leone (State Reply); South Sudan (State Reply); Argentina (State Reply); Colombia (State Reply); Albania (State Reply); Austria (State Reply); Belgium (NGO Reply; Defence for Children International, and State Reply); Croatia (State Reply); Czech Republic (State Reply); Denmark (State Reply); Greece (State Reply); Italy (NGOs Reply); Monaco (State Reply); Portugal (State Reply); Russian Federation (State Reply).

234 As highlighted during a UN Global Study regional consultation about States in Middle East, North Africa and Gulf Region, Tunis, November 2018.

235 UN Global Study Questionnaire, Vietnam (UN Agencies Reply).

236 ACERWC, Concluding Observations and Recommendations: Lesotho (2015), paras. 53-54; Sierra Leone (2017), para. 31; Madagascar (2015), para. 46.

4. Ways Forward: Minimising the Exposure of Children to Deprivation of Liberty

Ways forward to minimise the exposure of children to deprivation of liberty are highlighted in relation to each of the aforementioned stages, taking into account both the possible impact of family separation due to parental detention/imprisonment and the possible impact of residing in prison with a primary caregiver. In this light, promising practices are selected.

4.1 Availability of Non-custodial Solutions and Judicial Approaches to Pre-trial Decision-making and Sentencing

Parents/sole or primary caregivers of infants and young children should not be detained or imprisoned insofar as criminal justice requirements permit to honour this in practice. In this regard, a two-fold consideration can be articulated.

a. Legal availability of non-custodial solutions

Firstly, the legal availability of non-custodial solutions, from pre-trial to sentencing dispositions, can reduce the use of pre-trial detention as well as imprisonment for persons with child caring responsibilities, but should entail prioritising the financing and establishment of mechanisms for their design, implementation and follow-up, in order to make them operative. Promising practice includes the following examples:

- National laws (in several States) ensuring eligibility for precautionary measures (such as release on bail, house arrest, surveillance by some electronic device, and reporting) as well as for punitive measures (such as community service order, probation, home detention, suspended sentence, and restorative justice processes). For instance:
  - **Ukraine**: under Criminal Code (2001), Article 79(1), 'where a restraint of liberty or imprisonment is imposed upon pregnant women or a woman having children under seven years of age, except for the persons sentenced to imprisonment for a term over five years for grave or particularly grave criminal offenses, a court may discharge such persons from both primary and additional punishments on probation for a period of leave granted by law to women in view of pregnancy, childbirth and until the child attains seven years of age'.

- **Denmark**: if the convicted person has the sole responsibility for one or more children under the age of eighteen, a sentence can be served in a different institutional environment than a prison, such as at one of the Prison and Probation Service's pensions, including in one of its family homes, where counselling and therapy are specifically used for the purpose of supporting and developing the family's relations and taking care of the children's problems.

- National laws and policies (in some States) incorporating a gender perspective in pre-trial decisions by granting special protection to pregnant women and mothers. For example:
  - **Brazil**: a policy of assistance for people in pre-trial detention (implemented by the São Paulo Public Defender's Office) includes 'a data sheet form' for women to obtain information about people in custody pending trial, which includes the following points of consideration: (a) if the woman is pregnant or nursing, (b) their conditions of detention, (c) if her children are housed in the prison, (d) if the woman interviewed is solely responsible for her children, (e) if the children are in the prison, the length of time that the mother wishes them to stay with her, (f) preferences with respect to the situation of children who are outside the prison in terms of the person, who should be the caregiver and specifications for visits to the detention facility?

- National laws (in some States) incorporating a gender perspective in pre-trial decisions by prioritising the use of non-custodial remand measures. For example:
  - **Costa Rica**: under Law 9.271/2014, 'house arrest with electronic monitoring' is provided for women at an advanced stage of pregnancy and mothers who are household head with children under the age of twelve and people with a disability or a serious illness under their care.
  - **Peru**: under Legislative Decree 1.322/2017, Article 5(2), non-custodial measures are prioritised for pregnant women, women with children under three years old, and women family heads withspouses, minor children or children with disabilities.
  - **Ecuador**: under the Comprehensive Organic Criminal Code (2014), Article 522, house arrest or the use of an electronic tracking device may be decided for pregnant women and during the first ninety days after childbirth, which may be extended by an additional ninety days if the child is born with an illness requiring special care; a different treatment is provided also in case of violation of a non-custodial arrangement as pregnant women will be held in detention pending trial in separate sections of prison facilities.

- **Mexico**: under the Federal Code of Criminal Procedure, the application of house arrest is prioritised to pregnant women, nursing mothers, older persons, or people with a 'serious or terminal illness'.
- **Colombia**: under the Code of Criminal Procedure, Article 314 (3) and (5) as modified by Law 1.142/2007, preventive detention in prison can be substituted by the place of residence when the defendant or accused has two months or less before delivery. It can alternatively also be substituted during the six months following the date of birth, and when the defendant or accused is the head of a family of a minor child or who suffers permanent disability, as long as under her care. In her absence the father performing such a role has the same benefit. This measure cannot be applied if the imputation regards crimes defined serious by the same law.
- **Nicaragua**: under the Code of Criminal Procedure (Law 406/2002), Article 176, preventive detention can be substituted with house arrest in case of women during the last three months of pregnancy and women breastfeeding their babies up to six months.
- **Brazil**: the National Criminal Policy Plan (2015-2019) provides (a) the use of non-custodial measures for women, particularly those who are pregnant, have newborn children, or are in the postpartum stage, and older women, and (b) the promotion of house arrest for mothers, including those with newborn children. Under Law 13.257/2016 amending the Code of Criminal Procedure (Early Childhood Statute), Article 318, paras. IV-V, the number of instances in which pre-trial detention may be substituted with house arrest is increased and is applicable to all pregnant women (without delimitation for a certain period of time as provided earlier) as well as to women with children under twelve years old.

- National laws (in some States) indicating that caregiving duties/family situation/family hardship are among the legal criterions that a judge must take into account at the stage of both choosing and executing a sentence, so with possible adjustments according to the evolution of the situation. For example:
  - **France**: under the Criminal Code, Article 132(1), the court determines the nature, the amount and the regime of the sentences pronounced according to the circumstances of the offense and the personality of its author as well as its material, family and social situation; under the Code of Criminal Procedure, Article 707, the system 'is adapted as and when the execution of the sentence, according to the evolution of

the personality and the material situation, family and social of the sentenced person, which is the subject of regular evaluations'.

- National rules on the execution of a prison sentence which allow adjustments for a convicted parent, including the possibility of a non-custodial measure under certain conditions, especially depending on the length of the sentence, the situation of the prisoner, and the age of the child. For example:

  - **Denmark**: the Prison and Probation Service can make decisions to prevent that the child of the convicted parent will stay in prison: a parent can be *relocated to the own residence with an electronic foot shackle* for up to the last six months of imprisonment if weighty reasons regarding the family, including minor children, are in favour thereof; or a prisoner with young children can be granted *discontinuation of the serving of the sentence* if there are acute problems at the prisoner's home and the children's interest significantly speaks in favour of it (e.g., this could be relieving a pregnant spouse, where there are other minor children); or a *short advance of the release on parole* (normally up to about one month) can be made if, after a concrete assessment of the consideration of the prisoner's child, it is estimated essential that the prisoner is released before time.

  - **France**: under Code of Criminal Procedure, Article 729-3, 'parole may be granted to any person sentenced to a prison term of four years or less, where this person has parental rights over a child of less than ten years, who habitually leaves with this parent. The provisions of the present article are not applicable to those convicted of a felony of a misdemeanour committed against a minor or an offence committed in a state of legal recidivism.'

  - **Georgia**: as a new initiative introduced under legislative amendments, women inmates, whose children leave the facility after reaching the age limit, are granted the right to leave the penitentiary during official holidays and weekends for the period of one year.

- National rules on the execution of prison sentence which prevent the case where a parent would live with the dependent child in prison, by allowing deferment/suspension or postponement until a certain period of time or implementation in an open environment. For example:

  - **Vietnam**: under Criminal Code (2015), Articles 67-68, if the offender is a pregnant woman or has a young child, the sentence may be deferred until her child reaches three years of age. If the offender is the sole source of income in the family and the

imprisonment causes it to face extreme hardship, the sentence may be deferred for up to one year unless committing an offence against national securityor an extremely serious crime.

- **France**: under the Code of Criminal Procedure, Article 708-1 as created by Law 2014-896 of 15 August 2014, the execution of the sentence can be postponed or carried out in an open environment for a more than twelve weeks pregnant woman or for mothers with children up to two or four years (according to the judge's ruling). This excludes cases of crime or offence committed on children.
- **Italy**: under the Criminal Code, Articles 146 and 147, the execution of the sentence must be deferred for convicted pregnant women and mothers with children younger than one year of age, while it can be deferred for mothers with children younger than three years of age.
- **Croatia**: under the Act on Execution of Prison Sentence, the execution of a prison sentence can be postponed up to twenty months for parents (both male and female), *inter alia*, in order to take care of a child under the age of one, due to pregnancy when there is no more than six months to childbirth, or for a high-risk pregnancy of the inmate.
- **Armenia**: The Criminal Code, Article 78(1) provides that 'Pregnant women or women with children under 3 years of age, except women imprisoned for grave and particularly grave crimes for more than 5 years, can be exempted from punishment or the punishment can be postponed by the court for the period when the woman is exempted from work, due to pregnancy, child-birth and until the child reaches the age of 3.'
- **Russian Federation**: under the Criminal Code, Article 82(1), 'a court of law may defer the real serving of punishment by convicted pregnant women and women with children of up to fourteen years of age, except for those sentenced to deprivation of liberty for a period of over five years for grave and especially grave crimes against the person, until the child attains fourteen years of age.'
- **Ukraine**: under Criminal Code (2001), Article 83, (1) 'women sentenced to the restraint of liberty or imprisonment, who become pregnant or give birth to a child while serving their sentences, except women sentenced to imprisonment for a term over five years for intended grave or especially grave offenses, may be discharged, by a court, from serving their sentences for a period of time within which a women may enjoy her maternity leave, in accordance with the law, in connection with her pregnancy, child birth and until the child attains three years of age.' (2) 'Discharge from serving a

sentence shall apply to any sentenced female who has a family or relatives, who agree to live with her, or any sentenced female who is able to independently provide proper conditions for raising of her child.'

- National laws imposing a presumption against short-term prison sentences, which can require judges to explain why a short custodial sentence is necessary should they choose this course of action. For example:
  - **Scotland**: the Criminal Justice and Licensing (Scotland) Act 2010, which imposes a presumption against short prison sentences (currently implemented as a presumption against sentences of three months or less, with an extension to prison sentences of twelve months or less agreed, but not yet implemented). In order to support a reduction in use of such sentences, the use of electronic tagging has been extended under the Management of Offenders (Scotland) Bill 2018.

b. Judicial approaches to both pre-trial decision-making and sentencing of primary caregivers

Secondly, judicial approaches to both pre-trial decision-making and sentencing of primary caregivers which balance adequately all the varied interests involved, including those of their children who are impacted from such dispositions, can foster the determination of primary caregivers' eligibility for non-custodial measures. This should be aimed at both avoiding the accommodation of children in places of detention with them or the separation of children from them. Promising practice includes:

- **Brazil**: the Supreme Federal Court's decision of 2018 to grant collective *habeas corpus* to all women and teenagers in pre-trial detention who are pregnant, with children up to 12 years of age, or who are in charge of people with disabilities. It also substitutes preventive detention for house arrest of females in such situation throughout the national territory, also determining that, at the time of arrest, every woman and adolescent must be examined to verify if she is pregnant, and consequently, if house arrest applies immediately. These measures must be observed when conducting custody hearings (except in case of violent crimes or serious threats against their children 'or, also, highly exceptional situations').
- **India**: the Supreme Court's guideline elaborated in *R.D. Upadhyay v State of Andhra Pradesh* 2006 that arrangements for temporary release/parole should be made to enable an expectant prisoner to have her delivery outside the prison.

- **South Africa**: the five-step consideration as elaborated by the Constitutional Court to assist and guide courts in such a decision-making process (*S v M* 2007, para. 36). 1) A sentencing court should find out whether a convicted person is a primary caregiver whenever there are indications that this might be so. 2) The court should ascertain the effect that a custodial sentence will have on the children, if such a sentence is being considered. 3) When the appropriate sentence is custodial and the convicted person is a primary caregiver, the court should figure out whether it is necessary to take steps to ensure that the children will be adequately cared for while the caregiver is incarcerated. 4) If both custodial and non-custodial sentences are an option, the court must use 'the paramountcy principle concerning the best interests of the child' as a guide in deciding which sentence to impose; this principle should be a primary consideration and should ponder in favour of a non-custodial sentence. 5) Even if the committed crime is so serious as to warrant only a custodial sentence, the courts nonetheless must consider the best interests of the child and ensure that arrangements are made for the child to be adequately cared and placed in suitable alternative care.
- **England and Wales** case law establishing principles regarding the courts' consideration of dependent children when sentencing primary caregivers:
  - The criminal sentencing of a parent engages the right to respect for family life of both the parent and the dependent child under Article 8 ECHR. Any interference by the State with such rights must respond to a pressing social need, in pursuit of a legitimate aim, and in proportion to it. The more serious the intervention the more compelling the justification must be, and it cannot be much more serious than the act of separating a mother from a young child (*R (on the application of P and Q) v Secretary of State for the Home Department* [2001] EWCA Civ 1151, paras. 78 and 87; *R (on the application of Amanda Aldous) v Dartford Magistrates' Court* [2011] EWHC 1919 (Admin) in the High Court; and *R v Petherick* [2012] EWCA Crim 2214 para. 18).
  - The welfare of the child should be at the forefront of the judge's mind (*ZH (Tanzania) (FC) Appellant v Secretary of State for the Home Department* [2011] UKSC4, paras. 25 and 26).
  - It is the court's duty to make sure that it has all relevant information about dependent children before deciding on an appropriate sentence (*R v Bishop* [2011] WL 84407 Court of Appeal).
  - An offender who is the carer of young children should be sentenced to imprisonment only if that is absolutely necessary, and secondly, if it is, for the shortest term that

is conceivably commensurate with the offences in question (*R v Evelyn Arinze* [2010] EWCA Crim 1638).

- There is no standard or normative adjustment for dependent children, but their best interests are a 'distinct consideration to which full weight must be given'(*R v Petherick* [2012] EWCA Crim 2214, para. 19).
- In a case that is on the threshold between a custodial and non-custodial or suspended sentence, a child can tip the scales and a proportionate sentence can turn into a disproportionate one (*R v Petherick* [2012] EWCA Crim 2214, para. 22).
- It may be appropriate to suspend a custodial sentence when the person being sentenced is the parent of dependent children (*R v Modhwadia* [2017] EWCA Crim 501).

- **England and Wales**: training materials were co-designed by, and are used by the Judicial College, National Probation Service, and Criminal Bar Association, 'Safeguarding Children when Sentencing Mothers' (February 2018), providing that sentencers should ask for a 'pre-sentence report' in all cases where a primary carer is sentenced in order to have the fullest information about the related impact on a dependent child.[237]
- **England and Wales**: since the Sentencing Guideline on Assault of 2011, every subsequent sentencing guideline published by the Sentencing Council has included, in the list of 'factors reducing seriousness or reflecting personal mitigation', the element 'sole or primary carer for dependent relatives'.[238] The Imposition of Community and Custodial Sentences: Definitive Guideline of 2017 explicitly refers to the impact on dependents: 'For offenders on the cusp of custody, imprisonment should not be imposed when there would be an impact on dependants which would make a custodial sentence disproportionate to achieving the aims of sentencing' (p. 7). It additionally enunciates that the factors indicating that it 'may be appropriate to suspend a custodial sentence' include when 'immediate custody will result in significant harmful impact upon others'(p. 8).[239]
- **England and Wales**: the 'Pre-Sentence Reports: Interim Guidance on Report Formats' (March 2019), which was signed off by among others the Probation Institute, HMIP, OSAG, Sentencing Council, Justices Clerks Society, Senior Presiding Judge's office,

237 Cf. The training materials are available at https://shonaminson.com/information-for-primary-carers-facing-sentencing-in-the-criminal-courts/or at https://www.youtube.com/watch?v=L18nFBXzHlI (accessed18 August 2019).

238 See Sentencing Council, *Sentencing Guidelines for use in Magistrates' Court*, Available at https://www.sentencingcouncil.org.uk/the-magistrates-%20court-sentencing-guidelines/ (accessed 12 August 2019).

239 Sentencing Council, *Imposition of Commodity and Custodial Sentences: Definitive Guideline*, 2016, Available at https://www.sentencingcouncil.org.uk/wp-content/uploads/Imposition-definitive-guideline-Web.pdf (accessed 12 August 2019).

enunciates that: 'For those at risk of custody and who are primary/main carers with responsibilities for children/dependents, an adjournment [for a Pre-Sentence Report] is considered mandatory to ensure that: (i) The impact of a custodial sentence on dependents is considered, (ii) Care plans are developed and in place with Children's Services or Adult Safeguarding Services'.

- **Italy**: the MoU on the rights of children with a parent in prison, between the Ministry of Justice, the National Ombudsperson for Childhood and Adolescence and the non-governmental organisation 'Bambinisenzasbarre', (which was signed in 2014, extended in September 2016 and then has been renewed in November 2018), sets out in Article 1 that 'judicial authorities will be sensitized and invited … to take into account the rights and requirements of the underage children of the arrested or detained person who still has parental responsibility, when a possible precautionary measure is being decided, giving priority to measures alternative to pre-trial detention in prison'.

4.2 Decisions Concerning Co-residence Based on Case-by-Case Assessment

The decision about a child's stay in prison with a primary caregiver is to be determined on a case-by-case assessment of the best interests, welfare and circumstances of the child, ensuring that the imprisoned parent is invested in and likely to enable safe co-residence, meeting the child's basic health, nutritional and educational needs. The child's stay should ideally occur in a child-friendly living and sleeping area separate from other prisoners. Eligibility for co-residence should include babies born in prison as well as those born prior to the mother's imprisonment, as well as young children who have been adopted. Imprisoned mothers whose young children have aged out of the prison establishment and are returning for brief stays during the period following their departure from the prison also need nursery accommodation. Both young offenders and adult prisoners who are mothers with parental authority over infant children or are in late term pregnancy require accommodation in a nursery area. Promising practice includes:

- **Belgium**: a MoU adopted between the Federal State and the French Community in 2014 concerning the reception of infants with their detained parent (and accompanying pregnant women in detention). Article 4 describes the framework of mother-child living

units.[240] The assessment of the appropriateness of the reception of an infant with the parent shall be carried out, at least every six months, in a multidisciplinary manner, on the basis of the best interests of the child, by the Office of Birth and Childhood[241] in collaboration with the service-link or the service of help to the prisoners, as well as if necessary by the service of the aid to the youth if a file has been opened for the child.

- **France**: neither the judicial authority nor the prison administration can oppose/contest the choice of the mother, except if she compromises the child's safety, and within the limits of the reception capacity of the penitentiary establishments equipped for this purpose. If the risks are assumed the personnel (correctional, medical, etc.) can, through the head of facility, alert the public prosecutor who can refer the case to the juvenile court judge. In cases of request from the mother, the child can also be removed from the parental authority of the mother, even for lack of space.[242]
- **Belgium**: there is no formal appeal against the decision of the director, but the file can be sent to the juvenile judge for judicial review of the application, which will decide in the best interests of the child.[243]
- **Scotland**: the Criminal Justice (Scotland) Act 2016, Section 107, requires Scottish Ministers (in discharge of their functions through the Scottish Prison Service) to ask prisoners information about any dependent children (namely whether they are a parent or guardian of a child, if they are liable to maintain or have care of a child or have parental responsibilities in relation to a child) in order to ensure that support for them is in place.[244] If this is the case, they must be asked for information that will help SPS identify the child's named person service provider (in terms of Part 4 of the Children and Young People (Scotland) Act 2014). The Scottish Ministers must then notify the child's named service provider of the person's imprisonment, who can assess impact and subsequent needs. There are generally three possible outcomes of the decision about which care

240 Article 4: 'The mother-child unit of life includes a cell space of +/- 15m2 per mother-child with a changing place / bath and, collectively, a living room, a kitchen, furniture and adapted games. A capacity is defined according to the available infrastructure. The "Infrastructure Decree" and various existing recommendations in this area will serve as references. This unit will best promote the development and activities of the infant and ensure its safety. Specific rules will be provided and anything in the environment that evokes prison will be reduced. The ROI will be adapted specifically by integrating the principle of standardization. Pregnant women and mothers with children will be prioritized for this unit.'

241 The Office of Birth and Childhood is the reference body of the French Community for all matters relating to: childhood, childhood policies, protection of the mother and child, the medico-social support of the (future) mother and the child, the reception of the child outside his family environment and support for the parenting.

242 UN Global Study Questionnaire, France (State Reply and NHRI Reply).

243 UN Global Study Questionnaire, Belgium (State Reply).

244 The Code of Practice (Third Edition, 2017) for the Additional Support for Learning Scotland Act 2004 includes *children affected by the imprisonment of a family member* among the children or young people who may require additional support in their school education.

arrangement is in the best interests of babies of imprisoned mothers: they may live with their mother in prison, or live in the community with an alternative caregiver, or combine living in prison and in the community in a shared care arrangement.

- **Argentina**: previous research published in 2013, with a visual evaluation of the national 'co-residence program' and interviews with prison staff, suggested that this programme was developed with careful consideration and could serve as a model and be reviewed by other countries that decide to develop their own programme in domestic prisons. Decisions to place children in such programmes must be made based on their best interests.
- **India**: the Supreme Court's guidelines (formulated in *R.D. Upadhyay v State of Andhra Pradesh 2006*) highlighted *inter alia* that only in exceptional cases constituting high security risk or cases of equivalent grave descriptions the entry into the facility can be denied; that despite a prison is not the place to raise a child, children may have to stay therein for no fault of their own; that children should not be separated from their mothers during their formative years, particularly when no close family members are willing or available to take care of them, and so that female prisoners should be allowed to keep them in prison until the age of six and then they should be handed over to a suitable surrogate as per their mothers' wishes, or should be transferred to a nearby institution run by the Indian Social Welfare Department, minimising undue hardships because of physical distance, and then be brought to the prison to meet their mothers at least once a week.[245]
- **Denmark**: the Prison and Probation Service continuously reviews the grounds for maintaining the granted permission concerning the child's stay with the parent. It shall, if necessary, forward information to the social services department for giving it the chance to assess the child's wellbeing. It also has a duty to notify the social services if they become aware or have reason to believe that a child is in need of special support.
- **Germany**: the best interests of the child must be examined not only upon admission, but also at regular intervals during its stay in the mother-child facility. While the local youth welfare office is responsible for handling individual cases, it is the regional youth welfare office that is responsible for overseeing the facility itself.[246]

245 As reported by Amnesty International India, however, the lack of co-ordination between protective homes and the chronically understaffed prison department has made this difficult and children are seldom brought to meet their mothers in prison.

246 UN Global Study Questionnaire, Germany (State Reply).

- **Canada**: in the context of the residential mother-child program at the federal level, all staff in contact with the mother and her child(ren) have a duty to report suspicions of abuse or neglect in accordance with provincial legislation.
- **Palestine**: the family social guide regularly monitors the situation. Additionally, a report is made and submitted to the competent authorities in order to review the appropriate decision.[247]
- **France**: the Interregional Director of Prison Services may authorise an extension of the child's stay in prison after consulting a regional advisory commission (composed by the interregional direction, a psychologist, a psychiatric doctor, a paediatrician, the head of the prison, and an integration and probation staff member). The advisory commission hears the mother's lawyer and, if possible, the father. See Articles D401-1 and D401-2 of the Code of Criminal Procedure, and Article 2.1.3.2 in the Memorandum of 16 August 1999. It is recommended that the renewal does not exceed six months, thus respecting the twenty-four months age limit for the child.

4.3 Supportive Prison Nursery Units

Enriching and Supportive Prison Nursery Units that serve the child's best interests should be provided. Ideally, they include mother-child cells and a communal setting in a variety of colours and other sensory-stimulating features, with the mother's space in the cell separate from that of the child, and both discreetly visible to prison personnel. Logistics and activities should promote bonding with the mother and incorporate aspects of normalisation, such as enabling parents to exercise parental responsibility, spend time with their children and participate in everyday activities (such as cooking meals for their children and getting them ready for nursery schools or day-care centres outside). Promising practice includes:

- **India**: the Supreme Court's guidelines (formulated in *R.D. Upadhyay v State of Andhra Pradesh* 2006), in relation to pregnancy, child-birth, antenatal and postnatal care, and childcare in prisons, highlighted that these children should not be treated as detainees or convicts and should be provided with food, clothing, adequate sleeping facilities, and other services necessary for their healthy development, besides being entitled to medical care and vaccinations and being provided with adequate educational and recreational facilities. Indian prisons should provide crèches for children below the age of three and nurseries for children aged three to six, preferably run outside the prison

247 UN Global Study Questionnaire, Palestine (State Reply)

premises by the prison authorities. State legal services authorities should regularly inspect the implementation of such guidelines.

- **Italy**: the monitoring of child living conditions in prison is set forth in the aforementioned Italian MoU between the Ministry of Justice, the National Ombudsperson for Childhood and Adolescence and the non-governmental organisation 'Bambinisenzasbarre', which in Article 7 focuses on children living with imprisoned mothers and makes explicit reference to the Parties' commitment to verify: the child's possibility to freely access open air areas, to freely access the external world, to attend nursery schools and schools outside the prison; the offer of educational and supporting facilities; and the support in the development of parental abilities.
- **Estonia**: children have regular medical examination by a general practitioner in prison and Vitamin D is given to all the infants in Estonia and also provided to infants living with detained parents. Mothers can buy multivitamins for their children from the prison shop. If a mother needs counselling on the child's nutrition needs or on the suitable day plan, prison medical staff takes care of it. If a child is so sick as to need hospitalisation, the child is brought to the hospital outside the prison.[248]
- **Scotland**: the HMP Cornton Vale's MBU has capacity for seven mother and baby pairs, and is one of four units in a block, with the neighbouring three units housing national top end prisoners.[249] If the mother is on a licence, she may stay with her baby in one of the Independent Living Units (ILU) situated just outside the prison gate. A mother and her baby may move from the MBU to an ILU as the woman progresses through her sentence. It is possible to have a child up to pre-school age stay with the mother in an ILU.[250] Notably, the SPS is currently developing small 'Community Custodial Units' for women to recognise their general lower security risk and allow them to be housed closer to their local communities, with the intention to have facilities for overnight visits from children.
- **Portugal**: children living with their mothers in prisons have the right to be visited by the other parent and by other relatives, even when these are also imprisoned. Thus the child can maintain regular affective ties with other relatives (whether these are at

248 UN Global Study Questionnaire, Estonia (State Reply).

249 See University of Stirling, *The Rose Project: Best for Babies: Determining and supporting the best interests and wellbeing of babies of imprisoned mothers in Scotland*, March 2016, p. 17, indicating that the MBU is a repurposed unit that has been modified to make it suitable for the needs of mothers and babies (e.g., kitchen and laundry facilities have been added so that mothers can prepare food for their baby and wash their baby's clothes). It is an independent unit, as no prison officers are stationed in it, although officers are nearby within the block. No formal child-care arrangements are in place within the prison. Women in the MBU have sole responsibility for their baby 24 hours of every day.

250 Ibid., p. 18.

liberty or even detained in the context of a 'program for inter-prison visits'). There are cases where children living with their mother also live in the same prison with their grandmother, aunts and cousins. Children may also be visited and visit their siblings who reside outside the prison, even where they are in residential care.[251]

- **Albania**: the implementation of a 'Remote Pre-Trial Program' is aimed at strengthening parent-child relationships in order to guarantee their emotional sustainability and social support, education, interaction with the outside world and communication. Children have the right to develop contacts or to have contact with other family members outside the institution, with the consent of their mother.[252]
- **France**: the correctional facilities must ensure social support to the well-being of new-borns, which is defined by an agreement between the correctional facility and the department[253] and which provides for permitting the regular release of children outside the facility to allow for their socialisation. Agreements among correctional facilities with nurseries and specialised organisations (*creches*, day-care centres, and childminders) can be adopted to develop possibilities for child releases from detention.[254]
- **France**: the holders exercising parental authority freely choose the doctor who cares for their child. The doctor must be authorised to access the prison. Independently of this choice, each detention facility, alongside the partners concerned, organises an approach to health care that foresees that the healthcare professional has regular access.
- **Greece**: the child's needs are primarily monitored by the mother who cohabitates with her child. Children can benefit from the special care of a child-minder in the nursery station that operates within the prison facility of Eleonas or outside in the municipal day-care centre in Thiva. Infant development articles are all covered by the prison's service, regardless of the mother's financial situation (e.g. night light, kettle, vacuum flask, relax park, health and care items, diapers, etc.). It is also possible to celebrate the holidays and birthdays of the children in consultation with the prison service.[255]
- **Denmark**: children have access to their own toys in the cell and are able to participate in visits from friends or family with the parent at least once a week (and often more). If the inmate is serving in an open prison, he or she will typically be granted leave every third weekend. If the inmate is serving in a closed prison, he or she will typically

251 UN Global Study Questionnaire, Portugal (State and Ombudsperson Replies).

252 UN Global Study Questionnaire, Albania (State Reply).

253 Article 38, Criminal Law 2009-1436 of 24 November 2009.

254 UN Global Study Questionnaire, France (State Reply).

255 UN Global Study Questionnaire, Greece (State Reply).

only be granted leave with the child under special circumstances. The families can participate in the seasonal family events that take place in the prisons for instance at Christmas. There is the option of a family home. If the placement is in a remand prison the possibilities will typically be more restricted than within a prison depending on the physical environment and the terms of the parent's imprisonment etc.

- **Finland**: all child welfare support as well as general social services are available for the child and the parent; children have their own client plan in social services and the support is given according to their needs. Since 2010 a public institutionalised practice has entailed new policies concerning children in prison and a new family ward in the Finnish prison organisation; the position of children in prison has been recognised officially, with duties upon the municipal child welfare services.
- **Mauritius**: children at the age of three years and above are admitted at the municipal pre-school without having to incur any cost and are allowed to participate in indoor and outdoor activities of that pre-primary school. The school uniform and pedagogical materials are provided by the prison department.[256]
- **Myanmar**: a new Child Law bill amending relevant provisions is currently under consideration before the Parliament, to strengthen the rights of children in aspects such as education, access to sports and physical activities and alternative care (Section 92 of the new draft of the Child Law Bill)[257]. Under the new draft, the Officer in Charge of the Prison is responsible for providing the livelihood and health care of the child, must make the best possible arrangements for the health care of a pregnant woman prisoner, delivery of the child in a hospital outside the prison, and the care of the mother and the child, and must coordinate with the concerned departments and organisations to open and operate day-care centres and pre-primary schools as well as to arrange for engaging in sport and physical activities for children of early childhood. It also provides that the birth certificate of a child cannot mention that the child was born in prison.
- **Norway**: the State is working on legislation to make it legally binding to include children in discussions, requiring 'child ambassadors' in each prison to oversee their best interests.

256 UN Global Study Questionnaire, Mauritius (State Reply).

257 The text of draft amendments was sent by UNICEF Myanmar to the EIUC Research Team in May 2018.

4.4 Partnerships with Specialised Child-Parent Support Institutions

Efficient support networks can be established via prison partnerships with institutional partners and civil society specialised in child-parent support, as well as with social and child welfare services, family benefits agencies, associations and volunteers. Promising practice includes:

- **Belgium**: a cooperation agreement between the Federal State and the Flemish Community and the Flemish Region on the assistance and services provided to prisoners guarantees all prisoners and their social environment the right to assistance and to integrated services of quality so that they can grow in society. To this end, local partnerships are established around various prisons between different providers of help and services. This is also the case for the Bruges Prison. '*Kind enGezin*' (Agency 'Child and Family') is part of this partnership.[258]
- **Italy**: the aforementioned MoU (signed in 2014 and renewed in 2018) in Article 8 establishes a permanent working table, composed of representatives of the Ministry of Justice, the Ombudsman for Childhood and Adolescence, the Ombudsman Authority for the Rights of People Detained or Deprived of Personal Freedom and the Association Bambinisenzasbarre ONLUS, *inter alia* to periodically monitor the implementation of the MoU, to promote cooperation of institutional and non-institutional agencies involved, and to inform and raise awareness among staff in schools who come into contact with children of imprisoned parents.
- **Italy**: a memorandum of understanding on procedures for the activation of forms of reception of children in prison with their mother was signed on 22 May 2019 between the Regional Human Rights Ombudsman, the Directorate of the ICAM of Venice, the Directorate of the External Criminal Execution Office of Venice, the Venice Police Headquarters, the Municipality of Venice, the Committee of Mayors of the Municipalities of Marcon, Quarto d'Altino and Venice, and the Association '*La Gabbianella e glialtrianimali*'. It aims to guarantee children who stay in prison with their mothers up to the age of six and to those who are discharged at this age or even before, all the interventions necessary for their growth and psychophysical wellbeing. It therefore outlines intervention strategies on the part of the various institutions in support of the needs of the children staying with their mothers (who can be Italian, regular and irregular foreigners) in the minimum-security institution for detainee mothers (so-called ICAM) at Giudecca, Venice, over

258 '*Kind en Gezin*' is an agency of the Flemish Government. Its mission is to actively contribute to the wellbeing of young children and their families through services in the policy areas of preventive family support, childcare and adoption.

different phases (entry, restriction, release, post-release). For instance, the Directorate of the ICAM 'promotes interventions of support and accompaniment to the mother-child relationship and between the child and the outside world, both inside the ICAM and outside, aimed at guaranteeing the best conditions fora harmonious emotional and interpersonal development of the children staying in the ICAM'.[259]

- **Croatia**: as a rule, with the consent of the mother, children aged one year old are referred to a kindergarten in Požega, where they are taken and brought back on a daily basis, to meet their developmental needs and appropriate socio-emotional development.[260]
- **Ireland**: a collaboration between two legal academics and two NGOs (the Children's Rights Alliance and the Irish Penal Reform Trust) led to the development of *Principles for Action for children with a parent in prison*[261], with the aim to promote their endorsement by state agencies, to develop a national advocacy strategy for these children, and the effective implementation of their rights by relevant public and private organisation.
- **Canada**: the Correctional Service of Canada (CSC) has in place 'the Institutional Mother-Child Program' whose purpose is to foster positive relationships between federally imprisoned women and their children by providing a supportive environment that promotes stability and continuity for the mother-child relationship.[262] It is available at all federal institutions for women and the Indigenous-healing lodge for women, whereas provincial facilities have their own internal policies and practices on the matter.
- **Nepal**: Pushpa Basnet's Early Childhood Development Center (ECDC) provides assistance to more than one hundred children of imprisoned parents, running a day-care centre for children staying in prison with their mothers (since 2005) and offering a residential home for the older ones (since 2007) to live outside the prison while still visiting their mothers on holidays.
- **Colombia** (State Reply): the child of a detained adolescent counts on a Family Advocate, who is responsible for verifying the guarantee or re-establishment of their rights.

259 The text of the MoU is available at http://www.lagabbianella.org/?p=1914 or http://www.lagabbianella.org/wordpress/wp-content/uploads/2019/06/Protocollo-dIntesa_compressed.pdf(accessed 18 August 2019).

260 UN Global Study Questionnaire, Croatia (State Reply).

261 Cf. Aisling Parkes & Fiona Donson, *Principles of Action for Children with a Parent in Prison*, Irish Penal Reform Trust, 2017, Available at http://www.iprt.ie/contents/3190 (accessed 18 August 2019).

262 UN Global Study Questionnaire, Canada (State Reply): the Corrections and Conditional Release Act (CCRA) requires that CSC provide programmes designed to address the particular needs of female offenders. It is based on this requirement that CSC implemented Commissioner's Directive 768 on Institutional Mother-Child Program. A Commissioner's Directive is an internal policy document. For the purpose of this programme, 'mother' is defined as the biological or adoptive mother, legal guardian or step-mother.

4.5 Protection of Children from Violence, Trauma and Harmful Situations

UNICEF's Protective Environment Framework lays out factors which ensure children are protected from violence, trauma and harmful situations, including: information and education (for the child, parent and any individual who comes into contact with either); decision-makers' commitment to fulfilling protective rights; implementation of appropriate laws and policies; appropriate engagement of civil society and the media; appropriate services to protect children and support mothers (such as social services or parenting support); and monitoring.[263] In contexts where older children co-reside with their parent in prison, these children should be consulted on their sense of safety within the prison environment.

4.6 Preparation for Separation

Preparation for Separation should ideally begin from the onset of the co-residence, and at minimum six months prior to separation, with an accommodation period in the (immediate or extended) family home or other alternative care option, allowing the primary caregivers to see their children a minimum of once a week. Preparing a child well in advance of the departure should include engaging with the primary caregiver to learn about the child's specific needs and to plan the child's daily routine to ensure smooth adaptation, while

263 UNICEF, *Child Protection Strategy*, United Nations Children's Fund Executive Board Annual session 2008, E/ICEF/2008/5/Rev.1., 2008.

organising outings for the child with the future caregiver outside the prison, and granting the imprisoned caregiver temporary leave in order to be involved in these outings. Promising practice includes:

- **Uzbekistan**: convicted women who have children who are not yet school-aged may be permitted to leave the prison for up to fifteen days, not including travel time (no more than four days both ways), in order to place their children with relatives or guardians or in a childcare institution.[264]
- **El Salvador**: efforts have been made to develop and implement a protocol for action and cooperation between the authorities of the Juvenile Penal System and the Comprehensive Protection System for Children and Adolescents, in order to guarantee compliance with the rights of children in the process of leaving the prison and separating from their imprisoned mother.[265]
- **Croatia**: in 2011 and 2012 at the Pozega Penitentiary a clinical psychologist was hired to help preparing the separation of the mother from the child, in order to assess the effect of such separation on the child. In 2014 female prisoners at the Pozega Prison were also aware that the separation may hurt the child more than growing up within the penitentiary, and 64% of them believed that it is not justifiable to separate the child from the mother at the age of three. (Official letter from the Ministry of Justice, Prison System Directorate, Central Office dated from 1 February 2016).[266]
- **Sweden**: children are able to maintain relations with their imprisoned parents in several ways, through visits, home leave, phone calls and letters. Inmates with children can apply for extended contact opportunities. The Prison service is currently looking into the possibility to maintain contact using the Internet. All prisons have one or two specially designed 'visiting rooms' for child visits with appropriate furnishing including toys, books and TV games. Twenty-one prisons also have 'flats' consisting of two or three rooms and a small kitchen.[267]
- **Czech Republic**: the prison director decides when the child shall move out, but such a situation happens exceptionally: convicted mothers are admitted to a special department according to strict criteria which include that *the end of the sentence of the convicted woman corresponds to the completion of the child's age, usually for 3 years,*

264 UN Global Study Questionnaire, Uzbekistan (State Reply).
265 UN Global Study Questionnaire, El Salvador (State Reply).
266 UN Global Study Questionnaire, Croatia (State Reply).
267 UN Global Study Questionnaire, Sweden (State Reply).

exceptionally in the interest of preserving sibling links until the age of four. The release is prepared in co-operation with a social worker, an educator and the Social and Legal Children Protection Authority.[268]

- **Italy**: the aforementioned MoU (signed in 2014 and renewed in 2018), in Article 7, explicitly refers to the Parties' commitment to verify the provision of measures for psychological and social accompaniment to support both the child and parent in their separation.
- **Russian Federation**: in order to ensure the mental and physical development of children, the Russian Government decided that the motivation of convicted mothers to develop law-abiding behaviour should be supported. Additionally, efforts should be made to increase their re-socialisation after release. As such, a Road Map (N2167) has been adopted in December 2015, until 2021.[269]
- **Canada**: a 'transition plan' is developed (e.g. the mother is not being released or she is being released but the child will not be residing with her in the community) within the federal 'Institutional Mother-Child Program'.
- **Brazil**: a 'legal tutor/trustee' is designated by the'*Vara da Infância e da Juventude*' (the Childhood and Youth Lower Court), otherwise the child will be sent to a municipal refuge, see Articles 146-148 *do Estatuto da Criança e do Adolescente (ECA)* - Law 8069/1990.
- **Colombia** (State Reply): the National Penitentiary and Prison Institute informs that: '*Upon the children's exit from the service, they are accompanied by a psychologist or social worker from the operator who provides the service, and verified by the Family Advocate. From the moment they exit the female detention centre, children are the responsibility of the Colombian Family Welfare Institute, who must ensure their enrolment in the programs offered in their place of residence.*'
- **Argentina** (State Reply): detention units housing children with their mothers must allow the involvement from organisations for children, which are required to evaluate the protective measures to be taken in relation to the separation phase.

268 UN Global Study Questionnaire, Czech Republic (State Reply).

269 UN Global Study Questionnaire, Russia (State Reply).

5. Recommendations

1. In all matters related to criminal proceedings involving sole or primary caregivers of children, it is essential to ensure recognition of the **affected children as rights holders**.
2. States should establish a system that identifies whether a person in conflict with the law has **child-care responsibilities**.
3. The **best interests of the child** must be taken into account in decisions about possible detention or imprisonment of primary caregivers during pre- and post-trial phases.
4. The fundamental principle of **non-discrimination** must be upheld in all aspects of decision-making connected to and treatment of children with an incarcerated parent.
5. Governments are encouraged to adopt a **gender sensitive** and **child sensitive approach** in any policies relating to the detention of primary caregivers.
6. Governments are encouraged to recognise both the *detrimental impact of family separation due to parental incarceration* and the *detrimental impact of deprivation of liberty with a parent*. All possible measures should be taken to reduce the number of children deprived of liberty with a parent in the criminal justice system without increasing the separation of children from a parent due to the parent's incarceration. **A presumption against a custodial measure or sentence for primary caregivers should apply**.
7. States shall incorporate *best interests of the child assessments* into **decision-making processes at all points at which the detention of a parent in the criminal justice system could result in the deprivation of liberty of a child**. This includes pre-trial detention decisions, sentencing decisions, and decisions regarding whether and for how long a child shall live with a primary caregiver in prison. This may require different assessments at each decision-making point due to child developmental changes and other changing circumstances.
8. States should put in place laws and policies in favour of **non-custodial solutions** for parents of dependent children. In accordance with the best interests of the child, judicial authorities are encouraged to strictly apply the criteria of necessity, proportionality, and reasonableness when they consider ordering pre-trial detention of persons who are responsible for children and adolescents, specifically in view of its impact on these dependants.
9. States should give in-depth consideration to the social cost of the use of custodial sentences as punishment for non-violent offences committed by primary caregivers, taking into account the serious implications that their imprisonment has for the **relationship with their children**.

10. Pre-sentence reports including *best interests of the child determinations* should be a primary consideration in sentencing decisions. Sentencing remarks should articulate what information has been obtained about the affected children (e.g. health/welfare issues, disability status) and how this has been taken into account in the sentencing decision. Judicial training should be ensured in this regard. Where possible, age-appropriate and sensitive **child and family impact assessment** should be used for custodial and non-custodial sentences.

11. When imposing sentences on primary caregivers of infants and young children, non-custodial solutions should always be preferred to imprisonment. Non-custodial solutions allowing and enabling parents to provide and care for their dependents should have priority. Such measures **must be available also for all minority groups and foreign nationals**.

12. If imprisonment is unavoidable, an *individualised assessment of the best interests of the child* must inform any decision about whether and when a child should accompany a primary caregiver into prison or be separated from such carer. States should **avoid strict age limits**. This applies to children born prior to the criminal justice proceedings as well as to those children born to an incarcerated mother.

13. Essential considerations in evaluating the best interests of each child include the emotional and physical wellbeing, the possibility of developing a strong and early attachment to the mother and for breastfeeding. The factors to be considered by decision-makers, when deciding whether a child should live in prison with a primary caregiver, include the potential caregiving capacity, the nature of the offence, sentence length and carer's behaviour in prison only insofar as they **affect the child's welfare and best interests**.

14. All necessary measures must be taken to ensure the safety, dignity and development of any child living with a parent in prison. The child must be scrupulously **protected from violence, trauma and harmful situations**.

15. If imprisonment is unavoidable, adequate provisions must be made for the care of the children entering prison with their parent and age-appropriate facilities (such as nurseries, kindergartens, mother-child units, children's care home) and services must be supplied to safeguard and promote their rights to survival, protection, development and participation while in prison. **Freedom from discrimination requires the provision of disability specific services and support and action to meet the needs of foreign nationals**. This should be done by the responsible authorities in cooperation with relevant organisations, including NGOs, the private sector and the community.

- In relation to physical conditions, States should provide them with clean, hygienic and child-friendly facilities and cover costs for food, vaccinations and regular visits by paediatricians and other medical officers, clothing and accommodation.
- In relation to emotional wellbeing, States should provide them, immediately after birth and beyond, with possibilities to bond with imprisoned primary caregivers, including skin-to-skin contact and breastfeeding.
- In relation to the imprisoned parents, States should provide adequate support and social network, particularly where parents are adolescents, to help them to become competent caring parents and to promote attachment with the child, and enable their relationship and consequently the child's development as normally as possible.
- In relation to social and developmental conditions, States should provide them with adequate play activities and toys (including own toys), access to education, and the opportunity to leave the prison and experience ordinary life, in order to establish safe contact with the outside world, spend time with fathers and other family members and bond with other babies and young children.
- In this connection it is essential to ensure direct access for the child to natural light and open air areas and, as far as possible, facilitate aspects of normalisation that enable imprisoned parents to exercise parental responsibility, spend time with their children, and participate in everyday activities such as cooking meals for their children and getting them ready for nursery schools.
- States should provide inclusive settings for children with disabilities, availability to disability-specific services, support to prisoners with disabilities who are mothers, and related reasonable accommodation.

16. At the time the child enters the prison with a parent, there should be a case management system in place. A **social worker** or an **independent authority** (such as a curator/legal tutor) should be appointed in order to undertake a **regular individual assessment** of the situation and wellbeing of the child.
17. **Regular and comprehensive training** on child-related practices, procedures and policies shall be provided for all professionals working with, and for, children and their imprisoned parents, including police, caregivers, residential and prison officers. This should include systematic programmes for psychological and emotional support to children and their imprisoned parents.

18. The **separation** of an infant or young child from the imprisoned primary caregiver is likely to be a traumatic experience for both and, if this is going to occur, **preparation** for it ideally needs to begin at the outset of the sentence.

    - Regular 'individual assessments' should be required in law and practice before a decision is taken to separate a child from a primary caregiver, and must be based on the best interests of the child. Guidance on how to conduct such evaluations without impairing the parent-child connection should be elaborated. Separation should not be based on the existence of a disability.
    - Advanced planning should involve identifying suitable alternative carers and give the child the possibility to spend time with them, considering that institutionalisation of these children should be avoided.
    - Support and empowerment for caregivers, including fathers, should be provided to assist them in taking on the care of the child.
    - Children and imprisoned caregivers should be provided with psychological, emotional and practical support before, during and after separation.
    - Following separation, babies and children should be allowed to visit their imprisoned primary caregivers a minimum of once a week. Proximity to imprisoned parents should be facilitated to enable continued contact.

19. **Support** to and **rehabilitation** of primary caregivers inside the prison is crucial and should be organised and implemented in accordance with specific policies created for that purpose. Such policies should include mechanisms that allow the child to be protected from the stigma stemming from their situation. **Cooperation and coordination between government departments and civil society stakeholders** should be strengthened for the purpose of reintegrating children into the society after they leave detention centres.

20. When the child is leaving the place of detention, the **primary caregivers should ideally be released together with the child**.

21. If the child of a foreign national is leaving the prison, the detained or imprisoned parent should be released **at the same time** or be enabled to **serve the sentence in their own country** if they so wish and it is in the best interests of the child.

22. State agencies and civil society organisations should be **sufficiently resourced** in order to support children with imprisoned parents and their families and enable them to deal effectively with their situation and needs, including offering logistic and financial support.

23. States should ensure **disaggregated data collection** to allow evidence-based research and analysis of the situation of children living in prison with their primary caregivers.

CHAPTER 11

CHILDREN DEPRIVED OF LIBERTY FOR MIGRATION RELATED REASONS

© John Moore via Getty Images, Boy from Honduras watches movie at U.S. Border Patrol detention facility in Texas, United States

Jamil's Story
Greece

'I was treated as a terrorist and thought I would stay there all my life', recalls Jamil of his experiences of **migration detention** as an unaccompanied minor. At the **age of 17**, Jamil migrated across the Balkans and ended up in detention twice – once in Albania and once in Greece.

He was first arrested in 2015 in a village in Albania along with a few other migrants. They were immediately handcuffed and even hooded – with their faces completely covered. After first being taken to a police station, Jamil eventually found himself in a Tirana prison. Throughout this period, Jamil was not given any information as to where he is going and how long he would be detained.

Jamil reports that adults and children were detained together. The memory of this time still fills him with fear. 'I would hear people screaming.' One of his fellow child detainees was placed in isolation as a punishment for trying to escape, while Jamil himself was once beaten so severe that 'I couldn't move the next day.' He described how all personal items were removed, that food was scarce and that communication amongst detainees was deliberately limited. Any contact with the outside world was strictly prohibited during his entire stay in prison.

'One night (after a month) they came in and said to us to get our stuff, we leave for Greece'. Once he arrived, Jamil was first detained in Konitsa for 19 days and then another 5 days in Ioannina. He was quickly given a lawyer, which eventually led to his release from detention. In the end, Jamil had experienced detention as an unaccompanied child for 54 days.

Reflecting on his experiences, Jamil thinks that children should be connected directly to a prosecutor and hosted in a shelter with support. 'Police stations or prisons are not a suitable place for minors'.

For data protection and confidentiality reasons, the names have been altered.

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1. Introduction

According to the United Nations Department of Economic and Social Affairs (UNDESA), there were 258 million international migrants in 2017, a number that includes at least 26 million refugees and asylum seekers and amounts to approximately 3.4 percent of the world's population. While children tend to be underrepresented among international migrants globally, 12% – or approximately 30 million people – are under the age of 18.[1] Nine percent of migrants in 'more developed' countries and 21% in 'less developed' countries are children.[2] Some countries routinely detain children for migration-related reasons. In others, immigration detention of children is rarely or never employed.

Children migrate for a variety of reasons. Some seek better lives and opportunities for themselves or for their family or to reunite with family members. Others are escaping conflict, persecution, discrimination, intra-family violence, a lack of access to health, education, and other rights in countries of origin, food insecurity, natural disasters, or environmental degradation. Indeed, children often migrate for a combination of these factors, and the conditions or their motivations for moving may change throughout the migration process.

Children around the world migrate on their own, with parents or other caregivers, and with friends and siblings. Some are trafficked, yet the precise number or even the proportion remains unknown. The vast majority migrate in a regular situation; however, irregular migration is disproportionately covered in headlines in many world regions. States have a legitimate interest in regulating the terms of entry and residence of people on their territories in a manner that is consistent with their international human rights obligations. But in a growing number of countries responses to migration, and particularly to the presence of migrants in irregular situations, have taken the form of security-based approaches. This includes criminalising irregular entry, stay, or exit and using detention to manage or punish migrants while seeking to deter others from coming in the future. In this context, in some countries children are frequently detained for reasons relating to their or their parents' migration status, in violation of international norms and standards.[3]

1 Estimates according to UNICEF based on the data from UN DESA and other available data. See UNICEF, *Child migration,* last update: December 2018, Available at https://data.unicef.org/topic/child-migration-and-displacement/migration/ (accessed 11 August 2019).

2 United Nations Department of Economic and Social Affairs, Population Division, *Population Facts*, No. 2017/5, December 2017, pp. 1 & 4, Available at http://www.un.org/en/development/desa/population/migration/data/estimates2/estimates17.shtml (accessed 28 July 2019). See also United Nations Department of Economic and Social Affairs, Population Division, *International Migration Report 2017,* Available at http://www.un.org/en/development/desa/population/migration/publications/migrationreport/index.shtml (accessed 28 July 2019). See also UNHCR, *Global Trends: Forced Displacement 2017,* Available at https://www.unhcr.org/5b27be547.pdf (accessed 28 July 2019).

3 The Committee on Migrant Workers and the Committee on the Rights of the Child have concluded that 'child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice.' See *Joint General Comment No. 4/23 on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return,* CMW/C/GC/4-CRC/C/GC/23, 16 November 2017, para. 12. The UN Working Group on Arbitrary Detention has found that '[t]he deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited.' UN Working Group on Arbitrary Detention, *Revised Deliberation No. 5 on Deprivation of Liberty of Migrants,* 7 February 2018, para. 11. The international standards prohibiting migration detention of children and families are discussed more fully below.

2. Terminology used in and Scope of this Chapter

Consistent with the guidance of the UN human rights treaty bodies, this Study uses the term 'immigration detention' to refer to any setting in which children are deprived of their liberty for reasons relating to their migration status or that of their parents, regardless of the name or justification provided by the State for depriving children of their liberty or the name of the facility or location where the child is deprived of liberty.[4] The phrase 'reasons related to migration status' is understood to refer to any reason related to a person's migratory or residence status, or lack thereof.[5] This encompasses State actions related to regulating entry, stay, and return of non-nationals.[6]

Immigration detention has various forms, functions, and purported justifications around the world. It refers primarily to detention that is administratively authorised (that is, ordered by the executive), but can also include judicially sanctioned detention.[7] However, immigration detention may sometimes take place in criminal, institutional, or national security contexts. In some countries, for example, criminal detention is employed for migration-related status offence crimes such as irregular entry or stay. Children are also at times detained in asylum determination procedures, including when assessing their age. In others, institutional deprivation of liberty targets children for 'protection' based on their status as a migrant, in particular in cases in which human trafficking is suspected. Other countries may also make use of security detention based on the 'threat' of a child's irregular migration status, or of children from certain nationalities, ethnicities, religions, or other social groups who – as with adults – may be viewed as threats because of their migration status.

4 Cf. *Joint General Comment No. 4/23* (2017), *op. cit.*, para. 6.

5 Ibid.

6 Ibid.

7 See, e.g., Alice Edwards, *Back to Basics: The Right to Liberty and Security of Person and 'Alternatives to Detention' of Refugees, Asylum-Seekers, Stateless Persons and Other Migrants,* Legal and Protection Policy Research Series, PPLA/2011/01.Rev., Geneva, UNHCR, 2011, p. 8, Available at https://www.unhcr.org/en-us/protection/globalconsult/4dc949c49/17-basics-right-liberty-security-person-alternatives-detention-refugees.html (accessed 18 October 2019).

Places where migrant children are deprived of their liberty

Children are deprived of liberty in a variety of places of detention, which sometimes carry euphemistic and misleading names. Examples of euphemisms for immigration detention include, among others, 'hotspot' (**Greece** and **Italy**), 'migration station' (**Mexico**), 'residential centres' (**United States**), 'tender age shelters' (**United States**), 'accommodation' or 'guesthouses for foreigners' (**Turkey**), 'temporary stay facilities' (**Ukraine**), 'centres for the controlled stay of foreigners' (**Spain**), 'depots' (**Malaysia**), 'retention centres' and airport 'waiting zones' (**France**), 'transit zones' (**Hungary**), 'national administrative centre for transmigration' (**Belgium**), and 'specialised homes for temporary accommodation' (**Bulgaria**).[8]

However, international law is clear that whether or not a person is being deprived of liberty does not depend on the name, euphemism or classification assigned by the State, but rather on whether the reality and severity of the restrictions imposed amount to deprivation of liberty.[9] As the UN Working Group on Arbitrary Detention has observed, '[t]here is an increasing number of countries that hold irregular migrants in various temporary or permanent settings, such as holding rooms, reception centres and shelters. While not officially called "detention centres", those places are in fact closed institutions and individuals kept in them are not at liberty to leave, which makes such places de facto detention places.'[10]

Sometimes refugee camps are described as a form of deprivation of liberty.[11] However, although in some cases authorities may impose restrictions on movement outside refugee camps that amount to a similar degree of confinement as that seen in detention facilities, this is not always the case. Similarly, centres on **the Greek islands** and the offshore facilities operated and controlled by **Australia** on **Nauru** and **Papua New Guinea** have at times been closed facilities, meaning that they were places of detention during these times, and at other points operated as semi-open centres, albeit with severe restrictions on freedom of movement.[12] A case-by-case approach is necessary to understand the extent to which different settings, and in particular those in refugee camps, amount to deprivation of liberty.

8 See Mariette Grange, 'Smoke Screens: Is There a Correlation Between Migration Euphemisms and the Language of Detention?' *Global Detention Project Working Paper No. 5*, September 2013, Available at https://www.globaldetentionproject.org/smoke-screens-is-there-a-correlation-between-migration-euphemisms-and-the-language-of-detention (accessed 1 August 2018); European Court of Human Rights (ECtHR), *Ilias and Ahmed v. Hungary*, No. 47287/15, 14 March, 2017.

9 Cf. *Joint General Comment No. 4/23* (2017), *op. cit.*, para. 6; UN Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and security of person),* CCPR/C/GC/35, 16 December 2014, para. 5. See also International Commission of Jurists (ICJ), 'Migration and International Human Rights Law', *Practitioners Guide No. 6,* Updated Edition, 2014, p. 176; ECtHR, *Amuur v. France,* Application No. 19776/92, 25 June 1996, fn. 45, para. 42; ECtHR, *Nolan and K. v. Russia,* Application No. 2512/04, 12 February 2009, fn. 472, paras. 93–96; ECtHR, *Abdolkhani and Karimnia v. Turkey,* Application No. 30471/08, Judgment of 22 September 2009, paras. 125–127; ECtHR, *Ashingdane v. United Kingdom*, Application No. 8225/78, Judgment of 28 March 1985, para. 42.

10 UN General Assembly, *Report of the Working Group on Arbitrary Detention,* A/HRC/36/37, 19 July, 2017, para. 53.

11 Carolyn Hamilton, Kristen Anderson, Ruth Barnes & Kamena Dorling, *Administrative Detention of Children: a global report,* New York, UNICEF, 2011.

12 See, for example, ECtHR, Affair *J.R. et autres c. Grèce,* Requête, No. 22696/16, 25 January 2018, paras. 83-87.

3. Immigration Detention in Practice and Law

3.1 State Practice

In practice, immigration detention takes varied forms in different places. There are differences, for example, in the length of time that children can be detained for. It may be a transitory practice which lasts a few days or an extended period of deprivation of liberty. For example, in **Switzerland** a distinction is made between 'temporary detention' which can last up to three days to check an individual's identity or nationality, and 'detention in preparation for departure,' which can last for an initial period of six months and can then be extended up to a further six months with judicial approval.[13] In the **United Kingdom**, unaccompanied children can be detained for a maximum of 24 hours at any one time.[14] There is no statutory time limit on the detention of families with children,[15] but the Home Office's enforcement guidance states that families with children may be detained together in a special unit, generally for a maximum of 72 hours prior to deportation and in exceptional circumstances, with ministerial approval, for up to seven days.[16] The non-governmental organisation Coram notes, '[d]etention of children can also occur in "age dispute" cases, where children have stated that they are under 18 and the Home Office decides that their physical appearance/demeanour very strongly suggests that they are significantly over 18 years of age or the local authority assesses them to be over 18.'[17] Additional children's rights violations in the context of immigration detention are related to the lack of basic due process guarantees within the procedure and the decision that leads to their deprivation of liberty.

Immigration detention may also take place in a range of different facilities. In some contexts, it takes place in ad hoc locations which have not been prepared for housing children, such as police stations, airports or other border posts and ports of entry. In contrast, in some countries, such as **Finland**, unaccompanied children cannot be detained in police or border guard facilities.[18] In many places, detention takes place in dedicated facilities. These may be

13 *L'Assemblée fédérale de la Confédération Suisse, Loi fédérale sur les étrangers et l'integration (LEI) du 16 Décembre 2005 (état le 1er Mars 2019)*, Switzerland, Articles 73, 75 & 79, Available at https://www.admin.ch/opc/fr/classified-compilation/20020232/index.html (accessed 11 August 2019).

14 United Kingdom, *Immigration Act 2014, Chapter 22*, s 5, 14 May 2014, Available at http://www.legislation.gov.uk/ukpga/2014/22/enacted (accessed 7 February 2019).

15 See House of Commons and House of Lords, Joint Committee on Human Rights, Immigration Detention: Sixteenth Report of Session 2017-19, HC 1484/HL Paper 278, 7 February 2019, p. 3.

16 UK Home Office, 'Detention and Temporary Release', *Enforcement Instruction and Guidance*, Section 55.9.4 ('Families with children under the age of 18'), Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/470593/2015-10-23_Ch55_v19.pdf (accessed 7 February 2019).

17 Coram Children's Legal Centre, *Detention of Children and Families in the UK*, May 2017, p. 3, Available at https://www.childrenslegalcentre.com/wp-content/uploads/2017/05/Detention-May.2017.final_.pdf (accessed 7 February 2019).

18 See Ministry of the Interior, Aliens Act (301/2004, amendments up to 973/2007 included), Finland, Section 123.

defined as detention centres or given other titles such as immigration centres (**Bosnia and Herzegovina**), reception and placement facilities (**Burkina Faso**), or immigration holding centres (**Canada**). Children may also in some countries be 'accommodated' or 'housed' with parents in detention, but not considered to be detained themselves, which makes it impossible for them to challenge detention.

In the majority of States that practice immigration detention, it is managed by border authorities, national police authorities, or other security forces. In some cases, specialised authorities are responsible for immigration detention of children. As one example, in the **United States**, long-term immigration detention of unaccompanied children is the responsibility of the US Department of Health and Human Services.[19] In some federal States, detention for irregular stay is managed by regional authorities (such as the cantons in **Switzerland** or the Länder in **Germany**).[20] Immigration detention may, in certain countries, also involve a criminal procedure. This occurs where irregular entry or stay is a criminal offence, such as in **Russia**,[21] **Libya**,[22] **Hungary**[23] and **Iran**.[24] By contrast, in cases where children are deprived of liberty for protection-related purposes, such as in suspected cases of trafficking their detention tends to be managed by child protection and family welfare offices rather than border or police authorities (for example, in **Spain**[25] or **Gambia**[26]).

As described more fully below, the conditions in which children are detained vary from place to place and can have varying consequences for the people held in them. In some locations, children are detained in places with material settings prepared specifically for children. In others, abusive conditions are common. Particularly where immigration

19 See U.S. Department of Health and Human Services, 'About Unaccompanied Children's Services,' Administration for Children and Families, Office of Refugee Resettlement, 15 June 2018, Available at https://www.acf.hhs.gov/orr/programs/ucs/about (accessed 21 March 2019).

20 See UN Global Study Questionnaire, Switzerland (State Reply): 'The respective cantonal authorities are responsible for imposing an administrative detention as part of removal proceedings'.

21 '[C]rossing the State Border of the Russian Federation without valid documents for the right to enter the Russian Federation or exit the Russian Federation or without proper permission obtained in the manner prescribed by the legislation of the Russian Federation is punishable by a fine of up to two hundred thousand rubles [USD 3,040] or in the amount of the salary or other income of the convict for a period of up to eighteen months, or forced labor for up to two years, or imprisonment for the same period . . . the criminal responsibility provided for it in this article comes from the age of 16', UN Global Study Questionnaire, Russian Federation (State Replay). In February 2019, one US dollar was equivalent to 65.83 roubles.

22 UN Global Study Questionnaire, Libya (UN Agency): 'Children that are found entering the Libyan territory without a visa, violating the conditions of their visas, overstaying their visas are automatically arrested and detained in detention centers under the DCIM'.

23 UNHCR, Beyond Detention Progress Report mid-2016, Geneva, UNHCR, 2016, p. 43

24 UN Global Study Questionnaire, Iran (UN Agency): 'Persons shall be sentenced to discretionary imprisonment from one to three years and/or payment of fine from 500,000 IRR (5 USD) to 3,000,000 IRR (30 USD) unless their offence is subject to laws with heavier punishment' including '[a]ny person who intentionally cross Iranian borders without proper documentation and permission and also persons who cross illegal routs and or forbidden borders'.

25 UN Global Study Questionnaire, Spain (State Reply).

26 UN Global Study Questionnaire, Gambia (State Reply).

detention is ordered as administrative measure, due process safeguards are often absent or insufficient. Important procedural protections, such as the right to be informed about detention in a language the person understands, access to legal counsel, the right to challenge detention, independent and regular review of detention, access to relatives, and consular access upon the detainee's request,[27] may not be fully guaranteed. Furthermore, as discussed in more detail below, even in conditions which are prepared for children, there is evidence of children suffering harm to their physical and mental health and development.

The conditions and consequences of detention may also vary according to the gender of the child detained. Research on the immigration detention of adults has found that women and men's experiences in detention are often distinct. In the **United States**, for example, women in detention are more vulnerable to sexual assault and exploitation and they have particular health care needs which are often not met.[28] In the **United Kingdom**, research has suggested that normative perceptions of masculinity lead to men facing expectations to deal with the pressures of detention rather than accessing support.[29] These gender dynamics are likely to be repeated for children in detention.

In contexts in which unaccompanied children are detained, the number of girls in detention is frequently much lower than the number of boys (the same tendency is seen in adult facilities, where there are usually substantially fewer women than men in immigration detention), and as a result, girls may receive fewer services than boys. Experiences of being united with or separated from parents may also be gendered, with older boys more likely to be separated from mothers than girls or infants.[30]

In at least 70 States worldwide, LGBTI children are at risk of being criminalised for their sexual orientation.[31] This fact drives many to search for a better and safer future outside their home countries. When arriving in another country however, it often happens that

27 For a review of the principal procedural protections in the context of migration violations, see *Joint General Comment No. 3/22, on the general principles regarding the human rights of children in the context of international migration*, CMW/C/GC/3-CRC/C/GC/22, 16 November 2017, paras. 27-33 & 36-37; Committee on Migrant Workers and Committee on the Rights of the Child, *Joint General Comment No. 4/23* (2017), *op. cit.*, paras. 14-19; Committee on Migrant Workers, *General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families*, CMW/C/GC2, 28 August 2013, paras. 27-35.

28 Michelle Brané & Lee Wang, 'Women: the invisible detainees', *Forced Migration Review,* Vol. 44, September 2013.

29 Sarah Turnbull, 'Gender, Race, and Immigration Detention', *Border Criminologies,* University of Oxford, 17 April 2015, Available at http://bordercriminologies.law.ox.ac.uk/gender-race-and-immigration-detention/ (accessed 3 April 2019).

30 Cf. Francois Crepeau, 'Foreword', Hanna Gros & Yolanda Song, *No Life for a Child,* Toronto, University of Toronto, 2016, pp. 1-2; Human Rights Watch, *Two Years with no Moon: Immigration Detention of Children in Thailand,* 2014, Available at https://www.hrw.org/report/2014/09/01/two-years-no-moon/immigration-detention-children-thailand (accessed 11 August 2019). See also: Section 2, Chapter 5 on Gender Dimension.

31 International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA)/Lucas Ramon Mendos, State-Sponsored Homophobia 2019, Geneva; March 2019.

they are detained anyway – this time only for migration-related reasons. Existing evidence indicates that after entering detention, LGBTI children are not properly informed about their right to seek asylum. They also face significant pressure to accept 'voluntary return' or are denied asylum even though they face persecution in their countries of origin.[32] Additionally, LGBTI children are likely to be particularly vulnerable to discrimination, violence, and harassment during migration and in detention settings, particularly in countries in which homosexuality is outlawed.[33] Transgender children may be assigned to detention facilities on the basis of the sex they were assigned at birth, meaning, for example, that transgender girls may be held in facilities for boys. Alternatively, transgender children may be isolated, with potentially damaging consequences for their mental well-being.

Immigration detention itself may constitute a form of cruel, inhuman, or degrading treatment of children and, depending on the circumstances, sometimes rises to the level of torture. For instance, the UN Special Rapporteur on Torture, Juan Méndez, received reports that children in immigration detention have been 'tied up or gagged, beaten with sticks, burned with cigarettes and given electric shocks,' commonly subjected to solitary confinement, and 'suffered from severe anxiety and mental harm after having witnessed sexual abuse and violence against other detainees.'[34] The UN Special Rapporteur on the Human Rights of Migrants, François Crépeau, received reports that children and adults in immigration detention 'suffer violence, including sexual violence and abuse.'[35] The UN Special Rapporteur on Torture also found that immigration detention frequently subjected children to 'overcrowding, inappropriate food, insufficient access to drinking water, unsanitary conditions, lack of adequate medical attention, and irregular access to washing and sanitary facilities and to hygiene products, lack of appropriate accommodation and other basic necessities.'[36] Similarly, five judgments issued by the European Court of Human Rights in July 2016 on the detention of 'underage children' accompanying their parents in immigration detention found violations of the prohibition of torture and other inhuman or

32 Susan Hazeldean, 'Confounding Identities: The Paradox of LGBT Children under Asylum Law', *University of California, Davis, Law Review,* Vol. 45(2), pp. 2011-2012. Edward J. Alessi, Sarilee Kahn & Sangeeta Chatterji, 'The darkest times of my life: Recollections of child abuse among forced migrants persecuted because of their sexual orientation and gender identity', *Child Abuse & Neglect,* Vol. 51, 2016, pp. 93–105. Amnesty International, *No Safe Place: Salvadorans, Guatemalans and Hondurans seeking asylum in Mexico based on their sexual orientation and/or gender identity*, 2017. For more on LGBTI children see Chapter 8 on Gender Dimension.

33 Cf. Alice Driver, *The Road to Asylum,* Longreads, 2018, Available at https://longreads.com/2018/06/29/the-road-to-asylum/ (accessed 3 April 2019).

34 UN Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, A/HRC/28/68, 5 March 2015, para. 60.

35 UN Human Rights Council, *Report of the Special Rapporteur on the human rights of migrants,* François Crépeau, A/HRC/20/24, 2 April 2012, para. 30.

36 Cf. A/HRC/28/68, *op. cit.*, para. 61.

degrading treatment or punishment on account of the children's age, the duration of their detention, and conditions inherent to their detention.[37]

Furthermore, immigration detention of children is not only a children's rights violation in itself but also frequently causes other human rights violations. For instance, children are sometimes detained with unrelated adults in violation of the international prohibition of this practice.[38] They may also be routinely separated from other family members, in violation of the principle of family unity and with adverse consequences for mental health and development. And they may be held in ordinary jails, prisons, police stations, and other locations not adapted for the accommodation and care of children,[39] contrary to the recommendations of the Human Rights Committee, the Committee on Migrant Workers, the Committee against Torture, and the Committee on the Elimination of Racial Discrimination, among other authorities.[40]

3.2 Purported Justifications

Children are often placed in immigration detention because they have (or are thought to have) entered a country irregularly or because they are suspected of other migration status irregularities, such as overstaying a visa or because of their parents' irregular migration status. In some States, children may be legally considered non-nationals even though they were born in the country and have never lived anywhere else.

When parents are detained for migration purposes, States may suggest that detaining their children with them preserves family unity. At times domestic legislation provides for detention of children as a right of detained parents to have their children with them. In other countries, non-custodial measures are applied for families.

Other official justifications for immigration detention include health and security screening, identity verification, or the facilitation of deportation. The UN Special Rapporteur on Torture

37 Cf. Global Detention Project, 'France Immigration Detention', October 2018, Available at https://www.globaldetentionproject.org/countries/europe/france#_ftn56 (accessed 10 August 2019). See also: ECtHR, *Popov v. France*, Nos. 39472/07 & 39474/07, 19 January 2012, Available at http://www.echr.coe.int/Documents/CP_France_FRA.pdf (accessed 10 August 2019); ECtHR, *Popov v. France*, Nos. 39472/07 & 39474/07, 19 January 2012, Available at http://www.echr.coe.int/Documents/CP_France_FRA.pdf (accessed 10 August 2019).

38 UN General Assembly, *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, 18 December 1990, Article 17; Article 37(c) CRC. See also Articles 10(2)(b) & (3) ICCPR (applicable to 'accused juvenile persons' and 'juvenile offenders').

39 UN Human Rights Council, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Addendum: Mission to Greece, A/HRC/16/52/Add.4, 21 April 2011, paras. 68-69.

40 Cf. Concluding Observations by the UN Human Rights Committee on: Belgium, CCPR/CO/81/BEL, (12 August 2004), para. 17; France, CCPR/C/FRA/CO/4, (31 July 2008), para. 18; Poland, CCPR/C/POL/CO/6, (15 November 2010), para. 18; France, CAT/C/FRA/CO/4-6, (20 May 2010), para. 25; Poland, CAT/C/POL/CO/4, (25 July 2007), para. 12-13; Switzerland, CAT/C/CR/34/CHE, (21 June 2005), para. 5(i).

has noted, in addition, that 'sometimes, children may be inadvertently detained because there is a failure to distinguish between child and adult migrants, such as when children are unable to prove their age.'[41]

States may also claim that they are detaining children in order to protect them, ostensibly using detention to prevent trafficking, smuggling or exploitation. Two of the 42 States that responded to the migration section of the Global Study questionnaire reported using immigration detention of children solely as a protective measure, to prevent potential harm to or exploitation of children (**Gambia**) or in suspected cases of trafficking in persons (**Spain**). Elsewhere, reports show that unaccompanied children in **Greece** have been held in 'protective custody' in police stations or immigration detention centres around the country as of 30 March 2019, despite a European Court of Human Rights ruling that this practice exposed children to degrading treatment.[42]

States may also detain migrant children as part of criminal investigations or on the basis or purported (or potential) wrongdoing. For example, in 2016 and 2017 **U.S.** immigration officials sent a group of teenage boys to child detention centres for suspected gang membership (a vague basis for detention that itself raises due process and arbitrary detention concerns, as discussed more fully in the child justice chapter). Authorities later transferred the children to immigration detention facilities when they could not substantiate the allegations that the boys were gang members.[43]

41 Cf. A/HRC/28/68, *op. cit.*, para. 59.

42 Eva Cossé, 'Greece in Denial About Police Detention of Lone Kids: Athens Fails to Act on European Court Ruling Against Detaining Migrant Kids', *Human Rights Watch*, Available at https://www.hrw.org/news/2019/04/11/european-court-slams-greeces-police-detention-lone-kids (accessed 11 April 2019); ECtHR, *Affaire H.A. et autres c. Grèce*, Application No. 19951/16, 28 February 2019, para. 176; E.K.K.A., *Situation Update: Unaccompanied Children (UAC) in Greece*, 2019, Available at https://data2.unhcr.org/en/documents/download/68044 (accessed 15 April 2019).

43 See Anita Chabria, 'Feds Failed to Prove Undocumented Teens Sent to Jail Were Gang Members, Officials Say,' *Sacramento Bee*, 26 August 2017, Available at https://www.sacbee.com/news/local/article169472962.html (accessed 1 August 2018).

In a few countries, children may also be detained in situations which are defined as an emergency or crisis, such as during a 'mass arrival event' in **New Zealand**[44] or a state of emergency declared 'due to mass migration' in **Hungary**.[45]

Some States employ immigration detention during age assessment procedures. For example, **Belgium**, which prohibits the detention of unaccompanied children, allows immigration detention for age assessment in those cases where doubt remains about the age of a person claiming to be under 18.[46] Children who are unaccompanied and/or separated from their families are included in this assessment procedure.[47]

There are several reasons for the persistence of immigration detention of children despite the emerging international consensus that it is a violation of children's rights, and may constitute a form of cruel, inhuman, or degrading treatment of children, as well as a growing body of evidence that it is harmful to their physical and mental health.

First, hostility toward migration can lead to rhetoric and policy responses that discount or deny the reality that children need special protection and care. For example, U.S. President Donald J. Trump has regularly described unaccompanied children from **Central America** as potential gang members, whom he has in turn described in dehumanising terms: 'They're not people. They're animals, and we have to be very, very tough', he said in May 2018.[48] More generally, some Australian lawmakers have frequently spoken of asylum seekers who arrive irregularly as 'queue jumpers' (implying that the manner of arrival obviates their need for protection) and not 'genuine refugees' (suggesting that some refugees, by definition those

44 New Zealand Legislation, *Immigration Act 2009,* Parliamentary Council Office, Sections 9a, 317a-e, 16 November 2009, Available at http://www.legislation.govt.nz/act/public/2009/0051/126.0/whole.html (accessed 15 April 2019). See also Global Detention Project, *New Zealand Immigration Detention Profile,* Geneva, GDP, 2016.

45 During the state of emergency, families with children and unaccompanied minors (14 to 18 years of age) are compelled to stay in designated 'transit zones' while their asylum claim is processed, see Council of Europe, *Report to the Hungarian Government on the visit to Hungary carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 20 to 26 October 2017*, CPT/Inf (2018) 42, Strasbourg, Council of Europe, 18 September 2018; European Parliament, *Integration of Refugees in Greece, Hungary and Italy. Annex 2: Country Case Study Hungary,* European Parliament, IP/A/EMPL/2016-18, 2017; Hungarian Government, *Hungarian government declares state of emergency due to mass migration,* 2016, Available at http://www.kormany.hu/en/ministry-of-interior/news/hungarian-government-declares-state-of-emergency-due-to-mass-migration (accessed 15 April 2019).

46 Federal public justice service of Belgium, 'Loi du 15 décembre 1980 portant sur l'accès au territoire, le séjour, l'établissement et l'éloignement des étrangers', as amended through 24 December 2018, Belgium, 15 December 1980, Article 74/19; See also 'Loi du 12 janvier 2007 sur l'accueil des demandeurs d'asile et de certaines autres catégories d'étrangers', as amended through 12 March 2018, 12 January 2007, Article 41(2). See also Belgium National Contact Point of the European Migration Network, *The Use of Detention and Alternatives to Detention in the Context of Immigration Policies in Belgium,* June 2014, p. 14.

47 Human Rights Watch, *Boat Ride to Detention: Adult and Child Migrants in Malta,* 18 July 2012, Available at https://www.hrw.org/report/2012/07/18/boat-ride-detention/adult-and-child-migrants-malta (accessed 15 April 2019).

48 Seung Min Kim, 'Trump Warns Against Admitting Unaccompanied Migrant Children: "They're Not Innocent"', *Washington Post,* 23 May 2018, Available at https://www.washingtonpost.com/politics/trump-warns-against-admitting-unaccompanied-migrant-children-theyre-not-innocent/2018/05/23/e4b24a68-5ec2-11e8-8c93-8cf33c21da8d_story.html?utm_term=.2fed6c537f35 (accessed 1 August 2018).

with a well-founded fear of persecution, are not genuine).[49] **Israel's** Prime Minister, Benjamin Netanyahu, has used the term 'infiltrators' to describe asylum seekers from **Africa**.[50]

Second, too often States fail to consider children's specific protection needs. Children's asylum claims are not always well-understood by immigration officials.[51] This is the case for both the child-specific forms such claims may take as well as the independent bases children may have for claiming asylum.[52] Put another way, children are often 'not considered real refugees in their own right,' as the legal scholar Jacqueline Bhabha has observed.[53] Additionally, children can have claims for protection falling outside the asylum regime. Children who do not fit the specific legal category of 'refugee' may still be in vulnerable situations and need specific protection because of the situations they left behind, the circumstances in which they travel or the conditions they face on arrival, or because of personal characteristics such as their age, gender identity, disability or health status.[54] Such bases for protection are often poorly understood and may not be adequately reflected in law or implemented in practice.[55]

49 A research paper by the Australian Parliament's Department of Parliamentary Services noted in 2015, 'There is a view that asylum seekers, particularly those who arrive in Australia by boat, are "jumping the queue" and taking the place of a more deserving refugee awaiting resettlement in a refugee camp. The concept of an orderly queue does not accord with the reality of the asylum process.' Parliament of Australia, Department of Parliamentary Services, 'Asylum Seekers and Refugees: What Are the Facts?' *Research Paper Series,* 2014-15, 2 March 2015. See generally Fiona Mckay, Samantha L. Thomas & Susan Kneebone, '"It Would Be Okay if They Came Through the Proper Channels": Community Perceptions and Attitudes Toward Asylum Seekers in Australia,' *Journal of Refugee Studies,* Vol. 25, 2012, pp. 113-133.

50 Oren Liebermann, 'Fleeing Africa to Safety, then Labelled as an "Infiltrator" in Israel,' *CNN*, 13 February 2018, Available at https://www.cnn.com/2018/02/09/middleeast/israel-african-migrants-intl/index.html (accessed 1 August 2018).

51 See, for example, Richard Warren & Sheona York, *How children become failed asylum-seekers: Research report on the experiences of young unaccompanied asylum-seekers in Kent from 2006 to 2013, and how 'corrective remedies' have failed them*, Canterbury, Kent Law Clinic, University of Kent, 2014, pp. 18-19, Available at https://kar.kent.ac.uk/44608/ (accessed 1 August 2019); Jo Wilding & Marie-Bénédicte Dembour, *Whose Best Interests? Exploring Unaccompanied Minors' Rights Through the Lens of Migration and Asylum Processes,* Brighton, University of Brighton, 2015, Available at https://www.brighton.ac.uk/_pdf/research/crome/14-oct-15-final-minas-full-report.pdf (accessed 1 August 2018); Amanda Levinson, 'Unaccompanied Migrant Children: A Growing Phenomenon with Few Easy Solutions,' *Migration Policy Institute,* 24 January 2011, Available at https://www.migrationpolicy.org/article/unaccompanied-immigrant-children-growing-phenomenon-few-easy-solutions (accessed 1 August 2018); Jacqueline Bhabha, 'Seeking Asylum Alone: Treatment of Separated and Trafficked Children in Need of Refugee Protection,' *International Migration,* Vol. 42, 2004, pp. 141-148. See also Independent Chief Inspector of Borders and Immigration, *An Inspection into the Handling of Asylum Applications Made by Unaccompanied Children, February-June 2013,* October 2013, Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/546850/An-Inspection-into-the-Handling-of-Asylum-Applications-Made-by-Unaccompanied-Children-Oct_2013.pdf (accessed 1 August 2018).

52 UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees,* HCR/GIP/09/08, 2009, para. 3. See also CRC-Committee, *General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin,* CRC/GC/2005/6, 1 September 2005, para. 74 (which notes several other child-specific forms and manifestations of persecution such as persecution of family members, underage recruitment into military service, trafficking of children for sexual exploitation, other forms of sexual exploitation, and subjection to female genital mutilation).

53 Jacqueline Bhabha, *Child Migration and Human Rights in a Global Age,* Princeton, Princeton University Press, 2014, p. 206.

54 UN General Assembly, *Global Compact for Safe, Orderly and Regular Migration,* A/RES/73/195, 11 January 2019, para. 23.

55 OHCHR, *Principles and Guidelines, supported by practical guidance, on the human rights protection of migrants in vulnerable situations,* 2018, page 9.

Third, States may consider detention the best or the only way to ensure that they can ensure the return of children. In many cases, however, this is because the return of children is being prioritised on enforcement grounds rather than on an assessment that it is in the best interests of the child. Assuming that return is in the best interests of the child, non-custodial measures often have not been established that could be employed during return proceedings. In other cases, non-custodial measures are available but only as pilot projects or on a limited basis. In fact, as discussed more fully later in this chapter, there is substantial basis for concluding that non-custodial measures and other solutions sufficiently address States' legitimate objectives without resorting to deprivation of liberty.

Nevertheless, it should also be noted that the immigration detention of children is not a universally accepted global practice. Several countries have agreed in recent years to end or sharply reduce immigration detention of children. The **United Kingdom** has publicly committed to ending detention of children for immigration purposes.[56] **Japan**[57], **Panama**[58], **Taiwan**,[59] and **Turkey**[60] have enacted legislation or taken other steps to prohibit or restrict the immigration detention of children, and a **South African** court has ruled that children may only be held in immigration detention as a last resort.[61]

56 UK Border Agency, *Review into Ending the Detention of Children for Immigration Purposes*, December 2010, Available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/257654/child-detention-conclusions.pdf (accessed 15 April 2019).

57 Global Detention Project, 'Japan Immigration Detention,' Available at https://www.globaldetentionproject.org/countries/asia-pacific/japan#factsfigures (accessed 1 August 2018). Noting that immigration authorities have in recent years granted provisional release to anyone under age 18.

58 See Republic of Panama, *Decreto Ley No. 3,* 22 February 2008, Article 93, Available at http://www.acnur.org/fileadmin/Documentos/BDL/2008/6077.pdf?file=fileadmin/Documentos/BDL/2008/6077 (accessed 1 August 2018).

59 Ministry of the Interior, Republic of China (Taiwan), *Immigration Act,* 23 January 2015, Article 38, para. 1(3): noting that the National Immigration Agency 'would desist [from] or cease' detention of children under age 12. Available at https://www.moi.gov.tw/english/english_law/law_detail.aspx?sn=332 (accessed 1 August 2018).

60 Ministry of the Interior, Republic of Turkey, *Law No. 6458 on Foreigners and International Protection,* Articles 66(b) & (c): providing that '[t]he Ministry for Family and Social Policies shall place unaccompanied children in suitable facilities, in the care of their adult relatives, or a foster family' but that '[c]hildren over 16 years of age may be placed in reception and accommodation centers'. Available at http://www.refworld.org/docid/5167fbb20.html (accessed 1 August 2018).

61 See Transvaal Provincial Division, *Centre for Child Law and Another v. Minister of Home Affairs and Others, 2005 (6) SA 50 (T)*, South Africa, No. 22866/04, 13 September 2004; Republic of South Africa, *Refugees Act*, 2 December 1998, Section 29(2).

Examples of deprivation of liberty in practice

- Saladu (35), a **Somali** woman, experienced Saudi authorities detaining her for nine days with her two children, aged 7 and 9, and her sister's three children before deporting them: 'The room we stayed in with 150 other women and children was extremely hot and there was no air conditioning. The children were sick. My son was vomiting and his stomach was very bloated. There were no mattresses, people just slept on the floor,' she said.[62]
- **Thailand's** immigration laws permit the indefinite detention of all refugees, and children are held in squalid cells without adequate food or little or no opportunity to exercise or receive an education. Children have experienced immigration detention centres to sometimes be so crowded that they must sleep sitting up.[63]
- The **United States** has operated dedicated family immigration detention centres since 2001[64] and at intervals detained families for reasons related to their migration status in earlier years.[65] The number of detention beds for families increased markedly after 2014, when large numbers of Central American families and unaccompanied children began to arrive in the United States; in all, the three family detention centres currently in operation have a capacity of just over 3,650, as compared with under 100 in 2013.[66] The average length of stay in 2017 was 58 days, but some families were held for nearly two years.[67] The number of unaccompanied children in immigration detention has increased even more dramatically, reaching 13,200 in October 2018 as compared with 2,400 in May 2017, largely because they are detained for much longer than in previous years.[68]
- As part of the **Australian** Government´s policy of pushback and mandatory detention of all arrivals by sea, until recently hundreds of children were held in immigration

62 Human Rights Watch, *Saudi Arabia: 12,000 Somalis Expelled,* 18 February 2014, Available at https://www.hrw.org/news/2014/02/18/saudi-arabia-12000-somalis-expelled# (accessed 18 October 2019).

63 Human Rights Watch, *Two Years with No Moon: Immigration Detention of Children in Thailand* (New York: Human Rights Watch, 2014), p. 3, https://www.hrw.org/report/2014/09/01/two-years-no-moon/immigration-detention-children-thailand (accessed 18 October 2019).

64 See generally American Bar Association, Commission on Immigration, *Family Immigration Detention: Why the Past Cannot Be Prologue,* 31 July 2015.

65 See for example, Robert S. Kahn, Other People's Blood: U.S. Immigration Prisons in the Reagan Decade, Boulder, Colo., Westview Press, 1996, pp. 117-119; Michael Welch, Detained: Immigration Laws and the Expanding I.N.S. Jail Complex, Philadelphia, Temple University Press, 2003, p. 109. For discussions of immigration detention in the first half of the twentieth century, see Erika Lee & Judy Yung, Angel Island: Immigrant Gateway to America, Oxford, Oxford University Press, 2010.

66 See Ingrid Eagly, Steven Shafer & Jana Whalley, 'Detaining Families: A Study of Asylum Adjudication in Family Detention,' *California Law Review,* Vol. 106, 2018, p. 801.

67 Emily Kassie & Eli Hager, 'Inside Family Detention, Trump's Big Solution,' *The Marshall Project,* 22 June 2018, Available at https://www.themarshallproject.org/2018/06/22/inside-family-detention-trump-s-big-solution (accessed 1 August 2018).

68 See Caitlin Dickerson, 'Detention of Migrant Children Has Skyrocketed to Highest Levels Ever,' *New York Times,* 12 September 2018, Available at https://www.nytimes.com/2018/09/12/us/migrant-children-detention.html (accessed September 2018); Jonathan Blitzer, 'To Free Detained Children, Immigrant Families Are Forced to Risk Everything,' *The New Yorker,* 16 October 2018, Available at https://www.newyorker.com/news/dispatch/to-free-detained-children-immigrant-families-are-forced-to-risk-everything (accessed 7 October 2018).

detention. In 2014, the Australian Human Rights Commission recorded 584 children in immigration detention centres on **mainland Australia**, 305 held on **Christmas Island**, and 179 in Australia's offshore detention centre on **Nauru**.[69] After a 2014 National Inquiry into Children in Immigration Detention, **Australia** sharply reduced the use of immigration detention of children, recording 113 children in detention onshore in 2015 and fewer than 5 detained onshore in each of 2017 and 2018.[70] After October 2015, authorities on **Nauru** allowed refugees and asylum seekers greater freedom of movement around the island, in a step that was widely interpreted as a response to litigation in **Australia** that had challenged the lawfulness of asylum seekers' detention.[71] In late 2018, following growing pressure from hundreds of charities, human rights groups, medical and legal organisations, as well as doctors,[72] the **Australian** Government had begun to transfer people away from **Nauru**. Between 15 October and 1 November 2018, 135 people were brought to **Australia** from **Nauru**, including 47 children.[73] George Brandis, the former attorney general, now the high commissioner to the UK, confirmed that all children now held in immigration detention on **Nauru** will be transferred to **Australia** by the end of 2018.[74] However, the Australian Government continues to insist that those transferred to Australia for medical care will not be able to remain in Australia.[75]

69 Australian Human Rights Commission, *The Forgotten Children: National Inquiry into Children in Immigration Detention*, Sydney, Australian Human Rights Commission, 2014, p. 21.

70 See Australian Government Department of Immigration and Border Protection and Australian Border Force, *Immigration Detention and Community Statistics Summary 30 September 2015;* Australian Government Department of Immigration and Border Protection and Australian Border Force, *Immigration Detention and Community Statistics Summary 31st December 2017;* Australian Government Department of Immigration and Border Protection and Australian Border Force, *Immigration Detention and Community Statistics Summary 30th June 2018*.

71 See Paul Farrell, 'Nauru Says It Will Allow Asylum Seekers Free Movement on Island at All Times,' *The Guardian,* 3 October 2015, Available at https://www.theguardian.com/world/2015/oct/03/nauru-says-it-will-allow-asylum-seekers-free-movement-on-island-at-all-times (accessed 7 November 2018); See also Human Rights Watch & Amnesty International, *Australia: Appalling Abuse, Neglect of Refugees on Nauru,* 2 August 2016, Available at https://www.hrw.org/news/2016/08/02/australia-appalling-abuse-neglect-refugees-nauru (accessed 7 November 2018). For a recent overview of refugee and asylum-seeking children's life on Nauru, see Mridula Amin & Isabelle Kwai, 'The Nauru Experience: Zero-Tolerance Immigration and Suicidal Children,' *New York Times*, 5 November 2018, Available at https://www.nytimes.com/2018/11/05/world/australia/nauru-island-asylum-refugees-children-suicide.html (accessed 7 November 2018).

72 See Katherine Murphy, '"It Galls Me": The Doctor Turning the Political Tide on Nauru's Child Refugee Crisis,' *The Guardian*, 17 October 2018, Available at https://www.theguardian.com/world/2018/oct/18/it-galls-me-the-doctor-turning-the-political-tide-on-naurus-child-refugee-crisis (accessed 24 November 2018); Helen Davidson, 'How Australia Finally Started to Care About Asylum Seekers and Refugees on Nauru,' *The Guardian,* 27 October 2018, Available at https://www.theguardian.com/australia-news/2018/oct/27/how-australia-finally-started-to-care-about-asylum-seekers-and-refugees-on-nauru (accessed 24 November 2018).

73 Helen Davidson & Calla Wallquist, 'All Refugee Children to Be Removed from Nauru by Year's End, Brandis Confirms,' *The Guardian,* 1 November, 2018, Available at https://www.theguardian.com/australia-news/2018/nov/01/nauru-children-morrison-removed, (accessed 24 November 2018). See also Helen Davidson, 'Eleven Refugee Children Transferred from Nauru to Australia in One Day,' *The Guardian,* 23 October 2018, https://www.theguardian.com/australia-news/2018/oct/22/australia-spends-480000-more-in-legal-fees-on-nauru-detainee-healthcare-claims (accessed 24 November 2018); Saba Vasefi & Helen Davidson, 'Many Families Remain Separated amid Ongoing Nauru Medical Transfers,' *The Guardian,* 9 November 2018, Available at https://www.theguardian.com/australia-news/2018/nov/10/many-families-remain-separated-amid-ongoing-nauru-medical-transfers (accessed 24 November 2018).

74 Helen Davidson & Calla Wahlquist, 'All refugee children to be removed from Nauru by year's end, Brandis confirms', The Guardian, 1 November 2018.

75 Katherine Murphy, 'The Coalition Is Right to Remove Children from Nauru – But There's Very Little to Celebrate,' *Guardian*, 1 November 2018, Available at https://www.theguardian.com/australia-news/2018/nov/01/the-coalition-is-right-to-remove-children-from-nauru-but-theres-very-little-to-celebrate (accessed 24 November 2018).

3.3 Immigration Detention of Children Violates International Law

As explained in the introductory chapter on the right to personal liberty, Article 37(b) CRC applies a fairly strict standard with respect to the right of personal liberty. Children may only be deprived of liberty as a measure of last resort and, if absolutely necessary as an exceptional measure, then only for the shortest appropriate period of time. The question therefore arises whether migration-related detention of children can ever be justified as a measure of last resort.[76] In addition, the principle of the best interests of the child in Article 3 CRC requires that States would have to prove that the detention of children for purely migration-related reasons is in the best interests of the child. Migration-related detention might also violate the right of the child to life, survival and development in Article 6 CRC and might amount to cruel, inhuman or degrading treatment in violation of Article 37(a) CRC. As the following quotes from international and regional human rights bodies show, there is an emerging international consensus that the detention of children for purely migration-related reasons, whether with their families or as unaccompanied or separated children, can never meet these high standards.

Already in 2005, the CRC-Committee observed in a General Comment that 'detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status, or lack thereof.'[77] In 2010, the UN Working Group on Arbitrary Detention stated: 'Given the availability of alternatives to detention, it is difficult to conceive of a situation in which the detention of an unaccompanied minor would comply with the requirements stipulated in Article 37(b), clause 2, of the CRC, according to which detention can be used only as a measure of last resort.'[78] Additionally, the Parliamentary Assembly of the Council of Europe concluded in 2011 that 'no detention of unaccompanied children on migration grounds should be allowed'[79] and has called on States to 'introduce legislation prohibiting the detention of children for immigration reasons'.[80] In 2012, the UN Special Rapporteur on the Human Rights of Migrants, Francois Crépeau, dedicated his thematic report to 'Detention of migrants in an irregular situation' and concluded in a similar way

76 See in this respect e.g. Mariette Grange & Izabella Majcher, 'Immigration detention under international human rights law: the legal framework and the litmus test of human rights treaty bodies monitoring', Michael J. Flynn & Mathew B.Flynn (eds.), *Challenging Immigration Detention: Academics, Activists and Policy-makers,* Edward Elgar Publishers, Cheltenham 2017, pp. 265-292; Ton Liefaard, 'Deprivation of Liberty of Children', Ursula Kilkelly & Ton Liefaard (2018), *op. cit.*, pp. 321-332; Ciara M. Smyth, 'Towards a Complete Prohibition on the Immigration Detention of Children', *19 Human Rights Law Review,* 2019, pp. 1-36.

77 Cf. CRC/GC/2005/6, *op. cit.*, para. 61.

78 UN Human Rights Council, *Report of the Working Group on Arbitrary Detention*, A/HRC/13/30, 18 January 2010, para. 60.

79 Council of Europe, *Unaccompanied Children in Europe: Issues of Arrival, Stay and Return,* Parliamentary Assembly, Resolution 1810 (2011), 15 April 2011, para. 5.9.

80 Council of Europe, *The Alternatives to Immigration Detention of Children,* Parliamentary Assembly, Resolution 2020 (2014), 3 October 2014, para. 9.2.

that the detention of children 'cannot be justified solely on the basis of their migratory or residence status, or lack thereof.'[81] On the basis of a Day of General Discussion, the CRC-Committee in 2012 observed that the 'detention of a child because of their or their parent's migration status constitutes a child rights violation'.[82]

In June 2014, twenty-one prominent UN entities, intergovernmental organizations, and civil society organisations spearheaded by the Office of the United Nations High Commissioner for Human Rights (OHCHR), UNICEF and the International Detention Coalition (IDC), formed an Inter-Agency Working Group to End Child Immigration Detention in order to support States to 'expeditiously and completely' end the practice of child immigration detention, consistent with the UN Convention on the Rights of the Child. This inter-agency working group noted the 'that lack of data makes it difficult to determine how many children are detained due to their immigration status around the world each year' and expressed their support for the UN Global Study on Children Deprived of Liberty as an important step in addressing this gap.[83]

In July 2014, the UN Secretary-General also stated clearly that the 'detention of migrant children constitutes a violation of child rights.'[84] In the same vein, the European Parliament has adopted several resolutions condemning the detention of children for migration-related purposes, and called upon European Union Member States to 'cease, completely and expeditiously, the detention of children on the basis of their immigration status, to protect children from violations as part of migration policies and procedures and to adopt alternatives to detention that allow children to remain with family members and/or guardians.'[85]

In an Advisory Opinion of 2014, the Inter-American Court of Human Rights found that the detention of children solely on the basis of their migration status exceeds the requirement of necessity, is contrary to children's best interests, and is incompatible with regional human rights treaties. States should therefore never deprive children of their liberty on the basis of their own or their parents' or guardians' migration status.[86] The Court also addressed the argument often used by States that the principle of family unity would require that

81 Cf. A/HRC/20/24, *op. cit.*, para. 41.

82 CRC-Committee, Report of the 2012 Day of General Discussion: The Rights of all Children in the Context of International Migration, 28 September 2012, para. 78.

83 Inter-Agency Working Group to End Child Immigration Detention, *Ending Child Immigration Detention,* 2016, Available at https://endchilddetention.org/wp-content/uploads/2016/09/IAWG_Advocacy-Brochure_Aug-2016_FINAL-web.pdf (accessed 18 October 2019).

84 UN General Assembly, Report of the UN Secretary-General of 25 July 2014 on International Migration and Development, A/68/190, para. 75.

85 European Parliament, European Parliament resolution of 4 February 2014 on undocumented women migrants in the European Union, Resolution 2013/2115(INI), 2014

86 Inter-American Court of Human Rights, Advisory Opinion OC 21-14 on the 'Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection', 19 August 2014, paras. 154-160.

children are detained together with their parents: 'When the child's best interest requires keeping the family together, the imperative requirement not to deprive the child of liberty extends to her or his parents and obliges the authorities to choose alternative measures to detention for the family, which are appropriate to the needs of the children.'[87]

In 2016, all member States of the United Nations committed themselves in the New York Declaration for Refugees and Migrants to 'work towards the ending of (the) practice' of detaining children for the purpose of determining their migration status.[88] Moreover, in February 2017 the former Special Representative to the Secretary-General for International Migration, Peter Sutherland, in his final report to the UN General Assembly, called on States and other stakeholders to act on their international legal obligations towards migrant children by ending the detention of migrant children and their families for reasons related to their migration status and, drawing on the work of the Inter-Agency Working Group to End Child Immigration Detention, adopting rights-focused care alternatives to detention.[89] Also in 2017, the European Committee for the Prevention of Torture stated that States should 'avoid resorting to the deprivation of liberty of an irregular migrant who is a child'.[90]

In a joint General Comment, which was developed through a consultative process over two years and adopted in 2017, the CRC-Committee and the UN Committee on Migrant Workers held that 'the possibility of detaining children as a measure of last resort, which may apply in other contexts such as child criminal justice, is not applicable in immigration proceedings as it would conflict with the principle of the best interest of the child and the right to development.'[91] The two UN treaty monitoring bodies, therefore, concluded that 'child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice. Resources dedicated to detention should be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family'.[92]

Although this opinion would contradict the legal interpretation developed above, namely that Article 37(b) CRC applies to all forms of deprivation of liberty, the position of the two UN treaty monitoring bodies seems to suggest that there is an international trend to move

87 Inter-American Court of Human Rights, Advisory Opinion OC 21-14 on the 'Rights and Guarantees of Children in the Context of Migration and/or in Need of International Protection', 19 August 2014, para. 158.

88 UN General Assembly, *New York Declaration for Refugees and Migrants*, A/RES/71/1, 3 October 2016, para. 33.

89 UN General Assembly, Globalisation and interdependence: Follow-up on the outcome of the Millennium Summit, A/71/728, 3 February 2017, para. 52.

90 Council of Europe Committee for the Prevention of Torture (CPT), *Immigration Detention – Factsheet*, CPT/Inf(2017)3, pp. 8 & 9.

91 Cf. CMW/C/GC/4-CRC/C/GC/23, *op. cit.*, para.10. See also Smyth (2019), *op. cit.*; Liefaard (2008) *op. cit.*

92 Ibid., para. 12.

beyond the Article 37(b) standard as far as immigration detention of children is concerned. The Global Study argues that there is no need to move beyond the Article 37(b) standard as the principle of the best interests of the child in Article 3 CRC and the right of the child to life, survival and development in Article 6 CRC are not in conflict with the principle of last resort in Article 37(b) CRC. On the contrary, these rights and principles reinforce each other.[93]

On 11 June 2018, eleven independent UN experts also issued a joint statement addressed to the **United States** Government in which they expressed the legal opinion that 'children should never be detained for reasons related to their own or their parents' migration status'.[94] In its Revised Deliberation of 2018, the UN Working Group on Arbitrary Detention reiterated its position in clear terms: 'The deprivation of liberty of an asylum-seeking, refugee, stateless or migrant child, including unaccompanied or separated children, is prohibited.'[95]

These and other statements by international and regional authorities illustrate an emerging international consensus that the detention of children for purely migration-related reasons is prohibited under various provisions of the CRC. This is also reflected in a strong inter-agency commitment against any form of migration-related detention of children expressed by an overwhelming consensus of UN entities, UN human rights treaty bodies, UN special procedures mandate holders, and regional human rights bodies and experts.[96] Research conducted for the Global Study, including State responses to the questionnaire and other sources, also shows that there is a general consensus among States that they must work to end child and family immigration detention.[97] Indeed there is a growing number of States that no longer detain children for migration-related reasons (see above), and many others that have never done so. This State practice underlines the opinion of international and regional human rights experts that there are always alternatives to detention that meet States' legitimate objectives in responsibly governing international migration, without depriving children of the right to personal liberty for reasons related to their, or their parents' migration status. Both migrant families with children as well as unaccompanied and separated children can always be lodged in open family-type and community-based settings.

93 Cf. Smyth (2019), *op. cit.*; Liefaard (2008) *op. cit.*

94 UN experts to US of 22 June 2018: 'Release migrant children from detention and stop using them to deter irregular migration'.

95 Cf. Revised Deliberation No. 5 (2018), *op. cit.*, para. 5.

96 See Inter-Agency Working Group to End Child Immigration Detention, *Summary of normative standards and recommendations on ending child immigration detention*, 2016, Available at https://bettercarenetwork.org/sites/default/files/IAWG_Child%20Detention%20Standards_Aug%202016_FINAL.pdf (accessed 18 October 2019).

97 UN General Assembly, *New York Declaration for Refugees and Migrants*, A/RES/71/1, 3 October 2016, para. 33.

3.4 Global Data on Immigration Detention of Children

This section gives an overview of the main data on the scale of child migration around the world and the detention of children for migration related purposes. Precise data on the immigration detention of children at a global scale are missing. There are major differences in how child migration and the detention of children are defined, observed and measured from place to place. As a result, it is difficult to gain a precise overview of the scale of the immigration detention of children around the world or to assess the conditions in which they are detained and whether changes occur over time.

a. Data on Children who Migrate

The available data shows that children make up an important part of migrant populations around the world. The composition of these populations and the proportion composed by children can vary greatly in different situations.

UNICEF has stated that in 2017, 30 million of the 258 million people living outside of the country of their birth were children.[98] Data from UN DESA on world migrant stocks is disaggregated to indicate the proportion of the global population of 'young migrants' under 20 years old (these datasets do not separate children under the age of 18 from 18- and 19-year-olds). These data show that the number of young migrants around the world is increasing. Whereas in 1995 there were an estimated 28.9 million migrants under the age of 20 around the world, in 2017 this had risen to 36 million. However, the total global migrant population has grown to a greater degree over this time. As a result, the proportion of the estimated total migrant population who are under 20 years old has declined from 18% in 1995 to 14% in 2017.[99] Children also often make up a large proportion of populations which have been displaced across international borders.[100] Among the Rohingya fleeing **Myanmar**, for example, 55% were children.[101] In **Turkey** at the end of 2017 there were 3.8 million refugees and asylum seekers, of whom 1.6 million were children.[102]

98 UNICEF, *Child Migration*, last update December 2018, Available at https://data.unicef.org/topic/child-migration-and-displacement/migration/ (accessed 17 October 2019).

99 Data from the United Nations Department of Economic and Social Affairs (UNDESA), *Trends in International Migrant Stock: Migrants by Age and Sex*, United Nations database, POP/DB/MIG/Stock/Rev.2015, 2015, https://www.un.org/en/development/desa/population/migration/data/estimates2/estimates17.asp (accessed 17 October 2019).

100 Data available at http://popstats.unhcr.org/en/demographics (accessed 26 September 2018). These data do not reflect the total number of people of concern as not all countries report the data for each age category to UNHCR.

101 UNHCR, Global Trends: Forced Displacement in 2017, 2018, Geneva, UNHCR, p. 25.

102 UNICEF, *Turkey Co 2017 Humanitarian Results*, December 2017, Available at https://www.unicef.org/appeals/files/UNICEF_Turkey_Humanitarian_Situation_Report_Dec_2017.pdf (accessed 27 February 2019).

However, data sources on the scale of child migration are not always consistent among each other and comparable across countries. They use varying age ranges, methods of counting and definitions of whether children are in families or unaccompanied. According to UNICEF, only 77% of the world's countries and territories have age-disaggregated migrant stock data showing how many migrants of different age groups reside in a certain territory. In **Africa** only 57% do. When it comes to refugees, only 56% of global data sources are broken down by age.[103] In the **Horn of Africa**, for example, data on children who migrate has been criticised as being 'partial' and 'highly fragmented'.[104]

b. Children at Risk of Immigration Detention

The shortcomings in the available data on children in migration and the absence of reliable data on undocumented migrants make it especially difficult to estimate how many children around the world could be in situations in which they are at risk of immigration detention. Many children are placed in immigration detention due to irregularly entering, staying in or exiting a country. But accurate data on how many people migrate or reside in an irregular status in countries around the world is severely lacking. As noted by the Clandestino project, 'assessments of the size of the irregular migrant population are often vague and of unclear origin' and 'the nonregistered nature of irregular migration makes any quantification difficult and always produces estimates rather than hard data'.[105]

Some data sources give an indication of how many children are in situations in which they could be potentially detained for immigration purposes in particular locations. In the **United States**, for example, unaccompanied children and family units have represented an average of 25% of all apprehensions at the border per year over the past five years; nearly all such apprehensions are followed by some period of detention. Pew Research Center also produces frequent regular estimates of the size of the unauthorised population in the country. They state that 'in 2016, 5.6 million children younger than 18 were living with unauthorised immigrant parents. Of these, 675,000 were unauthorised immigrants themselves.'[106] In the EU, in contrast, figures are available for the number of people detected residing in Member States

103 UNICEF, *A call to action: Protecting children on the move starts with better data,* New York, UNICEF, 2018, Available at https://data.unicef.org/resources/call-action-protecting-children-move-starts-better-data (accessed 28 July 2019).

104 Save the Children & Regional Mixed Migration Secretariat, *Young and on the move,* Nairobi, 2016.

105 Clandestino Research Project, *Size And Development of Irregular Migration to the EU,* 2009, Available at http://clandestino.eliamep.gr/wp-content/uploads/2009/12/clandestino_policy_brief_comparative_size-of-irregular-migration.pdf (accessed 27 February 2019).

106 Jeffrey S. Passel & D'Vera Cohn, *U.S. Unauthorized Immigrant Total Dips to Lowest Level in a Decade,* 2018, Available at http://www.pewhispanic.org/2018/11/27/u-s-unauthorized-immigrant-total-dips-to-lowest-level-in-a-decade (accessed 27 February 2019).

in an irregular status.[107] According to this data, an average of 79,000 people under 18 years of age were detected per year with an irregular immigration status in the 28 EU Member States between 2008 and 2017. Over this time, children represented an average of 10% of the total number of people who were found to be residing with an irregular status.

However, there are very few similar or comparable datasets which measure the number of migrants in an irregular status in other locations. Instead, a patchwork of available evidence highlights that children live and migrate in an irregular status in many regions of the world but cannot reliably allow precise estimates to be made. The Turkish government has published data on apprehensions at its border, but this is not disaggregated by age, for example.[108] In the **Horn of Africa**, migrant smuggling and trafficking are considered by some to involve 80% of all international migrants in the region, including children who are alone or with family members, but there is little data available on them.[109] Similarly, reports from **Afghanistan** and **Pakistan** note that an increasing proportion of people smuggled from these countries are families with children or unaccompanied children.[110] A Human Rights Watch study from 2008 noted that many children of **North Korean** parents residing without a clear legal status in **China** faced potential detention and repatriation.[111] In the **Russian Federation**, over 42,000 persons were placed in immigration detention in 2015. This likely includes children, but Russian official statistics are not disaggregated.[112] Based on this information, it is clear that children in a range of countries around the world may be at risk of immigration detention, but it is not possible to give precise estimates of the total number, nor to track trends.

c. Children in Immigration Detention

Although a significant proportion of the world's migrants are children and many of them may be at risk of immigration detention, there is insufficient detailed information on the actual prevalence of the practice, particularly on the number of children in detention, for

107 European Commission, 'Third country nationals found to be illegally present - annual data (rounded)', Eurostat, Available at https://ec.europa.eu/eurostat/web/products-datasets/product?code=migr_eipre (accessed 27 February 2019).

108 Cf. Republic of Turkey, Ministry of Interior, *Directorate General of Migration Management,* Available at http://www.goc.gov.tr/icerik6/duzensiz-goc_363_378_4710_icerik (accessed 28 July 2019).

109 Nassim Majidi & Linda Oucho, 'East Africa', Marie McAuliffe & Franck Laczko (eds.), *Migrant Smuggling Data and Research: A global review of the emerging evidence base,* Geneva, IOM, 2016; Ivan Martin & Sara Bonfanti, *Migration and Asylum Challenges in Eastern Africa: Mixed Migration Flows Require Dual Policy Approaches,* Florence EUI, 2015.

110 Nassim Majidi & Richard Danziger, 'Afghanistan', Marie McAuliffe & Franck Laczko (eds.), *op. cit.*

111 Human Rights Watch, *Denied Status, Denied Education,* New York, 2008.

112 Russian Federation, *The Final Report of the FMS of Russia for 2015 year* (in Russian), General Administration for Migration Issues, pp. 38-40, Available at, https://гувм.мвд.рф/upload/site1/document_file/Itogovyy_doklad_na_19.02.16.pdf(accessed 11 November 2018).

how long they are there and the reasons why.[113] Some States detain children but do not collect data, whereas others refuse to make their data available. Others may collect data but not systematically and not consistently disaggregated by age. In several countries, the available information refers only to children in families, whereas in others it only refers to unaccompanied or separated children. There is no common, accepted methodology for collecting and storing data on children in immigration detention.[114] Some States collect and publish their data consistently over time, but for many others the only available insights come from single snapshots at particular moments in time in response to requests from researchers, parliamentarians, or visits by monitoring bodies and NGOs to detention centres.

As a result, many studies of the deprivation of liberty of children for migration-related purposes are based on individual case studies, ad hoc data collection and momentary observations. Although they make an important and valuable contribution to understanding the varied situations in which immigration detention of children does and does not occur, as well as documenting some of the difficulties with collecting more precise data, they are unable to present a comprehensive global overview.

In February 2018, under the ambit of the Global Study data were requested from States on all children deprived of liberty, including for migration-related reasons. Of the 92 countries that replied to the Study questionnaire, only 42 countries completed the migration section. Fourteen of those reported that they do not detain children for migration-related reasons; 28 reported that they do. We also received submissions on migration-related detention from non-governmental organisations, academics, and others. After reviewing and assessing those submissions along with publicly available official data, published reports, and other secondary material, we developed a secondary dataset containing information on immigration detention of children in 105 States over the past decade. However, it should be noted that, despite being the most extensive collection of data possible on the topic, this still provides only a limited view of the practice around the world.

Based on the collated data, we find evidence that **at least 80 States around the world deprive children of liberty for migration purposes**. A further **24 States** (2 of which are not a UN member)[115] **do not, or claim not to, deprive children of liberty for migration purposes**. Moreover, it should also be noted that there is a worrying lack of information about whether

113 Carolyn Hamilton, Kristen Anderson, Ruth Barnes & Kamena Dorling, *Administrative Detention of Children: a global report*, New York, UNICEF, 2011, p. 62.

114 See Global Detention Project, *Children in Immigration Detention: Challenges of Measurement and Definition*, Geneva, Global Detention Project, June 2015, p. 3.

115 This includes 22 UN Member States and two non-members (specifically Anguilla and Taiwan).

children are placed in immigration detention in the remaining 91 Member States of the United Nations.

Data which is disaggregated by gender is available for only 15% of the countries which detain children for migration purposes. These data show that one third of the children recorded in immigration detention are female and two-thirds are male.

It should also be noted that there are wide-reaching variations in the immigration detention of children in different regions of the world. These variations highlight the fact that although immigration detention of children is used in a broad range of different countries and contexts, it is not a truly global nor consistently implemented practice. There are also large differences when it comes to detention of unaccompanied children.

In **Africa**, there is a varied pattern of States using immigration detention of children. There is evidence that children are deprived of their liberty for migration purposes in much of North Africa (specifically **Egypt**[116], **Libya**[117] and **Tunisia**[118]), but detailed information – including on the conditions in which children are detained – is lacking. Elsewhere across the continent, immigration detention of children is inconsistently used. It has been documented in Eastern Africa (**Djibouti**[119], **Ethiopia**[120], **Kenya**[121], and **Tanzania**[122]), West and Central Africa

116 A recent study in Egypt found that children may be held in immigration detention facilities, police stations and prisons and international observers have often been denied access to detention facilities. Global Detention Project, *Country Report Immigration Detention in Egypt: Military Tribunals, Human Rights Abuses, Abysmal Conditions, And EU Partner,* Geneva, GDP, 2018.

117 In Libya it is known that unaccompanied children and children with family members are held in detention centres, often with adults, which may be run by the Libyan Department for Combatting Illegal Migration or by armed groups with unclear lines of authority and oversight. There have been numerous reports over recent years describing conditions in Libyan detention centres but gaining access and documenting this detention in detail is very complicated. One recent report notes 'armed groups across Libya, including those affiliated with the State, hold thousands of men, women and children in prolonged arbitrary and unlawful detention, and subject them to torture and other human rights violations and abuses. Victims have little or no recourse to judicial remedy or reparations, while members of armed groups enjoy total impunity.' OHCHR/UNSMIL, *Detained and Dehumanised: Report on Human Rights Abuses Against Migrants in Libya,* United Nations Support Mission in Libya, 2016. See also OHCHR, *Abuse Behind Bars: Arbitrary and unlawful detention in Libya,* New York, Office of the United Nations High Commissioner for Human Rights in cooperation with the United Nations Support Mission in Libya, 2018; Human Rights Watch, *'No Escape from Hell': EU Policies Contribute to Abuse of Migrants in Libya,* 2019, p. 2 ('Human Rights Watch witnessed large numbers of children, including newborns, detained in grossly unsuitable conditions in Ain Zara, Tajoura and Misrata detention centers').

118 Global Detention Project, *Immigration Detention in Tunisia,* Geneva, Global Detention Project, 2014.

119 Regional Mixed Migration Secretariat, *Behind Bars: The Detention of Migrants in and from the East and Horn of Africa*, February 2015, pp. 48-49, Available at http://www.mixedmigration.org/wp-content/uploads/2018/05/011_behind-bars.pdf (accessed 18 October 2019).

120 Global Detention Project, *Ethiopia Immigration Detention Profile,* August 2016, Available at https://www.globaldetentionproject.org/countries/africa/ethiopia (accessed 18 October 2019).

121 Cf. *Behind Bars* (2015), *op. cit.*, pp. 61-64; Global NextGen Index, "Kenya," 31 January 2018, Available at http://next-gen-index.org/wp/en/scorecards/kenya/ (accessed 18 October 2019).

122 Cf. *Behind Bars* (2015), *op. cit.*, pp. 72-75.

(**Angola**[123], **Burkina Faso**[124], **Gambia**[125], **Niger**[126]) and in Southern Africa (**Malawi**[127], **Zambia**[128]), but evidence is not comprehensive of all countries and there is little information on scale or conditions. Whereas reports from **Angola**, for example, have stated that detention is widespread, such as the UN Human Rights Council 2014 report of 'the deportation of more than 30,000 children, amongst whom were unaccompanied children, including children below the age of five',[129] in **Gambia** the decision to deprive a child of liberty is in order to 'deter or prevent children from potential harm or exploitation of any form [...] any actions to be taken when and how is always directed towards the best interest principle of the child'.[130] **South Africa** has national legislation prohibiting immigration detention of children and reported in response to the questionnaire that it does not detain children for migration-related reasons.[131] There have nevertheless been reports of immigration detention of children in South Africa. In 2016, MSF reported that dozens of children were unlawfully detained in one detention centre, the Lindela Repatriation Centre, which is managed by a private company.[132]

In **Asia**, immigration detention of children is prevalent in several countries but reliable documentation of it is severely lacking. There is evidence of children being detained for

123 Global Detention Project, *Immigration Detention in Angola,* Geneva, Global Detention Project, 2016, Available at https://www.globaldetentionproject.org/immigration-detention-in-angola (accessed 18 October 2019).

124 UN Global Study Questionnaire, Burkina Faso (State Reply).

125 UN Global Study Questionnaire, Gambia (State Reply).

126 Global Detention Project, *Immigration Detention in Niger: Expanding the EU-Financed Zone of Suffering Through "Penal Humanitarianism"?* March 2019, Available at https://www.globaldetentionproject.org/immigration-detention-niger-2019 (accessed 18 October 2019).

127 Global NextGen Index, "Malawi," 31 January 2018, Available at http://next-gen-index.org/wp/en/scorecards/malawi/ (accessed 18 October 2019).

128 Global NextGen Index, "Zambia," 31 January 2018, Available at http://next-gen-index.org/wp/en/scorecards/zambia/ (accessed 18 November 2019).

129 UN Human Rights Council, Compilation prepared by the Office of the United Nations High Commissioner for Human Rights in accordance with paragraph 15 (b) of the annex to Human Rights Council resolution 5/1 and paragraph 5 of the annex to Council resolution 16/21, 2014.

130 UN Global Study Questionnaire, Gambia (State Reply).

131 UN Global Study Questionnaire, South Africa (State Reply).

132 Lawyers for Human Rights, *Violence and violations at Lindela Repatriation Centre,* n.d., Available at https://www.lhr.org.za/news/2017/violence-and-violations-lindela-repatriation-centre (accessed 18 October 2019); South African Human Rights Commission, *Children illegally detained under Bosasa's watch at Lindela as healthcare crumbles,* 13 December 2017, Available at https://www.sahrc.org.za/index.php/sahrc-media/news/item/1075-children-illegally-detained-under-bosasa-s-watch-at-lindela-as-healthcare-crumbles (accessed 18 October 2019).

migration purposes at least in **Indonesia**,[133] **Japan**,[134] **Malaysia**,[135] **South Korea**,[136] **Sri Lanka**,[137] and **Thailand**.[138] Data shows a declining use of immigration detention in some places, such as **Malaysia** where the number of children in immigration detention fell from 2,142 in 2013 to 166 in 2017.[139] However, elsewhere this is not the case and reports describe conditions in detention in the region as poor. For example, in 2016 UNHCR commented that there were 'limited detention safeguards in national legislation, such as the absence of detention reviews and the right to challenge detention before a court of law, as well as the lack of implementation of such safeguards in practice' in **Indonesia**.[140] In 2012, the CRC-Committee also criticised **Thailand** for systematically detaining children and sometimes detaining them with adults[141] and in 2014 Human Rights Watch described immigration detention of children there as 'arbitrary' and 'indefinite.'[142] Notably, in 2016, the **Thai** Prime Minister affirmed the need to end child detention, and in January 2019, the Government established new internal procedures to release children and their mothers from immigration detention to community-based alternatives.[143] Immigration detention is also practiced in at least seven countries in the **Middle East** and **the Gulf**: **Iran**,[144] **Israel**,[145] **Kuwait**,[146] **Lebanon**,[147]

133 UNHCR, Beyond Detention: A global strategy to support governments to end detention of asylum-seekers and refugees 2014-2019, Geneva, Switzerland, 2019.

134 Global Detention Project, 'Japan Immigration Detention', Available at https://www.globaldetentionproject.org/countries/asia-pacific/japan#factsfigures (accessed 1 August 2018).

135 *Cf. Beyond Detention* (2019), *op. cit.*

136 Global NextGen Index, *Republic of Korea,* 2018, Available at http://next-gen-index.org/wp/en/scorecards/republic-of-korea (accessed 15 April 2019).

137 UN Global Study Questionnaire, Sri Lanka (State Reply).

138 UNHCR, Beyond Detention: A global strategy to support governments to end detention of asylum-seekers and refugees - 2014-2019, Progress report mid-2016, Geneva, Switzerland, 2016. See also Lisa Button, Unlocking childhood: Current immigration detention practices and alternatives for child asylum seekers in Asia and the Pacific, Save the Children & Asia Pacific Refugee Rights Network, 2017, Available at https://resourcecentre.savethechildren.net/node/12161/pdf/unlocking_chiildhood.pdf (accessed 11 August 2019).

139 Cf. *Beyond Detention* (2019), *op. cit.*

140 Cf. *Beyond Detention* (2016), *op. cit.*, p. 49.

141 CRC-Committee, Consideration of reports submitted by States parties under article 44 of the Convention. Concluding observations: Thailand, CRC/C/THA/CO/3-4, 17 February 2012.

142 Cf. HRW, Two Years with No Moon (2014), *op. cit.*

143 Vivienne Chew, 'How Change Happened in Thailand', *International Detention Coalition*, 21 March 2019.

144 UN Global Study Questionnaire, Iran (UN Agency).

145 Cf. Beyond Detention (2019), *op. cit.*

146 Global Detention Project, *Immigration Detention in Kuwait,* Geneva, GDP, 2016.

147 Global Detention Project, *Country Detention Report: Immigration detention in Lebanon; deprivation of liberty at the frontiers of global conflict,* Geneva, GDP, 2018, Available at https://www.globaldetentionproject.org/wp-content/uploads/2018/02/GDP-Immigration-Detention-Report-Lebanon-2018-1.pdf (accessed 16 October 2019).

Saudi Arabia,[148] **United Arab Emirates**,[149] and **Yemen**.[150] There is little or no information on the scale of child immigration detention or the conditions in which children are held in the region. One exception is **Israel**, where a review of detention practices in 2012 criticised the Government for detaining families in prisons,[151] but subsequent changes to legislation in the country introduced exceptions allowing release from detention for unaccompanied and separated children and for accompanied children (a humanitarian clause).[152] Since 2014, reports claim that no children have been detained in **Israel**.[153]

In **Europe**, immigration detention of children is employed extensively. Evidence has been collated for the Global Study of immigration detention of children being allowed in 40 European countries.[154] Focusing on the EU, a 2017 report from the EU Fundamental Rights Agency noted that one EU Member State, **Ireland**, prohibited the immigration detention of any children in asylum or return procedures. There are limitations in several European countries on who can be detained, such as in **Austria** where children under the age of 14 cannot be detained but children over the age of 14 can be detained for up to three months.[155] In the **Czech Republic**[156], **Finland**[157], **Latvia**[158] and **Poland**[159], children under the age of 15 cannot be detained but those over the age of 15 can be.

148 Global Detention Project, *Saudi Arabia Immigration Detention,* 2016, Available at https://www.globaldetentionproject.org/countries/middle-east/saudi-arabia (accessed 15 April 2019).

149 Global Detention Project, *Immigration Detention in United Arab Emirates,* Geneva, GDP, 2016.

150 RMMS, Behind bars: the detention of migrants in and from the East and Horn of Africa, Nairobi, 2015.

151 Hotline for Migrant Workers, Detention of Minors and Children Arriving from the Sinai Desert, 2012.

152 Israel, *Prevention of Infiltration Law,* 1954, Available at https://www.refworld.org/docid/55116dca4.html (accessed 5 April 2019).

153 Cf. Beyond Detention (2019), *op. cit.*

154 Albania, Austria, Belgium., Bosnia Herzegovina, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, North Macedonia, Norway, Poland, Portugal, Republic of Moldova, Romania, Russia, San Marino, Serbia, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom. See Council of Europe, *A study of immigration detention practices and the use of alternatives to immigration detention of children*, Strasbourg, 2017; European Migration Network, *The use of detention and alternatives to detention in the context of immigration policies, Country case studies,* 2014; the European Union Agency for Fundamental Rights, *European legal and policy framework on immigration detention of children,* 2017, UN Global Study Questionnaire, Albania (State Reply), Austria (State Reply), Belgium (State Reply), Bosnia Herzegovina (State Reply), Croatia (State Reply), Denmark (State Reply), Estonia (State Reply), Italy (State Reply), Liechtenstein (State Reply), Lithuania (State Reply), Portugal (State Reply), Romania (State Reply), Russia (State Reply), Slovenia (State Reply), Spain (State Reply), Sweden (State Reply), Switzerland (State Reply), Ukraine (State Reply), United Kingdom (State Reply).

155 UN Global Study Questionnaire, Austria (State Reply).

156 UN Global Study Questionnaire, Czech Republic (Ombudsman).

157 Global Detention Project, Country Report Immigration Detention in Finland: Limited Use Of 'Alternatives,' Restrictive Detention Review, Divisive Political Debate, Geneva, GDP, 2018.

158 Global Detention Project, *Country Detention Report: Immigration Detention in Latvia: Giving "Accommodation" a Whole New Meaning,* Geneva, GDP, 2019, Available at https://www.globaldetentionproject.org/immigration-detention-latvia-giving-accommodation-whole-new-meaning (accessed 16 October 2019)

159 UN Global Study Questionnaire, Poland (NGO).

There is no single consistent trend in immigration detention of children across European countries. In some, there has been a decline in the number of children deprived of liberty for migration purposes over recent years. For example, in the **United Kingdom** 63 children were detained in 2017, a reduction from 1,119 in 2009.[160] Elsewhere, however, there has been an increase in children placed in immigration detention, such as in **Hungary** (increase from 255 in 2015 to 1,254 in 2017).[161] In **France**, six non-governmental organisations reported that authorities held 304 children in mainland detention centres and 2,493 children in detention in the overseas department of **Mayotte**, an island located in the Indian Ocean between the northern tip of **Madagascar** and **Mozambique**. Of those held in metropolitan **France**, one in three was between the ages of 2 and 6.[162] In the questionnaire reply from **Spain**, it stipulated that the country does not detain children for migration-related reasons. However, the Jesuit Refugee Service found 93 children (probably minors) in immigration detention in 2018 and a smaller number of children in immigration detention in 2015.[163] Spanish law prohibits the immigration detention of children who are not accompanied by their parents, but allows children to be detained together with their parents.[164]

In **North America**, the **United States** and **Mexico** have made extensive use of immigration detention of children for immigration purposes over the past decade. In **Mexico** official data recorded 10,893 apprehensions of children in 2008, which had increased to 43.027 in the first eight months of 2019.[165] In all, over the period of more than 10 years from 2008 through August 2019, the **Mexican** Government carried out more than 232,000 detentions of children for migration-related purposes[166] with the share of unaccompanied children varying between 47% (2014-2017) and 22% (2019).[167]

160 Data from UK Government Home Office, Available at https://www.gov.uk/government/publications/immigration-statistics-january-to-march-2016/list-of-tables#detention (accessed 4 April 2019). See also *Beyond Detention* (2019), *op. cit.*

161 Cf. Beyond Detention (2019), *op. cit.*

162 Assfam-groupe SOS solidarités, Forum refugiés-Cosi, France terre d'asile, La Cimade, Ordre de Malte France & Solidarité Mayotte, *Centres et locaux de rétention administrative: 2017 rapport,* 2018, p. 16.

163 See Servicio Jesuita de Migrantes, *Informe CIE 2018: Discriminación de Origen,* Madrid, 2019, Available at https://sjme.org/wp-content/uploads/2019/06/Informe-CIE-2018-SJM.pdf (accessed 16 October 2019).

164 BOE Legislación Consolidada, Ley Orgánica 4/2000, de 11 de enero, sobre derechos y libertades de los extranjeros en España y su integración social, Articles 62(4) & 62 para. 1(i), BOE núm. 10, 12 January 2000.

165 Compare Secretaría de Gobernación, *Boletín estadístico 2007*, table 3.1.2, Available at http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Extranjeros_alojados_y_devueltos_2007 (1 September 2018), with Secretaría de Gobernación, *Boletín estadístico 2016,* table 3.1.5; Available at http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Extranjeros_alojados_y_devueltos_2016, (accessed 17 September 2018); Secretaría de Gobernación, *Boletín estadístico 2017,* table 3.1.5, Available at http://clandestino.eliamep.gr/wp-content/uploads/2009/12/clandestino_policy_brief_comparative_size-of-irregular-migration.pdf (accessed 17 September 2018); Secretaría de Gobernación, *Boletín estadístico 2018,* table 3.1.5, Available at http://portales.segob.gob.mx/es/PoliticaMigratoria/CuadrosBOLETIN?Anual=2018&Secc=3 (accessed 18 October 2019);

166 Data from the Secretaria de Gobernacion, Available at http://www.politicamigratoria.gob.mx/es_mx/SEGOB/Boletines_Estadisticos (accessed 3 April 2019); Secretaría de Gobernación, *Boletín estadístico 2018*, table 3.1.5, Available at http://portales.segob.gob.mx/es/PoliticaMigratoria/CuadrosBOLETIN?Anual=2018&Secc=3 (accessed 18 October 2019); Secretaría de Gobernación, *Boletín estadístico 2019,* table 3.1.5, Available at http://portales.segob.gob.mx/es/PoliticaMigratoria/CuadrosBOLETIN?Anual=2019&Secc=3 (accessed 18 October 2019).

167 Secretaría de Gobernación, *Boletín estadístico 2018,* table 3.1.5, Available at http://portales.segob.gob.mx/es/PoliticaMigratoria/CuadrosBOLETIN?Anual=2018&Secc=3 (accessed 18 October 2019); Secretaría de Gobernación, *Boletín estadístico 2019,* table 3.1.5, Available at http://portales.segob.gob.mx/es/PoliticaMigratoria/CuadrosBOLETIN?Anual=2019&Secc=3 (accessed 18 October 2019).

In the **United States**, in a period of 3 years, between 2013 and 2015 immigration authorities detained 278,885 children.[168] Apprehensions (and detention) of children reached a peak between October 2018 and August 2019, the first 11 months of the fiscal year 2019 (fiscal year, FY), when US Customs and Border Protection (CBP) apprehended 72,873 unaccompanied children and 457,871 members of 'family units' at or near the US-Mexico border.[169] Between 2013 and 2018, the annual number of apprehensions of unaccompanied children varied between ca. 39,000 and ca. 69,000. The annual number of apprehensions of 'family units'[170] varied between ca. 15,000 and 107,000 annually[171].

In **Canada**, immigration detention has occurred on a smaller scale.[172] Between 2008 and the end of 2012, an average of 396 children were detained each year.[173] From 2013 to the end of 2017 this has declined to 97 children detained in 2016 and 91 in 2017. These figures did not include children who are Canadian citizens but residing in detention centres with their parents who are foreign nationals, because the children themselves were not subject to a detention order.

The scale of immigration detention of children in **Oceania** has been declining over recent years. This is mainly due to the **Australian** Government reducing its use of offshore detention (specifically, on **Nauru** and **Christmas Island**) and increasing its use of community-based non-custodial measures on the Australian mainland. Whereas in 2013 there were 3,784 children in detention, by 2017 this had fallen to 145.[174] In late 2018 the Australian Government increased transfer of children off **Nauru**, and all children had been moved off **Nauru** by the

168 Cf. Beyond Detention (2016), *op. cit.*

169 CBP, 'Southwest Border Migration FY 2019,' 9 September 2019, Available at https://www.cbp.gov/newsroom/stats/sw-border-migration (accessed 10 September 2019).

170 Family Unit Aliens (FMUA) are people apprehended at the border (either a child under 18 years old, parent, or legal guardian) apprehended with a family member. For example, a mother and child apprehended together are counted as two family units.

171 US Customs and Border Protection (CBP), 'United States Border Patrol Southwest Family Unit Subject and Unaccompanied Alien Children Apprehensions Fiscal Year 2016,' 18 October 2016 (table giving apprehension figures for FY13-FY16), Available at https://www.cbp.gov/newsroom/stats/southwest-border-unaccompanied-children/fy-2016, (accessed 7 February 2019). See generally William A. Kandel, 'Unaccompanied Alien Children: An Overview,' *Congressional Research Service,* 28 January 2017, Available at https://fas.org/sgp/crs/homesec/R43599.pdf, (accessed 7 February, 2019). For an overview of apprehensions from FY 2005 to FY 2010, see US Department of Homeland Security, Office of Immigration Statistics, Policy Directorate, *Fact Sheet: Apprehensions by the US Border Patrol: 2005-2010,* July 2011, Available at https://www.dhs.gov/xlibrary/assets/statistics/publications/ois-apprehensions-fs-2005-2010.pdf, (accessed 7 February 2019). For aprrehensions in FY 2018 see: CBP, 'Southwest Border Migration FY 2018,' 9 November 2018, Available at https://www.cbp.gov/newsroom/stats/sw-border-migration/fy-2018, (accessed 19 October 2019).

172 Hanna Gros & Yolanda Song '*No Life for a Child:. A Roadmap to End Immigration Detention of Children and Family Separation,* Toronto, University of Toronto, 2016. For an earlier study of children in immigration detention in Canada, see Canadian Council for Refugees, *Detention and Best Interests of the Child,* Montreal, Canadian Council for Refugees, 2016.

173 UN Global Study Questionnaire, Canada (State Reply).

174 UN Global Study Questionnaire, Australia (State Reply).

end of February 2019.[175] However, in **Australia** detention is not limited by a set timeframe – rather, it ends when the person is either granted a visa or is removed from **Australia** – and it is mandatory, meaning that an officer does not have the discretion to decide whether or not to detain an 'unlawful non-citizen'.[176]

Finally, in **Central and South America** immigration detention of children is considerably less prevalent than elsewhere. Since 2017, no country which is either a full or associated member of MERCOSUR has a detention centre. Only a few of them allow the detention of adult migrants in their national legislation, and even those countries forbid the detention of children in legislation or do not carry out detentions in practice. In **El Salvador**[177] and **Brazil**,[178] for example, there is no legislation that establishes the deprivation of liberty of children on migration-related grounds. In Colombia, when a child is found the migration authority must contact the Police of Children and Adolescents or in their absence the authorities of the National Family Welfare System and activate the means of protection and restoration of the rights of the child until their migratory situation is defined.[179]

It is also important to note that while some of those countries, such as **Argentina**, have been a receiving country of South-South migration over recent decades, others have only more recently become destinations of intra- and inter-regional migration from other countries. In particular, between 2016 and 2019, inclusive, **Argentina**, **Brazil**, **Chile**, **Colombia**, **Ecuador** and **Perú** have received more than three million people who have fled from **Venezuela**.[180] Nevertheless, none of these countries has, to date, initiated the use of immigration detention as a regular practice. Increasingly, when needed, children and families are hosted in open shelters or child protection facilities. Instead, as it has been highlighted by UN entities, 'Host countries in the region have, thus far, maintained a commendable open-door policy and demonstrated considerable solidarity towards Venezuelans. This openness and solidarity are clearly reflected in the landmark Quito Declaration on Human Mobility of

175 See Helen Davidson, 'Last Four Refugee Children Leave Nauru for Resettlement in the US,' *The Guardian*, 27 February 2019, Available at https://www.theguardian.com/world/2019/feb/28/last-four-refugee-children-leave-nauru-for-resettlement-in-us (accessed 10 September 2019); Katherine Murphy, '"It Galls Me": The Doctor Turning the Political Tide on Nauru's Child Refugee Crisis,' *The Guardian*, 17 October 2018, Available at https://www.theguardian.com/world/2018/oct/18/it-galls-me-the-doctor-turning-the-political-tide-on-naurus-child-refugee-crisis (accessed 24 November, 2018); Helen Davidson, 'How Australia Finally Started to Care About Asylum Seekers and Refugees on Nauru,' *The Guardian*, 27 October 2018, Available at https://www.theguardian.com/australia-news/2018/oct/27/how-australia-finally-started-to-care-about-asylum-seekers-and-refugees-on-nauru, (accessed 24 November 2018).

176 UN Global Study Questionnaire, Australia (State Reply).

177 UN Global Study Questionnaire, El Salvador (State Reply).

178 UN Global NextGen Index, *Brazil Scorecard*, Available at http://next-gen-index.org/wp/en/scorecards/brazil/ (accessed 3 April 2019).

179 UN Global Study Questionnaire, Colombia (State Reply).

180 See UNHCR, *Stocks of Venezuelan population in the region - August 2019,* Available at https://data2.unhcr.org/es/documents/details/70676 (accessed 12 August 2019).

Venezuelan Citizens in the Region, adopted in September 2018, starting a regional initiative among governments of impacted countries'.[181] Indeed, while this Declaration includes commitments for protecting their rights (including through measures that facilitate a regular status) it does not contemplate measures focused on strengthening control policies and practices, as detention.[182]

The Use of Migration-related Detention for Children

COUNTRY	CHILDREN DETAINED	YEAR
UNITED STATES	103,140 / 69,550*	2015 / FY 2019
MEXICO	18,066	2017
MAYOTTE (FRA)	2,493	2017
HUNGARY	1,254	2017
INDONESIA	982	2017

*includes only unaccompanied children

24 COUNTRIES THAT DO NOT DETAIN:

ANGUILLA*, ARGENTINA, BENIN, BRAZIL, CHILE, COLOMBIA, CONGO, COSTA RICA, ECUADOR, EL SALVADOR, HONDURAS, IRELAND, JAPAN, LAO PEOPLE'S DEMOCRATIC REPUBLIC, LIBERIA, MADAGASCAR, MAURITIUS, NICARAGUA, PANAMA, PERU, QATAR, SAO TOME AND PRINCIPE, SOUTH AFRICA, TAIWAN*

Source: Global Study questionnaire supplemented with data extracted from official statistics, data from international organizations and peer-reviewed literature.

181 IOM, UNHCR, UNICEF *et al.*, 'Regional Refugee and Migrant Response Plan for Refugees and Migrants from Venezuela January-December 2019', 2019, p. 13.

182 See: *Declaration of Quito on Human Mobility of Venezuelan Citizens in the Region*, September 2018, Available at https://www.cancilleria.gob.ec/wp-content/uploads/2018/09/declaracion_de_quito_en.pdf (accessed 11 August 2019).

In sum, it is difficult to develop an accurate picture of the extent to which children are detained around the world, to monitor trends over time or to compare across different contexts. It is clear that immigration detention is widely employed by States but takes a range of forms in different parts of the world. However, several countries have never detained children for immigration purposes, and others have agreed in recent years to end or sharply reduce detention of migrant children, families, and, in some cases, all migrants (e.g. **Ecuador**[183]). Despite the evolution of the relevant human rights norms towards a prohibition of detention of children, there is no single, clear trend towards it being eliminated. Furthermore, where States do not gather information at all, it may mean that they are not monitoring the conditions in which children in their countries are residing.

The Global Scale of Child Immigration Detention

Efforts to estimate the global scale of the immigration detention of children have repeatedly been limited by the incomplete available data on the practice around the world. Many States do not publish data on non-citizens placed in immigration detention, including on the scope of children deprived of liberty for migration-related purposes.

Between 2013 and 2014 the Global Detention Project and Access Europe approached 33 countries in **Europe** and **North America** with freedom of information requests for data on immigration detention. They received only 17 adequate responses with details about the number of children detained.[184] Several countries responded saying that they did not collect data at all on children in detention.

As part of its Beyond Detention strategy, UNHCR has recorded the scale of immigration detention in 12 countries since 2013.[185] In 2014, they recorded 164,248 detained children, which then decreased by 14% to 141,800 in 2015.[186] In 2018, UNHCR noted evidence of further declines in some countries such as the **United Kingdom**, **Malaysia**, and **North Macedonia**,

183 See Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, *Concluding observations on the third periodic report of Ecuador*, CMW/C/ECU/CO/3, 5 October 2017, para. 22.

184 Global Detention Project & Access Info Europe, *The Uncounted: The Detention of Migrants and Asylum Seekers in Europe*, December 2015, p. 4.

185 Canada, USA, Mexico, United Kingdom, Lithuania, Hungary, Malta, Israel, Zambia, Thailand, Indonesia and Malaysia. Cf. UNHCR, *Beyond Detention Baseline Report*, Geneva, UNHCR, 2014.

186 Cf. Beyond Detention (2016), *op. cit.*

alongside large increases in child immigration detention in others such as **Hungary** and **Mexico**.[187] Moreover, it was not possible to trace an overall trend as information on two of the countries was not included (**Thailand** and **United States**). For the Global Study, statistics on the number of children in detention could be obtained for only 50 of the 80 States for which there is evidence of children being detained for migration purposes. Only 22 of those States provided annually updated statistics every year for the past 5 years, and only 10 of those had done so for every year over the past 10 years.

To seek to address these limitations, we developed statistical models to estimate missing values. This involved modelling the relationships between immigration detention data and other geographical, socio-economic and demographic variables (see Chapter 3 on Data Collection and Analysis). **The calculations find that at least 330,000 children may be deprived of liberty for migration-related purposes around the world per year.** Still, this figure should be interpreted with caution. Estimates should not be treated as a precise reflection of the scale of the practice, but as a guide to the minimum number of children which may reasonably be expected to be placed in immigration detention per year. It is likely to be a significant under-estimation of the true figure, due to limitations regarding the quality, consistency and coverage of information around the world.

187 UNHCR, Beyond Detention Progress Report 2018, Geneva, UNHCR, 2019.

For many countries, there is insufficient information available on children in detention. Some children are not included in statistics, such as those considered to be accompanying detained parents but not subject to detention orders themselves. Children held in *ad hoc* temporary arrangements, at border posts, police stations or in prisons for instance, are not always counted in statistics either. In some States, children who are undergoing age assessments or who seek a review of an adverse age assessment can be deprived of liberty, but they are not always included in the data.

There is also a lack of data on variables which may lead to more or less people being detained in different countries. For example, there are no consistently recorded and age-disaggregated global datasets on children making irregular border crossings or residing in an irregular status. There is also little reliable information on the duration of detention in different countries or on the capacity of the facilities in which children are detained.

Finally, any global estimate is based on the assumption that immigration detention of children will be similar in countries for which there is no data as it is in countries for which data are available. This cannot be guaranteed. Indeed, because immigration detention is not mandatory in many countries, decisions to detain might not be consistent from one place to another. To develop a more accurate representation of the true scale of the practice, significantly broader, more accurate, and more consistently collated information is needed.

4. Consequences of Deprivation of Liberty of Children for Migration-related Purposes

Studies have repeatedly found that children in immigration detention experience serious harm. Immigration detention has consistently been associated with physical and mental health concerns, either as a result of children being detained with existing health conditions that are exacerbated in detention (especially trauma) or of new conditions arising in detention contexts (such as anxiety and depression).[188] There is also evidence that detention can increase the likelihood of children self-harming or attempting suicide. However, there is an urgent need for further research and evidence of the consequences of immigration detention for children.[189]

As noted earlier in this chapter, the conditions in which children are detained vary enormously from one place to another. Even within individual countries, stark differences in the conditions of detention can be found. Some detention centres and prisons have developed spaces for children to have access to education and play, whereas others are more restrictive, overcrowded, unhygienic or place children in accommodation with adults. Differences in detention conditions affect the extent to which children can access necessary care facilities, have health conditions diagnosed, or are exposed to potentially distressing or violent incidents.

The consequences of detention may also vary for different groups of children who are detained. Negative consequences may be amplified when multiple forms of vulnerability intersect, but there is a need for specifically focused research to better understand the extent to which it is so. For example, studies of adults in detention have found sexual harassment to be more commonly experienced by women than men and this may also be the case for children, particularly those who are unaccompanied or separated. There is little, if any, evidence of detention settings having specific provisions for LGBTI people. The data collated for the Global Study also shows evidence of children being detained for migration-related purposes in at least 19 countries where homosexuality is outlawed.[190] In these places the combination of being a child, with an irregular migration status,

188 See, for example, Julie Linton, Marsha Griffin & Alan J. Shapiro, 'Detention of Immigrant Children', *Pediatrics*, Vol. 139(5), 2017; Francesca Esposito, José Ornelas, Erica Briozzo & Caterina Arcidiacono, 'Ecology of Sites of Confinement: Everyday Life in a Detention Center for Illegalized Non-citizens,' *American Journal of Community Psychology,* Vol. 63(1-2), pp. 190-207, 2019; Michael J. Dudley *et al.*, 'Children and young people in immigration detention', *Current Opinion in Psychiatry,* Vol. 25(4), 2012, pp. 285-292; Soorej J. Puthoopparambil *et al.*, *Quality of life among immigrants in Swedish immigration detention centres: a cross-sectional questionnaire study,* Global Health Action, 2015; Zachary Steel, Derrick Silove, Robert Brooks, Shakeh Momartin, Bushra Alzuhairi & Ina Susljik, 'Impact of immigration detention and temporary protection on the mental health of refugees,' *British Journal of Psychiatry* Vol. 188, 2006, pp. 58-64.

189 See Chapter 6 on the Impacts on Health of Children Deprived of Liberty.

190 This figure has been reached by cross referencing the Global Study data with a dataset on anti-gay laws produced by Paula Gerber, Available at https://antigaylaws.org/all-countries-alphabetical/(accessed 4 April 2019).

unaccompanied, and LGBTI can increase a person's vulnerability and amplify the negative consequences of being detained.

Further detail is offered below through a range of case studies from the existing research. This represents the best available evidence on the consequences of immigration detention for children. Nevertheless, there is a need for more sustained and consistent data collection and analysis from inside contexts of migration detention in which children are held. As one review has summed up, 'few studies have directly witnessed the life and experiences of people confined to migration-related detention centers'.[191] Researchers face numerous constraints when it comes to obtaining access to detention facilities. It can be particularly difficult to consistently gather data which enables an examination of the evolution of children's condition in detention over time. In most cases studies are carried out by non-governmental organisations which have had to negotiate access to detention centres and data sources on an ad hoc basis, rather than through sustained direct engagement and assessment over time and in different detention settings.[192] As one example of good practice, **France** allows authorised NGOs to have access to immigration detention centres to provide legal and social assistance to immigration detainees.[193]

The remainder of this section focuses on the consequences of immigration detention on different dimensions of children's lives, health and wellbeing. In doing so, it provides further evidence that immigration detention is not in the best interests of the child.

191 Francesca Esposito *et al.*, 'Migration-related detention centers: the challenges of an ecological perspective with a focus on justice', BMC: International Health and Human Rights, Vol. 15(13), 2015.

192 E.g. Sara Mares & Jon Jureidini, 'Psychiatric assessment of children and families in immigration detention clinical, administrative and ethical issues', *Aust N Z J Public Health,* Vol. 28, 2004, pp. 520–526; Steel, Zachary; Shakeh Momartin, Catherine Bateman, Atena Hafshejani, Derrick M. Silove, Naleya Everson, Konya Roy, Michael Dudley, Louise Newman, Bijou Blick & Sarah Mares, 'Psychiatric status of asylum seeker families held for a protracted period in a remote detention centre in Australia', *Australian and New Zealand Journal of Public Health,* Vol. 28(6), 2004, pp. 527-536, Rachel Kronick, Cécile Rousseau & Janet Cleveland, 'The Mental Health and Wellbeing of Refugee Children in Detention in Canada: A Pilot Study', *Paediatrics and Child Health,* Vol. 19(6), 2014; Rachel Kronick, Cécile Rousseau & Janet Cleveland, 'Asylum-seeking children's experiences of detention in Canada: A qualitative study', *American Journal of Orthopsychiatry,* Vol. 85(3), 2015, pp. 287-294; Aamer Sultan & Kevin O'Sullivan, 'Psychological disturbances in asylum seekers held in long term detention: a participant-observer account', *Med J Austr*., 2001, pp. 175 & 593-596. Ann Lorek *et al.* (2009), 'The Mental and Physical Health Difficulties of Children Held Within a British Immigration Detention Center: A Pilot Study', *Child abuse and neglect,* Vol. 33(9), 2009, pp. 573-585. Kimberly Ehntholt *et al.*, 'Mental health of unaccompanied asylum-seeking adolescents previously held in British detention centers', *Clinical Child Psychology and Psychiatry,* Vol. 23(2), 2018, pp. 238-257.

193 CESEDA, *Code de l'entrée et du séjour des étrangers et du droit d'asile* (Code of Entry and Residence of Foreigners and of the Right to Asylum), Article R.553-14 (France). See Global Detention Project, *Country Profile France: Immigration Detention in France: Longer, More Widespread, and Harder to Contest*, Geneva, 2018, Available at https://www.globaldetentionproject.org/immigration-detention-france (accessed 16 October 2019).

4.1 Children's Physical and Mental Health and Development

Despite limitations in the available evidence on the implications of the deprivation of liberty for children's health, it is clear that poor physical and mental health are often associated with being held in immigration detention.

On one hand, immigration detention has been repeatedly shown to aggravate children's pre-existing mental health conditions. This is particularly significant in the case of children who have had to migrate to find safety from contexts of persecution, war or violence in places of origin. Other children may have faced similar risks during their journeys. As a result, cases of trauma and post-traumatic stress disorder (PTSD) related to experiences prior to being detained are often found in detention contexts. As one report from an advisory committee of the US Department of Homeland Security noted in 2016, 'for many of the women and children detained [...] medical conditions resulted from domestic violence, sexual assault, attempted sexual assault, and/or other traumatic events in their home country, during their travel, and after arriving in the U.S.'[194] On the other hand, evidence shows that mental and physical health conditions can also arise in immigration detention, with an increased prevalence of children suffering mental health conditions in particular. These include, but are not restricted to, limited personal development, anxiety, depression and post-traumatic stress disorder.[195] As a result, immigration detention often leads to violations of the child's right to the highest attainable standard of health (Art. 24 CRC); the right to a standard of living adequate for the child's physical, mental, spiritual, moral, and social development (Art. 27 CRC) and the right to physical and psychological recovery (Art. 39). Although some detention settings provide children with opportunities to rest and carry out recreational activities (Art. 31 CRC), many do not, and even when they are provided it is often for a limited time. This lack can further exacerbate the harmful consequences.

A significant body of evidence highlighting the health consequences of immigration detention comes from **Australia**. Inquiries by the Australian Human Rights Commission in 2004 and 2014 underlined the harmful consequences of children being detained there. In 2004, it was found that children in detention for extended periods of time were 'at high risk of serious mental harm'.[196] Long-term detention was found to be a cause, or aggravator,

194 Department of Homeland Security, *Report of the DHS Advisory Committee on Family Residential Centers,* Washington DC, DHS, 2015, p. 7.

195 See generally European Union Agency for Fundamental Rights, *European Legal and Policy Framework on Immigration Detention of Children,* Luxembourg, Publications Office of the European Union, 2017, pp. 15-17.

196 Australian Human Rights Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, Sydney, Australian Human Rights Commission, 2004, p. 850.

of mental health problems for children.[197] For many of them living in long-term detention resulted in anxiety, distress, bed-wetting, suicidal ideation, and self-destructive behaviour, including attempted and actual self-harm.[198] Some of the stresses causing these conditions were related to the context of detention, included living behind razor wire, locked gates and being under the constant supervision of detention officers. Other stresses were related to experiences during their prior journeys or the complexities of administrative systems for managing migration and asylum, such as the uncertainty of waiting for visa decisions and having pre-existing cases of trauma.

A follow up study from the Australian Human Rights Commission in 2014 also found that detention has 'profoundly negative impacts on the mental and emotional health and development of children'.[199] Widespread emotional and developmental disorders were associated with 'the fact of detention itself' and the associated deprivation of liberty.[200] Significantly, 30% of respondents to the study reported being always sad and constantly crying and 25% were always worried.[201] Medical assessments of 243 children aged between 5 and 17 years old in detention centres in **Australia** and **Christmas Island** found that 34% of children had mental health disorders that would require referral for psychiatric treatment if they were outside of detention, compared to an average of less than 2% of children with similar disorders in the Australian population.[202] 38% of children had a stress score that was consistent with a diagnosis of post-traumatic stress disorder (PTSD).[203] 128 cases of self-harm were recorded between January 2013 and March 2014 among children aged between 12 and 17 years old.

The conclusions from **Australia's** two inquiries into the impact of immigration detention on children have repeatedly been found in other studies in the country.[204] Based on participant observation one study found disturbances including separation anxiety, disruptive conduct, nocturnal enuresis, sleep disturbances, and impaired cognitive development among

197 Australian Human Rights Commission, *A Last Resort? National Inquiry into Children in Immigration Detention*, Sydney, Australian Human Rights Commission, 2004, pp. 429-432.

198 Ibid., p. 430.

199 Cf. Australian Human Rights Commission, The Forgotten Children: National Inquiry into Children in Immigration Detention, 2014.

200 Ibid., p. 30.

201 Ibid., p. 59.

202 Ibid., p. 59.

203 Ibid., p. 64.

204 Sarah Mares, 'Fifteen years of detaining children who seek asylum in Australia – evidence and consequences', *Australasian Psychiatry*, Vol. 24(1), 2015; Sarah Mares & Jon Jureidini, 'Psychiatric assessment of children and families in immigration detention clinical, administrative and ethical issues', *Aust N Z J Public Health*, Vol. 28, 2004, pp. 520-526; Zachary Steel, Derrick Silove, Robert Brooks, Shakeh Momartin, Bushra Alzuhairi & Ina Susljik, 'Impact of immigration detention and temporary protection on the mental health of refugees', *Br J Psychiatry*, Vol. 188, 2006, pp. 58–64; Aamer Sultan & Kevin O'Sullivan (2001), *op. cit.*, pp. 593–596.

children in detention as well as cases of more serious disorders, such as distress (including mutism and refusal to eat and drink).[205]

Similar findings have also been highlighted in other countries. For example, in **Canada** researchers have found that immigration detention results in children having symptoms including becoming aggressive, difficulty sleeping, loss of appetite, and other symptoms associated with PTSD.[206] In the **United States**, an inquiry in 2016 found that despite a 'commitment to trauma-informed care' the policies and practices of immigration detention of families would re-traumatise those in its care and exacerbate the consequences of already experienced trauma in their past.[207] In the **United Kingdom**, clinical diagnoses with previously detained children have been employed to assess the impact that detention may have had on their mental health. These found higher levels of PTSD symptoms than for non-detained populations and that for 89% of the sample psychiatric disorders and PTSD symptoms were found three years after their detention. They conclude as a result that detention was harmful to these children.[208] In **Thailand**, a range of physical and mental health conditions were found among children in immigration detention centres, including depression, sleep problems, isolation and detachment.[209] In **Israel**, there were a reported 19 attempts at suicide from a population of 60 detained children during 2012.[210]

205 Aamer Sultan & Kevin O'Sullivan (2001), *op. cit.*, pp. 593–596.

206 Rachel Kronick *et al.* (2014), *op. cit.*

207 Department of Homeland Security, Report of the DHS Advisory Committee on Family Residential Centers, Washington DC, DHS, 2015.

208 Kimberly A. Ehntholt, David Trickey, Jean Harris Hendriks, Hannah Chambers, Mark Scott & William Yule, 'Mental health of unaccompanied asylum-seeking adolescents previously held in British detention centres', *Clinical Child Psychology and Psychiatry,* Vol. 23(2), 2018, pp. 238-257.

209 Cf. HRW, Two Years with No Moon (2014), *op. cit.*, p. 30.

210 Hotline for Migrant Workers, Detention of Minors and Children Arriving from the Sinai Desert, 2012.

The consequences of child detention on Nauru

In 2013, the **Australian** Government made detention on the island of **Nauru** mandatory and without a time limit. This has been found to have particularly negative consequences. In 2014, the Australian Human Rights Commission found children there to be 'suffering from extreme levels of physical, emotional, psychological and developmental distress'.[211] In 2015, observations and testing of people in Australian detention centres also led researchers to conclude that 'closed immigration detention in [...] Nauru is harmful to the health and mental health of young children and youth'.[212] Personal development tests carried out found the being in detention delayed children's development. Interviews with children also revealed some were considering self-harming or had already, or also considering suicide.[213] Children who arrived in detention with previously diagnosed physical health conditions often had difficulty receiving the treatment that they required.[214] It was found that the negative implications worsened as detention became more prolonged. Children who had been in Nauru for several months were described by the study authors as 'amongst the most traumatised children the paediatricians have ever seen'.[215] In response to public pressure, the Australian Government began removing children from Nauru in recent years. By the end of February 2019, there were no children on the island.[216]

4.2 Violence and Abuse

The available evidence of conditions for children shows that violence is prevalent, in violation of children's right to be free from all forms of physical or mental violence (Art. 19 CRC) and in many cases of their right to be free from torture and other cruel, inhuman or degrading treatment or punishment (Art. 37(a) CRC).

211 Cf. Australian Human Rights Commission, The Forgotten Children (2014), *op. cit.*, p. 36.

212 Elizabeth Elliott & Hasantha Gunasekera, The health and well-being of children in immigration detention: Report to the Australian Human Rights Commission Monitoring visit to Wickham Point Detention center, Darwin, NT, 2015.

213 Cf. Elliott & Gunasekera, *op. cit.*, pp. 18-9.

214 Ibid.

215 Ibid., p. 3. See alsoPhilip Moss, *Review into recent allegations relating to conditions and circumstance at the Regional Processing Centre in Nauru: final report,* Department of Immigration and Border Protection (Australia), 2015, Available at https://apo.org.au/node/53915 (accessed 27 July 2019).

216 Helen Davidson, 'Last Four Refugee Children Leave Nauru for Resettlement in the US,' *The Guardian,* 27 February 2019, Available at https://www.theguardian.com/world/2019/feb/28/last-four-refugee-children-leave-nauru-for-resettlement-in-us (accessed 10 September 2019).

When in immigration detention, many children find themselves facing a precarious legal status and uncertainty. This can make them particularly vulnerable to violence and abuse. Moreover, reports also find that detainees are often reluctant to report violence in order to not harm their application for residence permits or are deported before their claims can be investigated. Violence is also particularly prevalent in places in which there is little regulation of detention facilities or oversight of conditions within them.

Reports from **Libya** reveal how immigration detention, which is only loosely regulated and not subject to controls or oversight, can be a highly violent setting for children and adults alike. The 2016 report from UNSMIL *Detained and Dehumanised*[217] found that thousands of people were in immigration detention in the country. In these, children were often housed with adults and faced physical and psychological violence as well as extortion from guards. First-hand accounts described children being beaten by guards whilst demanding that relatives send money, young girls being raped and children and adults alike being referred to as 'animals' rather than by name.

In the **United Kingdom** a study of 141 children in immigration detention described physical harm resulting from an environment, which was not appropriate for them.[218] Specifically the report states that 48 of the children said they had witnessed violence against other detainees and 92 had physical health problems, which were either exacerbated or caused by immigration detention.

In **Australia**, detention centres were described in 2004 as places of high stress and tension in which there was a potential for violence by other residents, parents and staff.[219] A decade later, a follow up study found that the country's detention centres continued to be places where assaults, sexual assaults and self-harm involving children could take place.[220] Despite the presence of reporting and investigating measures of violence and abuse in the management of Australia's detention system, the 2014 report recorded 57 serious assaults, 233 assaults involving children, 207 incidents of self-harm and 33 incidents of sexual assault (the majority involving children) between January 2013 and March 2014 in centres where children were held.

In other settings, there is tighter control and oversight of the conditions in immigration detention. In many cases, however, oversight mechanisms are ineffective. For example,

217 OHCHR/UNSMIL, 'Detained and Dehumanised': Report on Human Rights Abuses Against Migrants in Libya, United Nations Support Mission in Libya, 2016.

218 Jon Burnett *et al.*, State Sponsored Cruelty: Children in immigration detention, London, Medical Justice, 2010.

219 Cf. Australian Human Rights Commission, *A Last Resort?* (2014), *op. cit.*, pp. 330-340.

220 Cf. Australian Human Rights Commission, *The Forgotten Children* (2014), *op. cit.*

Israeli national law outlines reasons for releasing people from detention and these are used to ensure unaccompanied and separated children are not detained. It is also illegal for guards to use violence that 'exceeds reasonable force' against detainees and there are oversight mechanisms in place to investigate complaints and prevent such violence.[221] A 2017 study found that in one prison where migrant families were held, conditions had improved and women with children would be held in separate rooms, receive additional food, hygiene products and milk for the children, as well as books and games. The women added that the doors of the cells where the children were held were not locked during the day, but were locked at night.[222] There is also no evidence that these changes in conditions improved physical and mental health outcomes for children nor that they entirely eliminated abusive behaviour on the part of guards. As noted above, detainees often do not speak about violence they have suffered and those who do are often deported before complaints can be investigated.[223] One testimony of a mother and daughter described humiliating and harsh treatment from guards, such as denial of basic needs such as food, water and medical care and not being given explanations regarding her status or rights.[224]

4.3 The Provision of Special Care, Protection and Assistance

The conditions of immigration detention often limit the access of children to legal representation, to health and education and to opportunities for play and recreation. As noted already, these have grave consequences for their development and physical and mental health. They are illustrations of how immigration detention of children can result in violations of the right to protection and care as is necessary for his or her well-being (Article 3.2 CRC); the right of unaccompanied and separated children to special care, protection and assistance (Article 20 CRC); the right to asylum, including to receive appropriate protection and humanitarian assistance (Article 22 CRC); and the right of mentally or physically disabled children to special care (Article 23 CRC).

Inquiries in some countries have revealed details, which show a range of different contexts in which limited forms of protection, special care, and assistance are provided and others in which they are not, particularly when children are detained with adults. In **Thailand**, for example, the specific conditions of overcrowding, insanitary facilities and routinely being

221 Hotline for Refugees and Migrants (2017), *Immigration Detention in Israel* (Tel Aviv: Hotline for Refugees and Migrants).

222 Ibid.

223 Ibid., p. 34.

224 Ibid., p. 13.

held with adults have been criticised for harming the development of children.[225] Similar conditions have been reported by UNHCR.[226] These harsh conditions were also criticised for potentially aggravating already-existing traumas from individuals' past experiences.

In the **United States**, agency standards and a court-ordered settlement agreement in effect since 1997 address immigration detention of children.[227] Nevertheless, an inquiry into the conditions of detention of families in 2016 was given little information on educational services provided to children in detention.[228]

Detention can also have implications for the access of children to fair immigration proceedings and asylum hearings. Often this is based on a lack of information about rights given to people who are detained, further emphasising the uncertainty and precarity faced by many detained families and children. In the **United States**, for example, children and their parents in family detention face barriers in access to information and legal assistance to prepare for asylum hearings or request other specialised forms of protection for which they may be eligible. Families who do not speak English or Spanish face additional barriers in access to information, legal assistance, and other services.[229] Similar conditions have been reported in **Australia** in the case of families with children who are deaf and unable to access information on their rights or access support for trauma or other health conditions.[230]

4.4 Family Life

As has already been noted above, many of the children who migrate internationally and are detained for immigration purposes do so with family members. Immigration detention disrupts healthy functioning of family units by undermining parents in their role as providers

225 Cf. HRW, Two Years with No Moon (2014), *op. cit.*

226 UNHCR, *No crime, no sentence, but refugees in Bangkok languish in detention*, Available at http://www.unhcr.org/news/stories/2009/7/4a55e8596/crime-sentence-refugees-bangkok-languish-detention.html (accessed 23 August 2018).

227 See U.S. Immigration and Customs Enforcement, *Family Residential Standards*, last updated 3 January 2018, Available at https://www.ice.gov/detention-standards/family-residential, (accessed 16 April 2019); U.S. Customs and Border Protection, *National Standards on Transport, Escort, Detention, and Search*, October 2015, Available at https://www.cbp.gov/document/directives/cbp-national-standards-transport-escort-detention-and-search, (accessed 16 April 2019); Stipulated Settlement Agreement, *Flores v. Reno*, No. CV 85-4544, C.D. Cal., 17 January 1997, Available at https://www.aclu.org/legal-document/flores-v-meese-stipulated-settlement-agreement-plus-extension-settlement, (accessed 16 April 2019). See also Human Rights First, *The Flores Settlement: A Brief History and Next Steps*, 19 February 2016, Available at https://www.humanrightsfirst.org/resource/flores-settlement-brief-history-and-next-steps, (accessed 16 April 2019).

228 Department of Homeland Security, Report of the DHS Advisory Committee on Family Residential Centers, 2015.

229 See Tristan Ahtone, 'Indigenous immigrants face unique challenges at the border,' *High Country News*, 21 June 2018, available at https://www.hcn.org/articles/tribal-affairs-indigenous-immigrants-face-unique-challenges-at-the-border (accessed 10 September 2019); Simon Romero, '"Don't Talk to Her": We Toured the Troubled Border Station Housing Migrant Children,' *New York Times*, 26 June 2019, Available at https://www.nytimes.com/2019/06/26/us/migrant-children-border-clint-texas.html (accessed 10 September 2019).

230 Cf. Australian Human Rights Commission, *The Forgotten Children* (2014), *op. cit.* p. 68.

for their children's physical and material well-being. Parents find themselves unable to protect their children from the harms of the detention environment, limited in their ability to provide comfort, care and protection or to transmit hope about the future, and restricted in their capacity to provide opportunities for their child's development through play and education.[231] These negative impacts on parental care and protection of children worsen when parents experience depression, anxiety and despair as a result of their detention.

When detained, children are sometimes separated from their parents and placed in child-specific centres. In others, they may be separated from their fathers as they are housed in different detention facilities for male adults or for women and children. This may amount to a violation of the right to family unity (Article 9 CRC), family life (Article 16 CRC) and family development (Article 18 CRC) as well as a source of stress for children. It is important to reiterate that the UN Committee on Migrant Workers and the CRC-Committee find that the child's best interests not to be detained extends to the entire family.

States should adopt solutions that fulfil the best interests of the child, along with their rights to liberty and family life, through legislation, policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their immigration status is being resolved and the children's best interests are assessed, as well as before return.[232]

A study in **Canada** found that detention was distressing and stressful for children and that this was compounded when they were separated from parents.[233]

In the **United States** there has been evidence of migrant families being separated, with parents placed in detention and expedited removal procedures and children placed in refugee resettlement initiatives. These separations broke emotional ties and relationships among family members. A 2016 DHS advisory committee report concluded that rather than separated detention there should be the joint release of families with other family members in the **United States**.[234]

More recently, a **United States** policy of forcibly separating children from their parents after apprehension meant that thousands of children, including toddlers and newborns,

231 Sarah Mares, Louise Newman, Michael Dudley & Fran Gale, 'Seeking refuge, losing hope: Parents and children in immigration detention', *Australasian Psychiatry,* Vol. 10 (2), 2002, pp. 91-96.

232 Cf. CMW/C/GC/4-CRC/C/GC/23, *op. cit.*, paras. 11 & 12.

233 Rachel Kronick, Cécile Rousseau & Janet Cleveland, 'The Mental Health and Wellbeing of Refugee Children in Detention in Canada: A Pilot Study', *Paediatrics and Child Health*, Vol. 19(6), 2014.

234 Department of Homeland Security, Report of the DHS Advisory Committee on Family Residential Centers, 2015, p. 10.

were treated as unaccompanied and held in immigration detention beginning in 2017.[235] In most of these cases, separation was not strictly necessary for the protection of children, not in their best interests, and amounted to cruel, inhuman and degrading treatment of children and their parents. This stands in clear violation of international law applicable to the United States. The Government announced an end to the policy in July 2018 in the face of legal challenges and public outcry, but **US** immigration officials separated at least 200 children from their parents between July 2018 and February 2019,[236] and children continued to report instances of separation from parents or other adult caregivers in mid-2019.[237] The **US** Government sought authority to hold families in immigration detention indefinitely and to relax standards for the detention of unaccompanied children, in spite of the known harms to children and families of immigration detention.[238]

However, the consequences of immigration detention for family life are varied and highly contextual. In some cases, children may be detained with their parents, maintaining family unity but with grave consequences for the liberty and security of the child. In **Australia**, for example, the detention of children with their families was recognised as potentially placing them in an insecure environment due to the mental health conditions of the adults around them. This is because parents in detention exhibit high rates of mental distress, mental ill-health and trauma. Mentally unwell adults were shown to have negative impacts on the development of their children in this context, in particular causing anxiety. The probability of harm to children was also noted from parents who were mentally unwell, with a case being described of a mother who had made three suicide attempts and reported that she

235 The exact number of children forcibly separated from their parents under this policy is not known, but in July 2018 the US Secretary of Health and Human Services said the number of children who remained separated from their parents was 'under 3,000'. Philip Bump, 'The Children Separated from Their Parents, by the Numbers', *Washington Post*, 9 July 2018, Available at https://www.washingtonpost.com/news/politics/wp/2018/07/09/the-children-separated-from-their-parents-by-the-numbers/?utm_term=.0ebbf2b48ff3 (accessed 11 August 2019). In January 2019, the US Department of Health and Human Services Inspector General concluded that an 'unknown' number of additional children, likely in the thousands, had been separated from their parents beginning as early as mid-2017. US Department of Health and Human Services, 'Separated Children Placed in Office of Refugee Resettlement Care,' OEI-BL-18-00511, January 2019, p. 13, Available at https://oig.hhs.gov/oei/reports/oei-BL-18-00511.pdf, (accessed 7 February 2019).

236 Miriam Jordan & Caitlin Dickerson, 'US Continues to Separate Migrant Families Despite Rollback of Policy,' *New York Times*, 9 March 2019, Available at https://www.nytimes.com/2019/03/09/us/migrant-family-separations-border.html (accessed 10 September 2019).

237 Human Rights Watch, 'US: Family Separation Harming Children, Families,' 11 July 2019, Available at https://www.hrw.org/news/2019/07/11/us-family-separation-harming-children-families (accessed 10 September 2019).

238 See Michael D. Shear & Zolan Kanno-Youngs, 'Migrant Families Would Face Indefinite Detention Under New Trump Rule,' *New York Times*, 21 August 2019, Available at https://www.nytimes.com/2019/08/21/us/politics/flores-migrant-family-detention.html (accessed 10 September 2019); Caitlin Dickerson, 'Trump Administration Moves to Sidestep Restrictions on Detaining Migrant Children,' *New York Times*, 6 September 2018, Available at https://www.nytimes.com/2018/09/06/us/trump-flores-settlement-regulations.html (accessed 11 August 2019).

had thoughts of harming her children.[239] Other studies in **Australia** have also found that detention amplified the vulnerabilities of parents and disrupted family life.[240]

Immigration detention with families can also leave children in an unclear legal situation. In **Canada**, in cases where detention was found not to be in the child's interest to be detained, children would be 'released'. Nevertheless, being released would in these cases mean being kept with their parents, who may also be detained.[241] This resulted in children being 'legally invisible' and therefore unable to challenge the lawfulness of their detention and with their best interests not being protected.

5. The Way Forward: Non-Custodial Solutions

5.1 Guiding Principles

Consistent with the requirement not to detain children for migration-related reasons, States should adopt solutions that fulfil the best interests of the child. Compliance with the prohibition of immigration detention of children means that States have an obligation to provide migrant and refugee children with the same appropriate care and protection that all children are entitled to, consistent with the principle of non-discrimination. This includes policy and practices that allow children to remain with their family members and/or guardians in non-custodial, community-based contexts while their best interests are assessed and determined and their immigration situations are being resolved.

As noted above, States present a range of justifications for the immigration detention of children and their families. These include control of entry at the border, identity verification, and ensuring appearance at administrative or judicial proceedings. However, States can meet the legitimate aims that they seek to achieve through the use of non-custodial measures that focus on child protection and engagement rather than on enforcement measures. As will be illustrated below, non-custodial measures in places such as the **United States** and the **United Kingdom** have had high compliance rates and low costs for the Governments of these countries.

239 Cf. Australian Human Rights Commission, *The Forgotten Children* (2014), *op. cit.* pp. 62-64.

240 Cf. Australian Human Rights Commission, *A Last Resort?* (2004), *op. cit.*, p. 430.

241 Canadian Council for Refugees, *Detention and Best Interests of the Child*, Montreal, Canadian Council for Refugees, 2009.

Such child-sensitive migration systems are founded on the principle that the best interests of the child come first. Child-sensitive approaches require authorities to undertake screening and assessment to ensure children, and any particular needs they have, are identified at the earliest stages. At this early stage, all children and/or their families will benefit from engagement with a case manager who will assist them in understanding what is happening and what is to come. They should have the assistance of interpreters throughout all procedures.

A best interest determination should inform all decisions regarding the child's placement and care, including for those within families. A best interest determination 'requires a clear and comprehensive assessment of the child's identity, including her or his nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs.'[242] Best interest determinations should be done 'in a friendly and safe atmosphere by qualified professionals who are trained in age- and gender-sensitive interviewing techniques.'[243]

If serious doubts arise about the child's claim to be under the age of 18, authorities may undertake an age assessment. Nevertheless, age assessment should be a matter of last resort, used only where there are serious doubts about an individual's declared age and where other approaches, including efforts to gather documentary evidence, have failed to establish an individual's age.[244] UNHCR notes that 'age assessments are never to be used as a matter of routine.'[245] A report from the European Commission's Joint Research Centre also states that assessments can be a useful tool for preventing arbitrary decisions on the age, and therefore the rights, of children in the absence of reliable documentation.[246] Age assessments should be conducted in a 'scientific' manner[247] while keeping in mind that medical examinations have a margin of error.[248] The margin of error is particularly wide for examinations used on adolescents, meaning that their probative value is negligible in

242 Cf. CRC/GC/2005/6, *op. cit.*, para. 20.

243 Ibid., para. 20.

244 Cf. CRC/GC/2005/6, *op. cit.*, para. 31(i); UNHCR, *Guidelines on International Protection: Child Asylum Claims,* HCR/GIP/09/08, 22 December 2009, para. 75; UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum,* February 1997, para. 5.11. With respect to documents, the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families (Committee on the Rights of Migrant Workers) and the CRC-Committee state, 'Documents that are available should be considered genuine unless there is proof to the contrary . . .', Cf. CMW/C/GC/4-CRC/C/GC/23, *op. cit.*, para. 4.

245 UNHCR, *Observations on the Use of Age Assessments in the Identification of Separated or Unaccompanied Children Seeking Asylum,* Case No. CIK-1938/2014 (Lithuanian Supreme Court), June 1, 2015, para. 9(ix), Available at http://www.refworld.org/pdfid/55759d2d4.pdf (accessed 28 September 2018).

246 Gunter Schumacher *et al.*, *Medical Age Assessments of Juvenile Migrants,* Ispra, Joint Research Centre Science for Policy Reports, 2018.

247 Cf. CRC/GC/2005/6, *op. cit.*, para. 31(i).

248 UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum,* para. 5.11(b).

close cases.[249] For these reasons, both the UN Committee on Migrant Workers and the CRC-Committee call on States to 'refrain from using medical methods based on, *inter alia*, bone and dental exam analysis.'[250] As a result, age assessments should be multidisciplinary in nature[251] and should afford the benefit of the doubt 'such that if there is a possibility that the individual is a child, s/he should be treated as such.'[252]

5.2 Unaccompanied and Separated Children

As with other children who have been deprived of their family environment, unaccompanied and separated children have the right to special protection and assistance provided by the State.[253] As with other children without parental care, 'the State is the de facto caregiver and is obliged [...] to ensure alternative care to a child temporarily or permanently deprived of his or her family environment.'[254] The UN Guidelines for the Alternative Care of Children assist States in responding to children deprived of parental care, including children in a country outside of their habitual residence.[255] Moreover, in the case of unaccompanied children authorities should not only be concerned with the risk of the child 'going missing' but also with their obligation to provide the necessary child specific support and protection in compliance with the CRC.

Unaccompanied children in particular, should be referred to child protection authorities. Non-custodial measures should not be a part of criminal or related policies as the issue being addressed is one of protection rather than security. Unaccompanied and separated children should also be appointed an independent guardian 'as expeditiously as possible' to take legal responsibility for decisions regarding the child's placement and care,[256] with due regard to the child's views and individual circumstances.[257] The guardian should be 'an adult who is familiar with the child's background and who is competent and able to represent his

249 Cf. Terry Smith & Laura Brownlees, *Age Assessment Practices: A Literature Review and Annotated Bibliography: Discussion Paper,* New York, UNICEF, 2011, Available at https://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf (accessed 28 September 2018).

250 Cf. CMW/C/GC/4-CRC/C/GC/23, *op. cit.*, para. 4.

251 Age assessment should be a comprehensive process that 'should not only take into account the physical appearance of the individual, but also his or her psychological maturity.' Cf. CRC/GC/2005/6, *op. cit.*, para. 31(i). See also CMW/C/GC/4-CRC/C/GC/23, *op. cit.*, para. 4.

252 Cf. CRC/GC/2005/6, *op. cit.*, para. 31(i). See also CMW/C/GC/4-CRC/C/GC/23, *op. cit.*, para. 4; Cf. HCR/GIP/09/08, *op. cit.*, para. 75. Accord UNHCR, *Guidelines on Policies and Procedures in dealing with Unaccompanied Children Seeking Asylum*, para. 5.11; UNHCR, *Observations on the Use of Age Assessment in the Identification of Separated or Unaccompanied Children Seeking Asylum;* Lithuanian Supreme Court, Case No. CIK-1938/2014, para. 9(ii).

253 Cf. Article 20(1) CRC; See also CMW/C/GC/4-CRC/C/GC/23, *op. cit.*, para. 11.

254 CRC-Committee, *General Comment No. 21 (2017) on children in street situations,* CRC/C/GC/21, 21 June 2017, para. 44. See also CRC-Committee, *General Comment No. 13,* paras. 33 & 35.

255 UN General Assembly, *Guidelines for the Alternative Care of Children,* 2009, A/RES/64/142, Available at: https://www.refworld.org/docid/4c3acd162.html (accessed 27 July 2019).

256 Cf. CRC/GC/2005/6, *op. cit.*, para. 21. See also CMW/C/GC/3-CRC/C/GC/22, *op. cit.*, paras. 32(h) & 36.

257 Cf. CRC/GC/2005/6, *op. cit.*, paras. 25 & 37.

or her best interests.'[258] Children who are in administrative or judicial proceedings, including asylum procedures and procedures to determine their migration status, should also receive a legal representative free of charge.[259]

Human trafficking is a significant risk for unaccompanied and separated children. In face of this risk, some authorities have come to believe that detention can protect children from 'going missing.' However, detention is not a form of child protection[260] and in fact can facilitate recruitment by human traffickers. Relevant guidelines show that the most efficient measure to prevent disappearance is through creating a relationship of trust between a carer or guardian, and the child.[261] A multi-disciplinary and inter-agency approach focused on engagement, rather than immigration enforcement, is the most effective protection from trafficking.

Alternative care can take a combination of forms to meet the practical needs of unaccompanied children. The types of care may include, for example, outreach and support programmes to identify and offer practical assistance (including food, clothing and information) to unaccompanied children living on the streets, drop-in and community or social centres, night shelters, temporary residential care in group homes, foster care, and independent living or long-term care options.[262]

The CRC-Committee calls on States to observe the following general parameters, among others, in making arrangements for accommodation for unaccompanied and separated children:

- Limit changes in residence only when the change is in the best interests of the child, in order to ensure continuity of care.
- Keep siblings together.
- Provide regular supervision and assessment by qualified persons.
- Keep children informed of care arrangements made for them and take their views into account in making those arrangements.[263]

258 Cf. CRC/GC/2005/6, *op. cit.*, para. 69. See also ibid., paras. 33-35.

259 Ibid., paras. 21 & 69; Cf. Joint CMW/C/GC/4-CRC/C/GC/23, *op. cit.*, para. 17(f); Cf. HCR/GIP/09/08, *op. cit.*, para. 69; Cf. *Inter-Agency, Inter-Agency Guiding Principles on Unaccompanied and Separated Children,* January 2004, p. 61.

260 As already shown, it is well established that immigration detention does not protect children, but rather causes them harm. In this light, the Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings observes, 'Child victims of trafficking are sometimes placed in detention institutions. In some cases, this happens because of a shortage of places in specialist child-welfare institutions. Placement of a child in a detention institution should never be regarded as appropriate accommodation.' Council of Europe, *Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings,* Council of Europe Treaty Series No. 197, 16 May 2005, para. 155, Available at https://rm.coe.int/16800d3812 (accessed 18 October 2019).

261 Missing Children Europe, *Summit handbook: Practical guidance on preventing and responding to unaccompanied children going missing,* Missing Children Europe, 2016, Available at http://missingchildreneurope.eu/Portals/0/Docs/report_SUMMIT%20-%20Safeguarding%20Unaccompanied%20Migrant%20Minors_1mrt.pdf (accessed 11 August 2019).

262 Cf. CRC/C/GC/21 (2017), *op. cit.*, para. 44.

263 Cf. CRC/GC/2005/6, *op. cit.*, para. 40.

These parameters can be met by non-custodial forms of accommodation which focus on support and protection. This may include publicly or privately run specialised open centres to host unaccompanied children, as are in use in many countries. 'Open' means that the children are not locked in and that supervision is conducted in an age-appropriate manner, focusing on protection. To reduce the risk of children disappearing from centres, the establishment should assess and understand the needs of the individual child and provide individualised support.

Placement in foster care, including kinship or network care, is the preferred option for providing family-like care.[264] This option is much better suited to building trusting relationships with unaccompanied children, one of the factors that can reduce absconding. Foster families should receive guidance and support to enable them to address the particular needs of migrant and refugee children. This includes awareness and handling of family ties in the country of origin, as well as the harmful impact of the experienced migration journey on physical and mental health. Ongoing, regular monitoring by child protection officials is essential to support foster families and enable early intervention when necessary.

The accommodation of a child in a dedicated centre or in a foster family may be accompanied with the obligation to report regularly to the responsible authorities or to allow being monitored by them. Such reporting requirements may restrict freedom of movement, but should never amount to a deprivation of liberty.

Child-headed households and other forms of independent living may also be appropriate accommodation options.[265] Older adolescents may have the experience, capability and desire to live alone, or to live alongside other young people of a similar age or life experience. Child-headed households provide accommodation for a number of children under the care and supervision of an older child or peer, such as a group of siblings living under the care of the eldest sibling.

When unaccompanied and separated children are accommodated in group homes and similar settings, the Inter-Agency Guiding Principles on Unaccompanied and Separated

264 For more information see case studies in Nidos, SALAR & CHTB, *Reception and living in families: Overview of family-based reception for unaccompanied minors in the EU Member States,* Utrecht, NL, Stichting Nidos, 2015, Available at https://engi.eu/projects/reception-and-living-in-families/ (accessed 11 August 2019).

265 UNHCR, *Child protection issue brief: Alternative care,* Geneva, 2014.

Children[266] spell out additional important elements to ensure that they benefit from a safe, supportive environment:

- 'Children in institutions should enjoy the same civil and political rights as the rest of the child population. Monitoring should take place to ensure that these rights are respected.'[267]
- 'It must be made clear that care will be provided for a short period while reunification or alternative community-based care is being sought.'[268]
- 'Centres should be small, temporary and organized around the needs of the child. Where possible they should be organized in small family-like units. Siblings must be kept together and, where appropriate, friends and those from the same geographical areas or community.'[269]
- 'The centre must be integrated into the local community as closely as possible and should liaise with the local authorities where relevant.'[270]
- 'The atmosphere should be stimulating, with a structured day including periods of education, recreation and rest, and household chores; the children should be taught appropriate life skills to enable them to survive in wider society.'[271]
- 'Access for separated children, including refugee children, to education including vocational training should be promoted and monitored.'[272]

A key process in the care of unaccompanied and separated children is family tracing and reunification. As established by the Guidelines on Alternative Care, 'all reasonable efforts should be made to trace [a child's] family and re-establish family ties, when this is in the best interests of the child and would not endanger those involved.'[273] Once traced, an assessment of the child's family situation, development and future opportunities is required to ensure family reunification is in the best interests of the child. For children who cannot

266 The *Inter-Agency Guiding Principles on Unaccompanied and Separated Children* were jointly endorsed by the International Committee of the Red Cross, the International Rescue Committee, Save the Children/UK, UNICEF, UNHCR, and World Vision International. The CRC-Committee has encouraged States to take these guiding principles into account in responding to the needs of unaccompanied and separated children. See CRC/GC/2005/6, *op. cit.*, para. 15.

267 Cf. Inter-Agency Guiding Principles (2004), *op. cit.*, p. 46.

268 Ibid.

269 Ibid.

270 Ibid.

271 Ibid., pp. 46-47.

272 Ibid., p. 49.

273 Cf. A/RES/64/142, *op. cit.*, p. 20.

be reunited with their families, 'it is important to promote community-based care that builds on local culture and provides continuity in learning, socialization and development.'[274]

Examples of non-custodial solutions for unaccompanied children[275]

In **South America**, in particular, immigration detention is considerably less prevalent than in some other parts of the world and children are very rarely detained for migration purposes. As one study notes, 'over the last decade, many **South American** countries have explicitly and repeatedly rejected policies aimed at criminalising irregular migration and enforcing punitive tools such as detention and deportation'.[276] The increasing number of unaccompanied children fleeing from **Venezuela** have been accommodated in non-custodial child protection facilities. In **Ecuador**, for example, immigration detention of children is prohibited;[277] when unaccompanied children are taken in by the police they can be held by the sector of the police specialised for children and adolescents under emergency measures for up to 72 hours and then are passed to UNHCR or NGOs.[278] **There is no South American country that formally authorise immigration-related detention of children and families.**

In **Germany**, unaccompanied children are usually integrated into the mainstream youth care system. In the first instance they are placed in an emergency reception centre and visited by a social worker, after which they are transferred to another reception centre and assigned a guardian and case manager. They work together to find long-term accommodation within two to four months.

In **Kenya**, the Government established a mobile court and social worker for children in Dadaab and international agencies provided case management and psychosocial support. The local community provided foster care for several hundred unaccompanied children and supported them with family tracing and reunification using traditional clan-based mechanisms. Save the Children assessed the suitability of placements for each child. This shows how a diverse network of stakeholders can be brought together around the aim of providing protection to unaccompanied children.

274 Cf. Inter-Agency Guiding Principles, *op. cit.*, p. 50.

275 These references are gathered from the following publication: International Detention Coalition, *Keeping Children Safe. October 2018, No. 3,* Geneva, International Detention Coalition, 2018.

276 Pablo Ceriani Cernadas, *Immigration Detention through the lens of International Human Rights: Lessons from South America,* Global Detention Project Working Paper No. 23, 2017.

277 Ley Orgánica de Movilidad Humana, *Suplemento – Registro Oficial No. 938,* Republic of Ecuador, Article 2, Available at https://www.refworld.org/pdfid/58a41f864.pdf, (accessed 18 October 2018).

278 Global Detention Project, 'Immigration Detention in Ecuador', Geneva, Switzerland, 2015.

In **Tunisia**, a form of unofficial guardianship is recognised under the term of the *Kafala,* which is based on Islamic law. It is considered to be a voluntary commitment of someone to take responsibility for the care, needs, education and protection of a child who is without a family.

In **Ireland**, all children are allowed to enter the territory. Those who do not arrive with a valid permit to do so are exempt from arrest and detention.[279] The Refugee Act of 1996 requires unaccompanied or separated children to be referred to the Child and Family Agency, rather than to security forces.[280]

In **Spain**, unaccompanied children arriving in its Southern Border are immediately referred to open facilities within the Child Protection System. Similarly, children with their parents are accommodated in open, humanitarian centres run by public child protection bodies or by civil society organisation - e.g. Red Cross - while their asylum application or other procedure is carried out.

5.3 Children in Migrant Families

Children who migrate together with their family members or guardians are similarly entitled to appropriate protection and care. When children are accompanied, the need to keep the family together is not a valid reason to justify the deprivation of liberty of a child. On the contrary whenever the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires authorities to choose non-custodial solutions for the entire family.[281] Similarly, States should not separate families in order to detain a parent or guardian traveling together with their child. Article 9 of the CRC states that children should not be separated from their parents against their will, except when such separation is deemed to be in the best interests of the child, such as in cases of child abuse or neglect. Consequently, non-custodial measures relating to children who are with families must take into account not only the child's right to liberty, but also the child's right to family life.

279 Irish Statute Book, *Immigration Act 2003* (Ireland), Available at http://www.irishstatutebook.ie/eli/2003/act/26/enacted/en/html (accessed 11 August 2019).

280 Irish Statute Book, *Refugee Act 1996* (Ireland), Available at http://www.irishstatutebook.ie/eli/1996/act/17/enacted/en/print (accessed 11 August 2019).

281 Cf. CMW/C/GC/4-CRC/C/GC/23, *op. cit.*, para. 11.

With respect to non-custodial solutions, some effective examples come from **Belgium**[282], **Canada**[283], **Sweden**[284], the **United Kingdom**[285] and the **United States**[286]. In the best of these practices, families have been placed either in joint structures or dedicated flats and apartments during their asylum or immigration proceedings where they can enjoy a maximum of freedom. This is accompanied with a case management that tries to avoid longer limbo situations. The results show high levels of compliance with the authorities and low financial costs.

In the **United States**, the Family Case Management Program (FCMP), a pilot program in operation for eighteen months, beginning under the Obama administration, until it was shut down by President Trump in June 2017,[287] was specifically implemented for families seeking asylum. Instead of detention, the FCMP allowed these families to live in the community, supported by case managers who facilitated their access to social and legal services and helped them meet immigration reporting requirements and court appearances. Over 99% of the families enrolled in the FCMP appeared at their check-ins with US immigration enforcement officials and immigration court hearings.[288] At a cost of only $38 each day for a whole family, compared to the $320 each day for just one family member in detention, the program also meant cost savings when used instead of family detention.[289]

282 Philippe de Bruycker (ed.), *Alternatives to Immigration and Asylum Detention in the EU: Time for Implementation,* Odysseus Network, 2015, pp. 130-33; Global Detention Project, Belgium Immigration Detention Profile, May 2017, https://www.globaldetentionproject.org/countries/europe/belgium (accessed 18 October 2019).

283 Immigration and Refugee Board of Canada, Guidelines Issued by the Chairperson Pursuant to Paragraph 159(1)(h) of the *Immigration and Refugee Protection Act,* Chairperson Guideline 2: Detention, section 3 (release and alternatives to detention), 1 April 2019, Available at https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir02.aspx#s3 (accessed 18 October 2019).

284 International Detention Coalition, *Alternatives to Detention in Sweden,* September 2015, Available at https://idcoalition.org/alternatives-to-detention-in-sweden/ (accessed 18 October 2019). For an examination of reception conditions for unaccompanied children in Sweden, see Human Rights Watch, *Seeking Refuge: Unaccompanied Children in Sweden*, 2016, Available at https://www.hrw.org/report/2016/06/09/seeking-refuge/unaccompanied-children-sweden (accessed 18 October 2019).

285 Cf. Philippe de Bruycker (2015), *op. cit.* pp. 147-154; International Detention Coalition, *Alternatives to Detention in the United Kingdom,* September 2015, Available at https://idcoalition.org/alternatives-to-detention-in-the-united-kingdom/ (accessed 18 October 2019).

286 See Women's Refugee Commission, *Family Case Management Program: A Backgrounder,* 20 July 2018, Available at https://www.womensrefugeecommission.org/rights/resources/1653-family-case-management-program (accessed at 11 August 2019); National Immigrant Justice Center, *A Better Way: Community-Based Programming as an Alternative to Immigrant Incarceration,* April 2019, Available at https://www.immigrantjustice.org/research-items/report-better-way-community-based-programming-alternative-immigrant-incarceration (accessed 18 October 2019).

287 Cf. Aria Bendix, 'ICE Shuts Down Program for Asylum Seekers,' *The Atlantic,* 9 June 2017, Available at https://www.theatlantic.com/news/archive/2017/06/ice-shuts-down-program-for-asylum-seekers/529887/ (accessed 28 September 2018).

288 See Office of Inspector General, Department of Homeland Security, *U.S. Immigration and Customs Enforcement's Award of the Family Case Management Program Contract (Redacted),* 30 November 2017, Available at https://www.oig.dhs.gov/sites/default/files/assets/2017-12/OIG-18-22-Nov17.pdf (accessed 28 July 2019).

289 Department of Homeland Security, Immigration and Customs Enforcement, *Budget Overview: Fiscal Year 2019 Congressional Justification,* Department of Homeland Security, Available at https://www.dhs.gov/sites/default/files/publications/U.S.%20Immigration%20and%20Customs%20Enforcement.pdf (accessed 11 August 2019); Women's Refugee Commission, *Family Case Management Program: A Backgrounder,* 20 July 2018, Available at https://www.womensrefugeecommission.org/rights/resources/1653-family-case-management-program (accessed at 11 August 2019).

Detention is not necessary for families facing return or departure from the country, if appropriate supports and management structures are in place.[290] The **United Kingdom** has been operating a Family Returns Process along these lines since 2011. The process places an emphasis on the need to safeguard and promote the welfare of children who are part of families which have exhausted all options to remain in the country. Tailored case management, with a tiered escalation process, is used to explore issues the family is facing, to tackle risks and barriers, and work with the family towards departure. An evaluation of the 2014-2016 period by the Independent Family Returns Panel reported 97% of families who departed the programme did so without enforcement actions.[291]

In **Cyprus**, following the directive of a May 2014 Ministerial Committee, families in irregular migration status are permitted to reside in the community subject to conditions that can include regular reporting requirements, surrender of travel documents, and financial guarantees.[292] Two years after the publication of this directive, children were in practice no longer held in immigration detention in Cyprus.[293]

290 European Union Agency for Fundamental Rights, *Alternatives to detention for asylum seekers and people in return procedures,* June 2017.

291 Independent Family Returns Panel, *Independent Family Returns Panel report 2014-2016,* 2016, p. 8, Available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/583790/Independent_Family_Returns_Panel_report_2014-16.pdf (access 11 August 2019).

292 Cyprus, Office of the Law Commissioner, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment: Follow-Up to Concluding Observations 18 May, 2015,* para. 28, Available at https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/CYP/CAT_C_CYP_CO_4_Add-1_19087_E.pdf (accessed 6 November 2018).

293 European Union Agency for Fundamental Rights, *European Legal and Policy Framework on Immigration Detention of Children,* Luxembourg, Publications Office of the European Union, 2017, p. 35.

Children are now, and throughout recorded history have been, on the move for a variety of reasons, and migration is an essential and overwhelmingly positive human phenomenon.[294] Any response by States to child migration should uphold the primacy of the rights of the child and recognise that all children in the context of international migration, regardless of status, are entitled to special care, assistance and protection.[295] State laws governing international migration must ensure the full and effective enjoyment of the rights of the child, including non-discrimination, the best interests of the child, the child's right to life, survival and development, and the right of the child to express his or her view and to have those views taken into account.[296]

Since migration related detention of children is never in the best interest of the child and can never meet the high standard of a measure of last resort (Article 37(b) CRC), States have an obligation to develop and apply effective non-custodial solutions for migrant children. This obligation should apply regardless of whether children are migrating with their families, unaccompanied or separated from their families.

294 Cf. A/RES/71/1, *op. cit.*, para. 1; General Assembly, *In safety and dignity: addressing large movements of refugees and migrants: Report of the Secretary-General*, A/70/59, 21 April 2016, para. 9.

295 Cf. CRC, 'Preamble', *op. cit.*; See also CMW/C/GC/3-CRC/C/GC/22, *op. cit.*, para. 13.

296 Ibid., para. 19.

Selected Non-Custodial Solutions Implemented by States

Cyprus	Families with an irregular migration status are permitted to reside in the community subject to conditions that can include, among others, regular reporting requirements.
Ecuador	Unaccompanied children can be held under emergency measures for up to 72 hours by a police unit specialised in working with children and adolescents. Then children are passed on to UNHCR or other relevant NGOs.
Germany	Unaccompanied children are usually integrated into the mainstream youth care system.
Ireland	All children are allowed to enter the territory and those who do not arrive with a valid permit are exempt from arrest and detention.
Kenya	A local community provided foster care for several hundred unaccompanied children and supported them by offering family tracing and reunification services using traditional clan-based mechanisms.
Spain	Unaccompanied children arriving in its Southern Border are immediately referred to open facilities within the Child Protection System.
Tunisia	A form of unofficial voluntary guardianship is recognised under the term of the Kafala, which is based on Islamic law.
United Kingdom	The Family Returns Process is a tailored case management process used to explore issues the family is facing. It helps to tackle risks and barriers, and assists families that have exhausted all options to remain in the country.

6. Recommendations

Definitions

1. States should employ the **international definition of 'child'**, as set forth in the Convention of the Rights of the Child and meaning 'any person under the age of 18 years,' in data collection, legislation, regulation, policy, and other State acts, including in matters relating to deprivation of liberty.

2. States should follow the standard set forth in the Optional Protocol to the Convention against Torture to consider a person as deprived of liberty when that person is subject to any form of detention or imprisonment or is placed in a public or private custodial setting which that person is not permitted to leave at will, by order of any judicial, administrative, or other authority. For children, legitimate and proportional restrictions on freedom of movement that take into account age and maturity may be appropriate means of supervision, protection, and care, provided that they follow defined criteria and are **in line with legislation on child protection and care**; such cases are not deprivation of liberty.

3. States should employ the **understanding of 'immigration detention'** as set forth by the UN Committee on the Rights of the Child and the UN Committee on Migrant Workers as any setting in which children are deprived of their liberty for reasons related to their, or their parents' migration status, regardless of the name and reason given to the action of depriving children of their liberty, or the name of the facility or location where children are deprived of liberty. In this context, the phrase 'reasons related to migration status' is understood by the Committees to mean actions taken by States relating to a person's migratory or residence status, or the lack thereof, whether relating to irregular entry, stay or exit, consistent with the Committees' previous guidance.

Data

4. States should collect and make **publicly available anonymised data**, disaggregated to the greatest extent possible while ensuring confidentiality. At a minimum this should be done by age, gender (ideally reflecting, in addition to only 'female' and 'male', numbers for those whose gender identity does not match the sex assigned at birth or on identity documents), unaccompanied/accompanied status, nationality and migration status, disability, length of stay (including cumulative length of detention for individuals released and immediately re-detained), and place of detention. It should also reflect the numbers of children deprived of their liberty on the basis of their own or their parents' migration status. These data should be made available at least annually.

Prompt identification and age assessment

5. States should design and implement **child-sensitive screening processes** to ensure prompt identification of children who come into contact with migration authorities.

6. Children should be identified as quickly as possible, in a manner consistent with their best interests and the principle that persons claiming to be children should be given the benefit of the doubt. In line with paragraph 4 of the Joint General Comment No.4 between the UN Committee on the Rights of the Child and the UN Committee on Migrant Workers, to make an **informed estimate of age**, States should undertake a comprehensive assessment of the child's physical and psychological development, conducted by specialist paediatricians or other professionals who are skilled in combining different aspects of development. Such **assessments should be carried out in a prompt, child-friendly, gender-sensitive and culturally appropriate manner**, including interviews of children and, as appropriate, accompanying adults, in a language the child understands. Documents that are available should be considered genuine unless there is proof to the contrary, and statements by children and their parents or relatives must be considered.

7. Unaccompanied and separated children should be referred to the **regular domestic child protection system** for appropriate attention, protection, and care.

Adherence to the international prohibition on the immigration detention of children and families

8. Since **migration-related detention of children** cannot be considered as a measure of last resort (as required by Article 37(b) CRC) and is never in the best interests of the child (Article 3 CRC), it is **prohibited under international law** and should, therefore, be **forbidden by domestic law**.

9. The prohibition in law of any form of immigration detention of children extends both to unaccompanied and separated children as well as to children with their families. Consistent with the guidance of the UN Committee on the Rights of the Child in its General Comment No. 14, the term **'family'** should be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom.

10. States should adopt all necessary measures in order to **eradicate any form of immigration detention of children and families**.

11. States should also ensure that children and adults are **not subject to criminal sanctions, including incarceration, for irregular entry and/or stay**. Offences concerning irregular entry or stay should not under any circumstances have consequences similar to those derived from the commission of a crime.

Best interests of the child

12. In all actions concerning children – including decisions regarding immigration law and enforcement – States should be **guided by the best interests of the child**.
13. The right of the child to have his or her best interests taken as a primary consideration means that the **child's interests have high priority** and are not just one of several considerations. Therefore, considerable weight must be attached to what serves the child best interest.
14. Considerations such as those relating to general migration control cannot override best interests considerations.
15. Assessments of best interests of the child should be **undertaken independent of migration authorities**, and should be carried out by actors responsible for child protection and welfare and other relevant actors, such as parents, guardians and legal representatives, with due account for the views of the child.

Non-custodial solutions

16. To respect, protect, and fulfil children's right to liberty and family life under international law, States should develop **credible and effective protection systems** that provide appropriate protection and care to migrant children, regardless whether they are unaccompanied, separated, or with their families.
17. States should ensure that children are never detained on the basis of their or their parents' migration status and should instead assess on a case-by-case basis, holistically and in line with the individual child's best interests, what **non-custodial, community-based solutions** would be most appropriate for the protection and care of children, whether they are unaccompanied, separated, or with their parents or other family members.
18. Unaccompanied and separated children should be provided with **alternative care and accommodation**, in line with the UN Guidelines for the Alternative Care of Children.

19. **Children with family members should be allowed to remain with their families in non-custodial, community-based contexts** while their immigration status is resolved and the children's best interests are assessed. Children should not be separated from their families except in accordance with applicable law and procedures and when necessary for the best interests of the child, such as in a particular case involving abuse or neglect of the child. Similarly, the need to keep the family together is not a valid basis for deprivation of liberty of the child; instead, the State should provide non-custodial solutions for the entire family.

20. Whether unaccompanied, separated, or with family members, child protection and welfare authorities – not immigration or enforcement officials – should **assess each child's individual needs** and should assist each child to meet those needs and enjoy access to rights on the basis of equality with children who are nationals of the host country.

21. The non-custodial solutions offered to the child and the family should always be based on an **ethic of care and protection**, not enforcement, consistent with the best interests of the child and providing all the material, social and emotional conditions necessary to ensure the comprehensive protection of the rights of the child.

22. States should make **sufficient resources available to promote the development, implementation, and improvement of non-custodial measures**, including by diverting resources from immigration detention to non-custodial solutions carried out by competent child protection actors.

23. Non-custodial measure should **ensure access to information, legal assistance, health, housing, education and other services**, as well as **appropriate case management** and **social support** are available to all migrant children and families. The practices of States that have implemented such child rights compliant non-custodial solutions should be internationally promoted and fostered. Such measures, in combination with information about the process, legal and other appropriate assistance, access to education, and regular check-ins by social workers, are very effective in ensuring attendance at immigration hearings and compliance with rights-respecting orders for return to countries of origin or last residence.

Age assessment

24. States should **only use age assessment procedures where there are grounds for serious doubt** about an individual's age.

25. Age assessment procedures should take into account children's rights. **Independent experts**, familiar with the respective child's cultural background and fully **respecting the child's dignity**, should undertake age assessments in a **gender-appropriate** manner.

26. Recognising that age assessment methods are scientifically unreliable, in cases of doubt, authorities should **treat the person as a child**. This means that persons claiming to be children should be treated as such and should not be placed in detention while any assessment is completed. The individual concerned should be given the benefit of the doubt and any margin of error should be applied in favour of the individual concerned.

Return

27. States should only return children to their countries of origin or last residence, or transfer children to a third country, based on a **determination that such return is in the individual child's best interests** undertaken by a child protection or child welfare authority.

28. States are obliged, in line with Article 3 CRC, to ensure that any decision to return a child to his or her country of origin, or to transfer a child to a third country, is based on evidentiary considerations on a case-by-case basis and pursuant to a procedure with appropriate due process safeguards, including a **robust individual assessment**, **the right to be heard**, and **access to legal assistance**. This procedure should ensure, *inter alia*, that the child, upon arrival, will be safe and provided with proper care and enjoyment of rights.

29. **Under no circumstances should children be returned or transferred to a country where there are grounds to believe the child would face risks** of: persecution, torture, gross violations of human rights or other irreparable harm, whether from State or non-State actors.

30. In such cases of return or transfer based on the best interests of the child, children should be afforded appropriate protection and care throughout the process of return. **They should not be subjected to immigration detention**.

Oversight and accountability

31. States should **ensure regular access** by legal representatives, national and international monitoring bodies, and civil society organisations **to all places of immigration detention** as well as to non-custodial facilities that may restrict migrant children's freedom of movement.

32. States should produce **rights-based indicators** and tools for measuring progress of the protection and realisation of children's rights in the context of immigration detention and in the implementation of non-custodial solutions.

33. States should develop and implement guidelines on **open facilities** (activities, integration, services, cultural mediators, standards on non-disciplinary rules as the guiding rules, etc.).

34. Whenever children are found to be deprived of liberty for reasons related to their, or their parents', migration status, **State authorities should promptly identify and immediately release these children, together with their family members, and ensure access to non-custodial, community-based solutions, including appropriate support and accommodation, as necessary for the adequate care and protection of children**. Authorities should take steps to ensure children and families have access to justice and effective remedies, including through administrative sanctions and prosecution as warranted, when their rights to liberty and family life are violated.

CHAPTER 12

CHILDREN DEPRIVED OF LIBERTY IN INSTITUTIONS

© Bernard Bisson/Sygma via Getty Images, Children in a Classroom of an Orphanage in Bucharest, Romania

Irene's Story
India

'I did not like anything in that shelter. We were confined inside the premises with no open spaces.' This is what Irene recalls of her time at a **shelter in India** specialising in repatriating girls who were trafficked into prostitutions from Bangladesh.

At the shelter she was promised that she will soon be able to go back home. Three years on, however, Irene is still there. The shelter does not offer any activities or opportunities to do sports or simply play. She wasn't even given any new clothes.

Irene feels overlooked and unheard. Since she was first trafficked at the **age of 12 years**, Irene has survived forced prostitution, physical violence and countless emotional threats in the various brothels she worked in. Constantly hearing that her date of repatriation has been delayed or deferred led her to harm herself. 'I have slashed my wrists and neck many times' says Irene and once she was even hospitalised for a month.

Yet, she still says 'I felt no one listened to my wish of returning home'. All Irene wants is to go back home to her native village to live with her mother, but she remains in the same shelter that nearly broke her, with nowhere to go and nothing to do.

For data protection and confidentiality reasons, the names have been altered.

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1. Introduction

'If you live in a family, your foster parents or otherwise, they would tuck you to bed in the evening. They will calm you down. They will tell you nice things. They will kiss you. They will tell you nice things like, "Everything will be okay. Don't worry if you're worried for something." They will make sure you feel relaxed and peaceful in the evening. While, if you're in institutions, the attitude that you will get, "Go to bed. Shut the light. Go to sleep," and that's it, so it is a huge difference.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

5.4 million Children living in Institutions are at Risk of Deprivation of Liberty

1 OUT OF 8 CHILDREN LIVING IN INSTITUTIONS ARE DEPRIVED OF LIBERTY BY STATE DECISION

Source: Chris Desmond, Kathryn Watt, Anamika Saha, Jialin Huang, Chunling Lu (2020), and responses to the Global Study questionnaire.

1.1 General Assessment of the Situation of Children in Institutions

The CRC declares in its preamble that the family is 'the fundamental group of society and the natural environment for the growth and well-being'[1] of children. However, most countries continue to have significant numbers of children separated from their families, many of them in institutions. The Special Rapporteur on the Right to Health, Dainius Puras, has pointed out that this critically impedes children's psychological and emotional development, particularly those who are placed in 'large institutions nominally aimed at securing their welfare, including infant homes and education, health and welfare facilities for children with disabilities'.[2] It is clear that effects of child separation and institutionalisation are grave and may last a lifetime. Being largely invisible, such children are particularly vulnerable to violence, neglect and abuse.[3]

> '... There are no ways to express your feelings, and the only feeling that you actually feel when you're in an institution is that you're always worried. It's a feeling of anxiety really. You go to bed. You go to sleep and you worry that somebody's going to steal your belongings, so you're constantly in a state of anguish, if you will.'
>
> 'They are very unhappy, they feel miserable and they are actually nobody. They feel as if they're nobody.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

The purpose of this chapter within the Global Study is to gather and analyse global data, the relevant international law and literature, and to draw the world's attention to the prevalence of children being deprived of liberty in institutions and the harmful impact this has on their development and wellbeing. The chapter also shares promising practice examples to assist States in transforming their systems and legal frameworks to prevent separation of children from their families and end institutionalisation of children.

The Global Study questionnaire added significantly to the available data on children in institutions, but lacked the coverage to support an estimate of the global population of children in institutions or of children deprived of liberty in institutions. To supplement the

1 Cf. Preamble CRC.

2 UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/38/36, 10 April 2018, para 55.

3 Paulo Sergio Pinheiro, *World Report on Violence Against Children*, United Nations Secretary-General's Study on Violence against Children, Geneva, Switzerland, 2006, Available at https://www.unicef.org/violencestudy/I.%20World%20Report%20on%20Violence%20against%20Children.pdf (accessed 12 August 2019).

questionnaire data, the Study has drawn on independent research, which systematically collated available official and survey datasets since 2001 from around the world in order to estimate the global prevalence of children in institutions (whether or not they were classified as 'deprived of liberty').[4] Major limitations were found in the availability and quality of official data, with inconsistent definitions between studies and evidence of substantial under-reporting of children and institutions. Their combined dataset produced a wide range of estimates depending on the modelling assumptions used, with as many as 9.34m children in the highest model. The authors selected the estimation method which performed best statistically over the period for which they received data.[5] Initial calculations that were available during the drafting of the report to the General Assembly estimated 3.5 - 5.5 million children. Further in-depth calculations framed the total population of children in institutions more accurately to **5.4 million children** thus minimising the margin of error.[6]

Further analysis by the Global Study team using the Desmond and Lu estimates considered how many children, of this larger number of children in institutions, can be considered deprived of their liberty according to the legal definition used in this study. Using the largest sample available, and applying weighting strategies (e.g. strategy to ensure regional representativeness), the percentage of children deprived of liberty is estimated by the Global Study team to be 12.4%. This is a figure of around **670,000 children**, representing **1 out of 8 children living in institutions to be deprived of liberty by decision of a State authority**.

It must be noted, however that this estimate is extremely conservative. One of the problems we faced in calculating this figure was that children who are referred to institutions without an order given by a public authority fall outside of the definition, although they are *de facto* also deprived of liberty.

Based on findings presented in this chapter, and expert testimony, it is reasonable to conclude that institutions, by their very nature, are unable to operate without depriving children of their liberty.

4 Chris Desmond, Kathryn Watt, Anamika Saha, Jialin Huang & Chunling Lu, Prevalence and number of children living in institutional care: global, regional, and country estimates, 'The Lancet Child & Adolescent Health', Vol. 4, Issue 5, pp. 370-377. The research undertook a review of the published and grey literature on children living in institutions as well as a secondary analysis of national datasets, which include institutions in their sampling frame. The authors' first estimate used data from official sources, then a second estimate used data from official and unofficial sources. The estimate was wide – indicating under-reporting.

5 Performance was measured by the size of the error, i.e. the difference (squared) between predicted values and actual data, for those countries/years we have both official and unofficial data.

6 Chris Desmond, Kathryn Watt, Anamika Saha, Jialin Huang & Chunling Lu, Prevalence and number of children living in institutional care: global, regional, and country estimates, 'The Lancet Child & Adolescent Health', Vol. 4, Issue 5, pp. 370-377.

According to the Human Rights Committee, 'the placement of a child in institutional care amounts to deprivation of liberty within the meaning of Art 9'.[7] Applying this strict standard means in fact that **5.4 million children are deprived of liberty per year in various types of institutions worldwide**.

Global Rates of Institutionalisation of Children

7 UN Human Rights Committee (HRC), *General Comment No. 35: Article 9 (Liberty and security of person)*, CCPR/C/GC/35, 16 December 2014, para 62.

< 100

Afghanistan
Argentina
Benin
Bolivia
Brazil
Chad
China
Costa Rica
Ecuador
Eritrea
Ethiopia
Ghana
Guatemala
India
Ireland
Kosovo
Liberia
Libya
Maldives
Mexico
Mongolia
Norway
Rwanda
Serbia
Sierra Leone
Somalia
South Africa
Tanzania
Tunisia
United States
Venezuela
Vietnam

101 - 200

Albania
Algeria
Angola
Antigua and Barbuda
Australia
Belize
Cameroon
Central African Republic
Comoros
Congo
Djibouti
El Salvador
Equatorial Guinea
Gabon
Georgia
Greece
Grenada
Guinea
Guinea-Bissau
Iraq
Kiribati
Montenegro
Nepal
Palau
Papua New Guinea
Samoa
South Sudan
Spain
Sudan
Syria
Turkmenistan
Tuvalu
Uzbekistan
Vanuatu
Yemen
Zimbabwe

201 - 300

Bhutan
Botswana
Bulgaria
Burkina Faso
Burundi
Cabo Verde
Chile
Colombia
Democratic Republic of the Congo
Denmark
Dominica
Fiji
Guyana
Honduras
Israel
Jordan
Kenya
Lesotho
Madagascar
Mali
Mauritania
Mozambique
Namibia
Nauru
Nicaragua
Niger
Nigeria
Panama
Paraguay
Peru
Romania
Saint Kitts and Nevis
Saint Lucia
Saint Vincent and the Grenadines
São Tomé and Príncipe
Seychelles
Sri Lanka
Suriname
Sweden
Tajikistan
Timor-Leste
Trinidad and Tobago
Uganda
Zambia

301 - 500

Armenia
Azerbaijan
Bahrain
Belarus
Bosnia and Herzegovina
Côte d'Ivoire
Croatia
Democratic People's Republic of North Korea
Dominican Republic
Estonia
Eswatini
Hungary
Iceland
Iran
Jamaica
Lao People's Democratic Republic
Luxembourg
Malawi
Malaysia
Mauritius
Moldova
Philippines
Portugal
Republic of Korea
Russian Federation
Senegal
Slovenia
Thailand
Togo
Tonga
Turkey
Uruguay

501 - 1,000

Andorra
Austria
Bahamas
Barbados
Belgium
Brunei Darussalam
Cambodia
Canada
Cuba
Cyprus
Czech Republic
Egypt
Finland
France
Gambia
Germany
Haiti
Indonesia
Italy
Japan
Kazakhstan
Kuwait
Latvia
Liechtenstein
Lithuania
Malta
Monaco
Morocco
Myanmar
Oman
Pakistan
Poland
Qatar
San Marino
Saudi Arabia
Singapore
Switzerland
United Arab Emirates
United Kingdom

> 1,000

Bangladesh
Kyrgyzstan
Lebanon
Netherlands
New Zealand
Slovakia
Ukraine

Source: Chris Desmond, Kathryn Watt, Anamika Saha, Jialin Huang & Chunling Lu, Prevalence and number of children living in institutional care: global, regional, and country estimates, 'The Lancet Child & Adolescent Health', Vol. 4, Issue 5, pp. 370-377.

1.2 Terminology and Concepts

The **definition of an institution** that was set out in the Global Study questionnaire to States attempted to identify the types of institutions that States were requested to report on.[8] There is no globally accepted definition of 'institutions'. However, official attempts to define institutions tend to refer to **characteristics rather than types of institutions**. For example, the European Ad Hoc Expert Group on the Transition from Institutional to Community-based Care[9] acknowledged the difficulties in setting a definition. They focused on characteristics, which combine to form an institutional culture, i.e.:

- residents are isolated from the broader community;
- are compelled to live together;
- do not have sufficient control over their lives and over decisions which affect them;
- and the requirements of the organisation itself tend to take precedence over the residents' individual needs.[10]

The definition of an institution set out in General Comment No. 5 by the CRPD-Committee also takes a characteristics-based approach.[11]

The CRC refers to **alternative care**, which is not defined in the instrument itself, but is broadly understood to cover formal and informal care of children lacking parental care. It includes kinship care in the wider family, foster care and other family-based care options, supervised living arrangements for children and suitable forms of small-scale residential care. The alternative care field is developing increasingly community-integrated models of care that are modelled on family life, usually used on a temporary basis, and there is ongoing dialogue about what range of options are suitable to ensure that all children's needs and preferences can be met.

8 The term 'institutions' (or 'centres') used in the questionnaire shared with UN Member States for this study, refers to 'all public or private settings outside the justice system or the penitentiary administration, where children can be deprived of liberty for their own protection, for reasons of their education, health or disability, drug or alcohol abuse, poverty, for being separated from their parents, for being orphans, for living in street situations, for having been trafficked or abused, or for similar reasons - by action of the state (either directly or through licensing or contracting of non-state actors) - where the state has assumed or accepted responsibility for the care of the child'. (cf. UN Global Study Questionnaire)

9 In order to address the issues of institutional care in Europe, Vladimír Špidla (the EU Commissioner for Employment, Social Affairs and Equal Opportunities), convened a group of independent experts.

10 European Commission, *Report of the Ad Hoc Expert Group on the Transition from Institutional to Community-based Care*, 2009, Available at https://ec.europa.eu/social/main.jsp?langId=en&catId=89&newsId=614&furtherNews=yes.

11 Cf. CRPD/C/GC/5, *op. cit.*, para. 16(c).

'They spend their free time inside the premises of the institution, either actually in the building or, in the best-case scenario, in the garden, in the yard, if they have a yard. That's it. It's within the boundaries of the institution.'

'... Young children they go to school by themselves because they know how to take the bus [...] this is not the way it works in the centres. As I said, those centres are creating a state of dependency for the children that are put in there.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

Any child who has been placed in any facility (whether or not it features the characteristics that would define it as an institution) by a judicial, administrative or other public body, and who cannot leave at will, immediately suffers a limitation on freedom of movement. However, deprivation of liberty relates to a very specific aspect of bodily movement. The difference between limitation of movement and deprivation of liberty is 'one of degree or intensity'.[12] Deprivation of liberty is occurring within a wide range of institutions, including through the following measures: children being confined and cut off from communities, having limited or no contact with their families, often placed far away from where they live. The use of physical restraints, isolation and solitary confinement occur in some institutions, which are particularly egregious examples of deprivation of liberty, in some instances amounting to torture.

Although the definition of deprivation of liberty adopted by the Study is in some respects very wide when applied to institutions outside the criminal justice system, in other respects it appears to exclude concerning situations. For example, institutions such as so-called 'orphanages' that are run by faith groups or other non-governmental organisations for which the State has not assumed responsibility, and which are not registered,[13] may not have been included in the State responses to questionnaires. Such placements are prohibited under international law as being arbitrary or unlawful detention,[14] but the practice is widespread.

12 Ton Liefaard, 'Deprivation of Liberty of Children', Ursula Kilkelly & Ton Liefaard, *International Human Rights of Children,* Singapore, Springer Nature, 2018. Liefaard identifies a body of European Court of Human Rights judgments which take this approach, notably: ECtHR, *Guzzardi v. Italy,* Application No. 7367/76, 6 November 1980; ECtHR, *Ashingdane v United Kingdom,* Application No. 8225/78, 25 May 1985; ECtHR, *Rantsev v. Cyprus and Russia,* Application No. 25965/04, 7 January 2010; ECtHR, *Stanev v. Bulgaria*, Application No. 36760/06, 17 January 2012; ECtHR, *De Tommaso v. Italy,* Application No. 43395/09, 23 February 2017. See also CCPR/C/GC/35, *op. cit.*, para. 62. The HRC includes institutional custody of children within the definition of deprivation of liberty, but views such deprivation of liberty as justified if it is in the child's best interest. See also Chapter 4 on the Right to Personal Liberty.

13 SOS Children's Villages International & European Commission, *Towards the right care for children: Orientations for reforming alternative care systems,* Luxembourg, European Union, 2017, pp. 7-8.

14 Article 9 ICCPR, Article 37(b) CRC.

Such institutions often receive children through informal referrals that do not involve any authorities, again excluding them from the definition. Yet these institutions may factually deprive children of their liberty on a daily basis, and in very harmful ways. Unregistered, privately run institutions might in some cases lead to trafficking of children into institutions and their exploitation through commodifying care and linking it to tourism.[15] Although these institutions may not have been counted by States in their responses to questionnaires, the recommendations arising from this chapter seek to ensure that they are included and will receive urgent attention.

1.3 History and Context of Institutions

In his Report to the United Nations General Assembly on Violence Against Children[16], Paulo Sérgio Pinheiro provided a concise history of institutions for children. He stated that from their earliest inception, institutions were set up as repositories for the unwanted, noting that historians suggest that the earliest recorded institution specifically for the care of neglected children was created in **Constantinople** in the 3rd century AD as a means of reducing infanticide. Later on, in the Middle Ages, foundling homes for abandoned children were set up by the Church in **Italy**, and the practice spread across **Europe**. He went on to say that institutions for children grew with industrialisation and colonialism, coinciding with the idea that child offenders and children lacking care required rescuing and protection in institutions. Pinheiro indicated that in colonial and post-colonial settings, indigenous or aboriginal children were also seen as needing to be 'saved' from what were judged to be 'inferior' cultures.[17] Historically, children from racial and ethnic minorities have been over-represented in child protection and/or justice systems.

According to Pinheiro, in some places, large-scale institutions for children were developed either to deal with profound social distress after events such as the two World Wars; or as part of an ideological commitment to 'socialised' child care. This was the pattern in many communist countries, notably those in the post-1945 USSR sphere of influence. Beginning in the second half of the 20th century, it became recognised that large, closed institutions could not support children's physical, social, emotional and cognitive development in any

15 Cf. SOS Children's Villages (2017), *op. cit.*, p.20.

16 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*

17 Since the Pinheiro report in 2006, further evidence in processes such as the Truth and Reconciliation Commission (TRC) in Canada, has found a wide-spread process of assimilation and 'cultural genocide'. Children were forcibly removed from their homes, placed in residential schools, denied their language, traditional clothing, and culture. The majority were subjected to forced labour, violence, sexual, physical and emotional abuse, degrading treatment and torture.

way comparable to a family setting. Today, social policy 'best practice,' reflecting the CRC and other human rights obligations, aims to provide as many children as possible with an upbringing in a family, and access to a mainstream school and community life. Some countries (such as the **United Kingdom** and **Spain**) in which large-scale institutional care was previously approved have deliberately moved away from this kind of care for children without families. According to Pinheiro, at the time of his report institutions for children were more prevalent in **Central and Eastern Europe (CEE)** and in the **Commonwealth of Independent States (CIS)** than any other regions of Europe. Moreover, during the last 15 years, major deinstitutionalisation programmes developed and implemented with the assistance of UNICEF, have led to a significant decrease of children in (large) institutions.[18] In the developing world, although large-scale institutions still predominate, there have been notable efforts, to transform the planning and not simply to deinstitutionalise, but to shift systemically towards stronger care and protection systems, in countries such as **Malaysia** and **Cambodia**.[19] In some countries children labelled as having disabilities made up the majority of those in residential care.[20] A number of countries have made significant progress in their deinstitutionalisation strategies and promising practices and progress in this regard will be identified in part 6 of this chapter. On the other hand, in **many African countries** private 'orphanages' mushroomed, as faith-based organisations, NGOs and private donors sought to respond to the growing numbers of children orphaned by HIV/AIDS and armed conflict.

18 See UNICEF, *15 years of De-Institutionalisation Reforms in Europe and Central Asia: Key results achieved for children and remaining challenges*, 2018.

19 See, TuhinulIslam & Leon Fulcher (eds.), *Residential Child and Youth Care in a Developing World: Global Perspectives* The CYC-Net Press, 2016, Available at https://bettercarenetwork.org/library/the-continuum-of-care/residential-care/residential-child-and-youth-care-in-a-developing-world-global-perspectives. (accessed 12 August 2019).

20 UN General Assembly, *Report of the Special Rapporteur on the rights of persons with disabilities*, A/HRC/40/54, 11 January 2019, para. 13, which states '...it has been well established that children with disabilities are overrepresented in ... residential institutions for children, such as orphanages, social care settings and small-group homes'. Citing Georgette Mulhier, 'Deinstitutionalisation – a human rights priority for children with disabilities', *Equal Rights Review* 9, 2012, pp. 117-137.

2. International Legal Framework

The international law that is relevant for this chapter is drawn primarily from two UN Conventions – the CRC and the CRPD. The International Convenant on Economic, Social and Cultural Rights (ICESCR) is mentioned, and the Declaration on the Rights of Indigenous People (DRIP) is briefly discussed. The chapter also draws on General Comments of both the CRC and the CRPD Committees and on the Guidelines for the Alternative Care of Children (2009).[21]

21 Other relevant guidelines relating to child justice, which have some relevance to this chapter, have been discussed earlier in the study.

2.1 A Child Should Grow Up in a Family Environment

> 'The child who lives in an institution, he receives no love, no attention, no care, no understanding, no affection. It's not happy, and it has nothing to do with money.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

The ICESCR indicates 'that the widest possible protection and assistance should be accorded to the family which is the natural and fundamental group unit of society, particularly for its establishment and while it is responsible for the care and education of dependent children.'[22] The preamble of the CRC further stipulates that a child 'should grow up in a family environment, in an atmosphere of happiness, love and understanding.' This is viewed as the best situation to enhance the full and harmonious development of a child's personality. The CRPD requires States parties to ensure that children with disabilities have equal rights with regard to family life.[23] Every child has the right to know and be cared for by his or her parents,[24] and the State must ensure that no child is separated from his or her parents against his or her will, except where such separation is necessary to safeguard the best interests of the child.[25] The decision to effect such a removal must be made by competent authorities, in accordance with domestic law (which must be in line with international law) and must be subject to review.[26] The CRPD also emphasises that 'in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents.'[27]

The Guidelines for the Alternative Care of Children, welcomed by the UN General Assembly in 2009,[28] follow the same reasoning as the CRC. The family is described as the natural environment for the growth, wellbeing and protection of children, and therefore, efforts should primarily be directed to keeping children in their families or returning them to their

22 Article 10 ICESCR.

23 Cf. Article 23(3) CRPD.

24 Article 7 CRC; Article 18(2) CRPD, both include the words 'as far as possible'. Article 5 CRC requires State parties to respect the responsibilities, rights and duties of parents, or where applicable the members of the extended family or community as provided by local custom.

25 Article 9(1) CRC; Article 23(4) CRPD.

26 Ibid.

27 Article 23(4) CRPD.

28 No State opposed the adoption of the Guidelines.

families as soon as possible.[29] Reasons for children going into alternative care go beyond children being removed by authorities, and also include situations that cause families to abandon or relinquish their children, where parents have died or are unable to care for their children due to illness, children who decide to leave home and for whom return is not appropriate, internal displacement within a State, or arrival unaccompanied into another State.[30] Early and comprehensive information, services and support must be targeted to prevent these causes.[31] The placement of children in formal alternative care should be limited to situations where the care in the extended family and community-based support services are assessed as being inadequate.[32] The range of issues to be tackled is very broad: 'from material poverty, stigmatisation and discrimination to reproductive health awareness, parent education and other family support measures such as provision of day-care facilities'.[33] Respite care, the support and development of customary community based care alternatives,[34] social services, social assistance (including financial assistance), counselling services and circles of support[35] have also been identified as part of the basket of services required to effectively respect the necessity principle.[36]

There is a need for all States to establish a robust 'gatekeeping' system, to ensure that children are admitted into any form of alternative care only if all possible means of keeping them with their parents or extended family have been carefully considered[37] and only after applying a proper process to determine the child's best interests. This in turn requires adequate support services or community structures to which referrals can be made –

29 Cf. Article 24(3) CRPD, which aims to prevent concealment, abandonment, neglect and segregation of children with disabilities through providing early and comprehensive information, services and support to persons with disabilities and their families. See also UN Human Rights Council, *Resolution on the Rights of the Child: empowering children with disabilities for the enjoyment of their human rights, including through inclusive education,* A/HRC/40/L.20/Rev.1., 20 March 2019 para.16. See also UN General Assembly, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 2009, guideline 3.

30 Nigel Cantwell & Anna Holzehelter, 'Article 20: Children Deprived of their Family Environment', André Alen, Johan VandeLanotte, Eugene Verhellen, Eva Berghmans, Mieke Verheyde & Fiona Ang (eds.), *A Commentary on the United Nations Convention on the Rights of the Child,* 2007, p. 39.

31 Cf., A/RES/64/142, *op. cit.*, guideline 10.

32 Cf. Nigel Cantwell & Anna Holzehelter, *op. cit.*, p. 37.

33 Nigel Cantwell, *Moving Forward: Implementing the 'Guidelines for the Alternative Care of Children'*, UNICEF, 2012, p. 22. Day-care is also included in Article 18 CRC.

34 Cf. SOS Children's Villages (2017), *op. cit.*, pp. 7-8. See also *Council of Europe, Council of Europe Recommendation on children's rights and social services friendly to children and families,* Recommendation CM/Rec(2011)12, 2011, Available at https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168046ccea (accessed 12 August 2019).

35 CRPD-Committee, *General Comment No. 5 on the right to live independently and be included in the community*, CRPD/C/18/1, 27 October 2017, para. 68. Available at https://www.ohchr.org/EN/HRBodies/CRPD/Pages/GC.aspx (accessed 12 August 2019).

36 Cf. Article 26 CRC.

37 See: Better Care Network & UNICEF, *Making Decisions for the Better Care of Children: The role of gatekeeping in strengthening family-based care and reforming alternative care systems.* New York, BCN & UNICEF, 2015. Available at https://www.unicef.org/protection/files/UNICEF_Gatekeeping_V11_WEB_(003).pdf (accessed 12 August 2019).

and States are required by the CRC to ensure that special protection and assistance are provided.[38] A high quality range of suitable alternative care options must be available to meet the specific care needs of every child. After the placement of a child in alternative care, a process needs to be established that regularly reviews the child's situation[39], while constantly working with families. This process is vital to ensure that the child does not remain in alternative care any longer than is absolutely necessary.

2.2 Best Interests of the Child

Article 3(1) CRC provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. In General Comment No. 14, the CRC-Committee[40] describes best interests as a three-fold concept, comprising a substantive right, an interpretive legal principle, and a rule of procedure. Any person authorised to make decisions about a child must consider the potential impact of that decision on the child's present and future wellbeing and the holistic realisation of all the child's rights. The best interests principle must be read together with Article 12 CRC, which provides children with the right to participate in decisions that are made about them, in accordance with their age and maturity. Appropriate weight must be given to the child's views and wishes in the determination of his or her best interests.

Highly relevant for this chapter is the emphasis in CRC General Comment No. 14 on the preservation of the family environment and maintaining relations between children and their families.[41]

> Because you are there, so you don't have support, real love, real attention – meaning like real, real attention like you have from your family – so it's very easy that you are there and so you start to do like problems and negative things.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

38 Cf. Articles 18 & 19 CRC.

39 Cf. A/RES/64/142, *op. cit.*, guideline 14.

40 CRC-Committee, *General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, CRC/C/GC/14, 29 May 2013, para 1. Available at https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf (accessed 12 August 2019).

41 Cf. Articles 18 & 19 CRC.

The Committee requires an assessment to be carried out which considers the child's best interests in situations where there is the potential for the separation of a child from his or her parents. The Committee has also stressed that it is vitally important to keep siblings together unless this is against their wishes or in cases of clear abuse.[42]

The Committee states as follows: 'Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure and for the shortest appropriate period of time, or when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child. Before resorting to separation, the State has a duty to provide support to the parents in assuming their parental responsibilities, and restore or enhance the family's capacity to take care of the child, unless separation is necessary to protect the child. Economic reasons cannot be a justification for separating a child from his or her parents'.[43] Furthermore, a child may not be separated from his or her parents purely on the grounds of a disability. Juan E. Méndez, former Special Rapporteur on Torture, warned that the 'best interests of the child should not be defined in accordance to the convenience of the State'.[44]

If a child is placed in alternative care, then all decisions within that placement setting, as well as regular reviews of the placement, must be guided by the child's best interests, with due regard to his or her wishes, and the Committee points to the Guidelines for Alternative Care for detailed guidance. It notes that the flexibility of the concept of best interests is both its strength – because it allows it to be responsive to the situation of the individual child and to evolve as our knowledge about child development advances, and its weakness – because it is sometimes subjectively applied to support decisions or policies that do not uphold rights. The Committee proposes that to ensure proper implementation of the best interests principle, child rights impact assessments of policies and actions must be regularly undertaken.[45] According to the Committee, the application of the principle of the best interests of the child to indigenous children requires particular attention. The Committee notes that the best interests principle is not only a personal matter between individuals. It is also a matter that applies more broadly to society – i.e. to the collective. This becomes especially relevant when applying the best interests principle to indigenous children, as specific cultural rights need

42 See: CRC-Committee, *Concluding Observations to the United Kingdom*, CRC/C/GBR/CO/5, 3 June 2016, paras. 52(d) & 53(c).

43 Cf. CRC/C/GC/14, *op. cit.*, paras. 58-65.

44 UN General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, A/HRC/28/68, 5 March 2015, para. 76.

45 Cf. CRC/C/GC/14, *op. cit.*, para. 34-35.

to be respected as well. It is therefore crucial to also involve indigenous communities when deciding on what course of action would be in the best interest of the child.[46]

2.3 Provision of Alternative Care

a. State Obligations under the CRC

Article 20(1) CRC indicates that any child unable to temporarily or permanently live with their parents or family and who cannot remain in that environment due to risks to the child, shall be entitled to special protection and assistance provided by the State. Regardless of whether an NGO or other private organisation becomes involved, this remains a State obligation. The State under Article 20(2) and (3) must ensure a range of suitable alternative care options, such as foster placement, Kafalah under Islamic Law, adoption, or *if necessary* placement in a 'suitable institution' for *the care* of children. The fact that the CRC uses the word 'institution' must be viewed against the fact that the Convention is 30 years old. Policy and practice regarding care and protection and the provision of alternative care have subsequently developed. The word 'suitable' preceding the word 'institution' is where the focus should be. The CRC-Committee does not consider it 'suitable' for a child to be in an institution that is characterised by the features discussed above. In fact, the Committee has repeatedly called for deinstitutionalisation as part of a broader process of care and protection system strengthening.[47]

The use of the word 'suitable' in Article 20(3) CRC requires matching the child with a care arrangement that is suitable, and that is 'specifically appropriate, necessary and constructive for the individual child concerned and in his/her best interests'.[48] This rests on the assumption that there is a range of family-based and other care settings available, so that there is 'a real choice',[49] and that there is a system that includes proper criteria based on sound professional principles which is consistently applied for assessing the child's and the family's situation. Respecting the suitability principle also requires that all care settings

46 CRC-Committee, *General Comment No. 11 on Indigenous children and their rights under the Convention,* CRC/C/GC/11, 12 February 2009, Available at https://www.un.org/esa/socdev/unpfii/documents/CRC.GC.C.11_EN.pdf (accessed 12 August 2019).

47 CRC-Committee, *Concluding observations on the combined third and fourth periodic reports of China (including Hong Kong and Macau Special Administrative Regions)*, CRC/C/CHN/CO/3-4, 4 October 2013. CRC-Committee, *Concluding observations on the combined fourth and fifth periodic reports of the Russian Federation*, CRC/C/RUS/CO/4-52, 5 February 2014. CRC-Committee, *Concluding observations on the combined fourth and fifth periodic reports of Mexico*, CRC/C/MEX/CO/4-5, 3 July 2015. CRC-Committee, *Concluding observations on the second to fourth periodic reports of Estonia,* CRC/C/EST/CO/2-4, 3 February 2017. CRC-Committee, *Concluding observations on the fifth periodic report of Romania,* CRC/C/ROU/CO/5, 13 July 2017. CRC-Committee, *Concluding Observations on the combined fifth and sixth periodic reports of Guatemala*, CRC/C/GTM/CO/5-6, 28 February 2018.

48 Cf. Article 20(1) CRC refers to placement in a 'suitable institution for the care of children'.

49 Cf. Cantwell *et al.* (2012), *op. cit.*, p. 22.

must meet general minimum standards. A mechanism as well as a process is required for registering and authorising care providers, and to monitor compliance and ensure quality through an inspection process.

The world 'suitable' must also be interpreted in conjunction with Article 37(b) CRC, which requires that deprivation of liberty of children shall be used only as a measure of last resort. *Prima facie*, institutions where children are or may be deprived of liberty are unlikely to be *suitable* as an alternative care option. Given the harm caused to children by deprivation of liberty, its use for the purpose of delivering support or services is disproportionate and will hardly ever meet the high standards of a 'measure of last resort' in Article 37(b) CRC. However, as deinstitutionalisation is not an event but a process, there will be a period of time during which some children, regrettably, will remain in institutions which deprive them of their liberty. While working expeditiously to end this, the rights of children in such settings must be strictly safeguarded. However, nothing in this chapter should be read as encouragement to keep children in institutions or to deprive them of their liberty.

b. Children with Disabilities

> 'For people in wheelchairs, it's much more difficult. If they're in an institution it's almost impossible for them to get out because they need somebody to take them out.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

Article 19 CRPD protects the rights of all persons with disabilities to live in the community. This principle in turn is supported by Article 23(1) and 23(3) CRC, which emphasise that children with disabilities have the right to actively participate in the community and to receive services, education and supports which promote 'full integration'. No child should be placed in alternative care on the basis of his or her disability or the disability of their parents. As noted above, while the CRC allows for the placement of a child in a 'suitable institution', Article 23(5) CRPD provides that States shall 'where the immediate family is unable to care for a child with disabilities, undertake every effort to provide alternative care within the wider family, and failing that, within the community in a family setting'. The CRPD-Committee has reinforced this in its General Comment No. 5, which states that regardless of size, institutionalised settings are not appropriate if they have 'other defining elements of institutions or institutionalization'. Additionally, the CRPD-Committee stresses that family-like 'institutions are still institutions' and for children, 'are no substitute for care by a family'.[50]

50 Cf. CRPD/C/18/1, *op. cit.*, para. 16(c).

Article 7 CRPD requires that States parties shall take all measures to ensure the enjoyment by children with disabilities of their rights on an equal basis with other children. It also requires that children with disabilities are permitted to express their views on matters affecting them, their views being given due weight in accordance with their age and maturity (and are to be provided with appropriate assistance to realise that right), on an equal basis with other children. The Human Rights Council has also emphasised the importance of taking into account the child's will and preferences. In this context, States are encouraged to replace institutionalisation with appropriate measures to keep children in their families of origin or extended families, and, failing that to remain in the community in a family setting.[51]

c. Indigenous Children

The preamble to the Declaration on the Rights of Indigenous People (DRIP) states that 'in particular indigenous families and communities retain a shared responsibility (with States) for the upbringing, training, education and well–being of their children, consistent with the rights of the child'.[52] This implies that the indigenous peoples have a right as a whole to fully engage in matters relating to their children, including any decisions and actions to remove their children and place them in care, treatment or any form of custody.[53] As indigenous peoples have the right to transmit their culture and language generation after generation, maintain their indigenous identities and participate in and learn their cultural and spiritual practices[54], States have a heightened responsibility to ensure that children remain in their family, extended family or community and where this is not possible, place children within indigenous families. Where placement in any form of residential care is necessary, that facility should reflect the culture of the child and take measures to keep the child closely linked to their community, culture of origin and land.[55]

51 UN Human Rights Council, *Resolution on Rights of the child: empowering children with disabilities for the enjoyment of their human rights, including through inclusive education*, A/HRC/40/L.20/Rev.1, 20 March 2019.

52 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 2 October 2007.

53 The critical importance of culture, language and traditional land to the wellbeing of the indigenous child (and the obvious inability of any alternative care or institution to substitute the family and community context in which these critical needs are met), heightens the due diligence required of States in protecting and supporting indigenous children and families in their community and on their traditional lands if that is where the family resides.

54 UN General Assembly, *United Nations Declaration on the Rights of Indigenous Peoples*, A/RES/61/295, 2 October 2007, Articles 13(1), 13(2), 21(1 & 2), 9, 12 & 25, Available at https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html (accessed 12 August 2019).

55 Indigenous land has a spiritual value to indigenous peoples and is the origin of their identity, as well as indigenous laws and beliefs.

2.4 The Right to Safety, Care, Participation and Development for Children in Alternative Care

'... When you're a young child, you don't know why you're there. It's extremely difficult as a small boy, as a young child to understand what goes on. Nobody explains that to you.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

Article 6 CRC requires that States ensure that children survive and thrive in their development. This highlights the critical need for those children in any form of alternative care to be protected, and be provided with the emotional supports, education and programmes needed for healthy development. In relation to the 'best interests' principle, Article 3 CRC stipulates that institutions, services and facilities responsible for care or protection 'shall conform with standards established by competent authorities, particularly with regard to health, safety, staffing and competent supervision.' The CRC-Committee has frequently referred States to consider the Guidelines for Alternative Care in the setting of such standards.[56] These relate to matters such as contact with family and community, nutrition, health care,[57] education to the maximum extent in the community, play and leisure activities,[58] the needs of babies and children with special needs, respect for religion and culture, the right to privacy, protection against abuse and exploitation, avoidance of stigma.[59]

The accommodation and supervision provided to children in alternative care must effectively protect them against abuse and from abduction, trafficking, sale and other forms of exploitation, in conformity with the law and without unreasonably constraining their liberty.[60] All disciplinary measures and behaviour management which could be considered torture, cruel, inhuman or degrading punishment, including, corporal punishment, solitary confinement and other forms of physical or psychological violence, must be strictly

56 For example: Russia (CRC/C/RUS/CO/4-5), 2014, para. 40; Mexico (CRC/C/MEX/CO/4-5), 2015, para. 40; Estonia (CRC/C/EST/CO/2-4), 2017, para. 37; Romania (CRC/C/ROU/CO/5), 2017, para. 29.

57 See also UN Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health*, A/HRC/35/21, 28 March 2017.

58 See also CRC-Committee, *General Comment No. 17 (2013) on the right of the child to rest, leisure, play, recreational activities, cultural life and the arts (art. 31)*, CRC/C/GC/17, 17 April 2013, Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 (accessed 12 August 2019). The General Comment above refers to the denial of play and recreational activities for children in institutions.

59 See also CRC-Committee, *General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence*, CRC/C/GC/20, 6 December 2016. Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11 (accessed 12 August 2019).

60 Cf. A/RES/64/142, *op. cit.*, guidelines 91-93.

prohibited and States shall take measures to prevent such practices, and to ensure that they are punishable by law.[61]

Under the Rules for the Protection of Juveniles Deprived of their Liberty ('Havana Rules'), conditions and circumstances in institutions must ensure respect for human rights, guaranteeing 'meaningful activities and programs which serve to promote and sustain their health and self-respect.'[62] Article 24(1) CRC determines that every child has the right to 'the highest attainable standard of health'. This focus on the child's wellbeing is endorsed further in Article 39, which states that 'all appropriate measures' must be taken to promote 'physical and psychological recovery and social reintegration of a child victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment' and goes further to emphasise that 'such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child'.

Article 12 CRC established that when adults are making decisions about children, those children should have a say in decisions that affect them. They should be able to express their opinion and have their opinions considered. This is particularly relevant when children are placed in institutions. Children in institutions are seldom given sufficient or any say over the decisions made about them. As institutions predominantly focus on the group as a whole rather than individuals, and because blanket rules tend to apply, children most often will be told what to do, when to do it, and how to do it, leaving them powerless to influence their own lives. Article 16 CRC establishes that children have the right to privacy.[63] In an institutional setting this right is difficult to implement and frequently violated where children share accommodation, ablution facilities and most other spaces.

2.5 Independent Oversight, Monitoring and Complaints

Children in care must have access to (and must know about) effective and impartial mechanisms for complaints or concerns regarding their treatment or the conditions of

61 Cf. A/RES/64/142, *op. cit.*, guideline 96. See also Article 37(a) CRC; CRC-Committee, *General Comment No. 13 (2011): The right of the child to freedom from all forms of violence,* CRC/C/GC/13, 18 April 2011, paras. 41 & 46, Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=5&DocTypeID=11(accessed 12 August 2019); CRC-Committee, *General Comment No. 8 (2006) on The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*, CRC/C/GC/8, 3 March 2007, para. 26; cf. 'Havana Rules', *op. cit.*, Rule 12.

62 Cf. 'Havana Rules', *op. cit.*,rule 12.

63 See also CRC/C/GC/20, *op. cit.*, para. 46 on the implementation of the rights of the child during adolescence.

placement. Complaints should be dealt with in a consultative and confidential manner, with feedback, implementation and further consultation.[64]

The Optional Protocol to the Convention Against Torture (OPCAT) establishes a system of regular visits undertaken by independent international and national bodies to places where people are deprived of their liberty, in order to prevent torture and other cruel, inhuman or degrading treatment or punishment.[65] The 'Havana Rules' provide similar independent oversight and monitoring[66] – all of which are applicable in the situation where a child has been placed in an institution by a judicial, administrative or public body and cannot leave at will. The Guidelines for Alternative Care also provide that agencies, facilities and professionals involved in care provision should be accountable to a specific public authority which should ensure frequent inspections through both scheduled and unannounced visits.[67]

An example of such a mechanism is found in **Austria**. In its response to the Study questionnaire, **Austria** pointed to the fact that the Austrian Ombudsman Board (AOB), as an independent oversight and monitoring mechanism, has been responsible for protecting and promoting human rights in the Republic of Austria since 1 July 2012. The AOB, along with six regional commissions serves as the National Preventive Mechanism and regularly and extensively monitors public and private institutions that are classified as 'places of deprivation of liberty within the meaning of Article 4 of the OPCAT' nationwide and on a regular basis. In 2017, the Austrian Ombudsman Board released a special report to Parliament drawing attention to the situation of children and their rights in public institutions.[68] In addition to the AOB, each Federal State in **Austria** has an 'ombudsperson for children and youth', found in **Austria's** child and youth advocacy offices. These bodies ensure that children have access to an external, independent and also anonymous contact person, who supports the children, defends their views and strengthens their voice.[69]

64 Cf. A/RES/64/142, *op. cit.*, guideline 99. Cf. 'Havana Rules', *op. cit.*, Rule 72-8.

65 UN General Assembly, *Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT),* A/RES/57/199, 18 December 2002, Available at https://www.ohchr.org/en/professionalinterest/pages/opcat.aspx (accessed 13 August 2019).

66 Cf. Article 2 OPCAT; 'Havana Rules', *op. cit.*, Rule 72.

67 Cf. A/RES/64/142, *op. cit.*, guidelines 128-130.

68 Available in German at https://volksanwaltschaft.gv.at/downloads/evrov/Sonderbericht_Kinderrechte_2017.pdf (accessed 13 August 2019).

69 UN Global Study Questionnaire, Austria (State Reply). Other States have mechanisms similar to a Children's Ombudsperson or Commissioner: Australia, Belgium, Republika Srpska, Ireland, Lithuania, the Netherlands and others. States also make use of bodies that investigate all human rights related issues such as National Human Rights Institutions (which go by various titles in different countries).

3. Pathways into Institutions

'Most commonly, children are placed in (institutional) care because of disability, family disintegration, violence in the home, lack of social support systems, and poor social and economic conditions, including poverty. In some countries, natural disasters, armed conflict or the effects of the HIV/AIDS pandemic may leave parents unable to care for their children. Illness, accidents, and incarceration may also separate children from their parents.'

Source: Paulo Sergio Pinheiro, World Report on Violence Against Children. Geneva, United Nations Secretary-General's Study on Violence against Children, 2006

3.1 Socio-Economic Conditions

Poverty is one of the root causes leading to the institutionalisation of children. Families living in poverty often deal with a host of disadvantages not of their own making, such as poor access to housing, employment, health care, food and other basic services. These in turn create ever-deepening cycles of poverty and place parents and children in a vulnerable position with the potential of children being removed on the basis of neglect. People living in rural areas or some distance from cities have an added layer of challenge in terms of transport, access to food and medical services, and access to education. In a number of countries, the majority of children in institutions are placed there based on poverty related concerns.[70] Research shows that in some countries the Government is more likely to separate children from their family due to issues related to poverty, than to provide the family the supports and guidance they may need.[71]

Poverty, and therefore neglect based on poverty, is an inadequate justification to separate children from families, and not at all a justification for deprivation of liberty in institutions. Institutionalisation on the basis of poverty points to the neglect of States of their obligations to children and families in their own communities.

3.2 Lack of Proper Family and Community-based Solutions

Although violence, exploitation or neglect in the home can contribute to family separation and subsequent placement of children into alternative care, the lack of access to social services is often the starting point that creates vulnerability within a family context.[72]

A report in 2015 indicates that the vast majority of families with children who have intellectual disabilities 'have no access to any form of community supports such as day care services, inclusive education, or therapy services, making it difficult to keep their child at home'.[73] Many countries lock up children with disabilities, ostensibly for their care, but in reality due to a lack of community services and support for families.

Family and community-based solutions are essential in preventing deprivation of liberty in institutions. These include, among others: day-care; respite care; community-based

70 Cf. SOS Villages International (2017), *op. cit.*

71 Disability Rights International, *Still in Harm's Way: International voluntourism, segregation and abuse of children in Guatemala.* Washington DC, Disability Rights International, 2018.

72 Better Care Network, *Violence Against Children and Care in Africa: A Discussion Paper,* New York, Better Care Network, 2017.

73 Disability Rights International, *No Way Home: The Exploitation and Abuse of Children in Ukraine's Orphanages.* Washington DC, Disability Rights International, 2015.

health workers, child and youth care workers, and social workers; inclusive community schools; therapeutic services; adequate justice and policing systems that put the emphasis on perpetrators of violence rather than removal of the child; financial aid through grants; kinship care, foster care, and forms of care that are integrated within the community. Without these community-based solutions, countries may overly depend on placement of children into institutions.

3.3 Discrimination and Marginalisation

As confirmed in the Global Study on Violence against Children,[74] historically, children with disabilities and children from racial and ethnic minorities tend to be over-represented in care institutions, and in many States this trend persists.

a. Children with Disabilities

The exact number of children with disabilities in institutions is unknown, but there is significant evidence that they are over-represented. In 2006, the Pinheiro report indicated that children with disabilities were institutionalised at a far greater rate than children without disabilities and exposed to significant violence within such institutions.[75] In spite of Pinheiro's recommendations, the protections under the CRC and the CRPD, and numerous recommendations from investigations, the numbers of children with disabilities deprived of their liberty remains high.[76] Stigmatisation, lack of support provided to parents, lack of care-giving capacity of families, misdiagnosis, over-diagnosis and an exclusive focus on the medical model of disability leads to the overuse of institutionalisation.[77]

b. Indigenous Children and Children from Ethnic Minorities

Evidence on indigenous child welfare and child justice shows the significant over-representation of indigenous children in care and justice systems.[78] Referencing the most recent data available in June 2016, the Guardian of Children and Young People in South

74 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*

75 Ibid.

76 Cf. Disability Rights International (2018), *op. cit.* See also Chapter 7 on Children with Disabilities Deprived of Liberty.

77 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*

78 Grand Chief Ed John, *Indigenous resilience, connectedness and reunification: From root causes to root solutions. A report on Indigenous child welfare in British Columbia. Victoria, BC: Ministry of Children and Family Development,* 2016, Available at http://fns.bc.ca/wp-content/uploads/2017/01/Final-Report-of-Grand-Chief-Ed-John-re-Indig-Child-Welfare-in-BC-November-2016.pdf (accessed 13 August 2019).

Australia indicated that 47.9% of all those detained in secure child care were aboriginal children, while Aboriginal children comprise only 4.5% of the population of **South Australia**.[79] Similarly, in **British Columbia (Canada)** less than 10% of the child population in British Columbia is indigenous and yet, as of May 2016, 60.1% (4,445) of the total (7,246) children and youth in care in British Columbia were indigenous (although it is difficult to know how many of the latter are living in institutions). The Canadian Human Rights Tribunal's decision in January 2016 in *First Nations Child and Family Caring Society of Canada et al. v. Attorney General of Canada* found that the human rights of indigenous children, as set out in the Canadian Human Rights Act, were violated because the federal Government had consistently and deliberately underfunded First Nations child and family services on reserves.[80]

A report from the European Roma Rights Centre (ERRC) on *Forced removals of Romani Children from the care of their families* indicates a high number of Roma children placed in institutions on the basis of historic and present-day racism and oppression.[81] A further study conducted in 2011[82] indicates a huge overrepresentation of Roma children in institutions. All countries identified in the report, had less than a 10% share of Roma in the total population, but at that time, in **Slovakia** more than 80% of children in institutions were Romani. In **Bulgaria** and **Hungary** more than 60%, in the **Czech Republic** it was more than 40%, and in **Romania** more than 20%, and in **Italy**, where the total share of the Roma population is less than 0.25% of the total population, Roma children constituted more than 10% of all children in institutions.[83] Significant efforts to deinstitutionalise since that time may have had a positive impact on numbers, but the percentages may have remained much the same.

Over a decade ago, deadly ethnic riots occurred in the **western China's Xinjiang** region that caused the tightening of control of the region in which the majority of the population is made up of ethnic Uyghur Muslims. Recent reports[84] indicate that huge numbers of

79 Government of South Australia, Office of the Guardian for Children and Young People, *Snapshot of South Australian Aboriginal and Torres Strait Islander Children and Young People in Care and/or Detention from the Report on Government Services 2018*, 2018, Available at http://www.gcyp.sa.gov.au/wp-content/uploads/2018/04/South-Australian-ATSI-children-in-care-and-youth-detention-from-ROGS-2016-17.pdf (accessed 13 August 2019).

80 Cf. Grand Chief Ed John (2016), *op. cit.*

81 Jolie Chai, *Forced Removals of Romani children from the care of their families*, Budapest, European Roma Rights Centre, 2005.

82 European Roma Rights Centre, *Life Sentence: a Report By The European Roma Rights Centre, Bulgarian Helsinki Committee, Milan Šimečka Foundation and Osservazione*, Budapest, European Roma Rights Centre, 2011.

83 Ibid.

84 Patrick de Hahn, 'More than 1 million Muslims are detained in China—but how did we get that number?', *Quartz*, 5 July 2019, Available at https://qz.com/1599393/how-researchers-estimate-1-million-uyghurs-are-detained-in-xinjiang/ (accessed on 12 July 2019).

Uyghur Muslims are being held in detention by Chinese authorities under the guise of 're-education'.[85] The detention of the Uyghur Muslims has resulted in the institutionalisation of Uyghur children who are separated from their detained parents. The children are reported to be placed in 'boarding schools or in special children's shelters'.[86] The report by Adrain Zenz notes that in one township that is occupied by ethnic Uyghurs, over 400 children have both parents detained with many other children having one parent in detention.[87] The children's relatives are not provided the opportunity to have the children in their care or custody.[88] The conditions of the schools or centres are said to be detrimental to the needs of the children: 'children were in an extremely pitiful state, wearing thin clothes despite freezing December weather. The classroom was filled with an unbearable stench because the children neither washed nor changed their clothes.'[89]

3.4 Family Violence

According to Pinheiro, many children end up in institutions because of violence in their families, including neglect, and psychological, physical and sexual violence.[90] A report by SOS Children's Villages found that, in 15 out of 21 country assessments reviewed, violence was a primary cause for entering the care system – meaning that children were either victim or witness of violence before entering alternative care.[91] In **Colombia**, it was estimated that 21% of children were in alternative care because of maltreatment and 11.6% due to sexual abuse.[92] In **Bosnia and Herzegovina** and **Croatia**, over 50% of children entered alternative care because of neglect and in **Argentina**, an alarming 70% of all children were placed in alternative care because of previous experiences of violence.[93] Also, many children are removed from families because of substance abuse by their parents and caregivers.[94]

85 Patrick de Hahn, 'More than 1 million Muslims are detained in China—but how did we get that number?', *Quartz*, 5 July 2019, Available at https://qz.com/1599393/how-researchers-estimate-1-million-uyghurs-are-detained-in-xinjiang/ (accessed on 12 July 2019).

86 Adrian Zenz, 'Break Their Roots: Evidence for China's Parent-Child Separation Campaign in Xinjiang', *The Journal of Political Risk*, Vol. 7(7), 2019, Available at: http://www.jpolrisk.com/break-their-roots-evidence-for-chinas-parent-child-separation-campaign-in-xinjiang/ (accessed 12 July 2019). UN Committee on the Elimination of Racial Discrimination, *Concluding observations on the combined fourteenth to seventeenth periodic reports of China (including Hong Kong, China and Macao, China)*, CERD/C/CHN/CO/14-17, 30 August 2018.

87 Ibid.

88 Ibid.

89 Ibid.

90 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*

91 SOS Children's Villages International & University of Bedfordshire, *From a Whisper to a Shout: A call to End Violence Against Children in Alternative Care*, 2014, p. 32.

92 Ibid.

93 Ibid.

94 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*

Protection from family violence is one of the leading causes for children being removed from their family and placed in alternative care, including institutions, and in particular when no family and community-based supports and services are available. Article 19 CRC deals with protection of the child from abuse and neglect while in the care of parents or caregivers, and it requires protective measures which include social programmes to provide necessary support for the child and for those who have the care of the child. Only if Children cannot remain in the home environment, in situations where it would be against their best interests to remain, does the State have a duty to provide alternative care.

3.5 Drug Dependence

Many children are detained in the name of 'treatment' or 'rehabilitation' from drug dependence. The Special Rapporteur on the Right to Health, Dainius Pūras, has described detention of drug users as a failed practice. He has noted positive trends in which a number of countries are replacing punitive approaches with modern policies based on public health and human rights principles.[95] In a joint statement, UN entities have called for closure of all compulsory drug detention centres, and movement towards the decriminalisation of non-violent drug offences.[96] The UNODC has developed a model, within a strong framework of evaluated strategies, that can be adapted to support Member States for the scaling up of services to meet the needs of those affected by drug use, particularly children and adolescents at risk and/or those affected by drug use dependence and its health and social consequences.[97] The focus is on science-driven public health approaches in drug control as the springboard for existing good practices.[98]

95 Cf. Report of Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Annual Report (2018),* A/HRC.38/36, paras. 12-13, Available at https://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/36 (accessed 9 September 2019).

96 United Nations Entities, *Joint statement by United Nations entities on compulsory drug detention and rehabilitation centres,* March 2012, Available at www.unodc.org/documents/southeastasiaandpacific//2012/03/drug-detention-centre/JC2310_Joint_Statement6March12FINAL_En.pdf (accessed 13 August 2019); United Nations Entities, joint United Nations statement on ending discrimination in health-care settings, July 2017, Available at https://www.unaids.org/sites/default/files/media_asset/ending-discrimination-healthcare-settings_en.pdf (accessed 13 August 2019).

97 United Nations Office on Drugs and Crime, 'UNODC role and work', Available at https://www.unodc.org/unodc/en/drug-prevention-and-treatment/children/unodc-role.html (accessed 12 July 2019).

98 Countries reached by the program include Afghanistan, Bangladesh, India, Pakistan, Iran, Kazakhstan, Kyrgyzstan, Tajikistan, Turkmenistan.

3.6 Unregistered Institutions

All over the globe, children are in unregistered institutions, such as 'orphanages', including many children who are actually not orphans.[99] Many of the children there are not referred by a court or administrative authority, which may render their placement there unlawful or arbitrary. Although in many cases the State is directly placing the children in these institutions, their neglect by not ensuring registration may still amount to a violation of rights. Furthermore, the children in these institutions are at grave risk, in part because of the informality of their arrangements.

Faith groups have contributed to the burgeoning of institutions through establishing and funding 'orphanages' and 'children's homes'. In some countries, external funding from faith-based organisations represents a huge proportion of the budgets of institutions.[100] There are recent developments raising awareness of the problem. For example, the Australian Christian Churches International Program issued a Report in 2016, calling for the engagement of faith-based actors in deinstitutionalisation and child welfare reforms.[101]

Some groups and individuals commodify the care of children through seeking donations, funding salaries of (often unqualified) caregivers. Some institutions actively recruit children from their parents, often through promises of education, food or improved life chances. While many of these institutions are often run by well-meaning individuals, these facilities that operate outside of the formal system present a grave risk to children. Evidence shows that establishing institutions has become a lucrative 'business' in a number of countries.[102] A range of private actors (including NGOs and faith-based organisations) run orphanages and other institutions for children who could be living with their families, if the latter received proper support. Many such facilities do not provide quality care and often do not meet the most basic standards of health and safety. In addition, these facilities often lack oversight and monitoring systems, and a professional workforce. In some cases, operators

99 A survey carried out by UNICEF and MoSA of Cambodia found that between 2005 and 2015, the number of orphanages has increased by 60%. 16,579 orphans are living in 406 orphanages across Cambodia, while 80% of these children are actually not orphans, 12% are not registered with the government, 38% of the orphanages had never been inspected and, 21% have no agreement with the government in place – cf. Prak Chan Thul, 'Cambodia: UN launches plan to tackle fake orphanages', *Reuters*, 20 April 2017, Available at https://www.reuters.com/article/us-cambodia-orphanage/cambodia-u-n-launch-plan-to-tackle-fake-orphanages-idUSKBN17M0UD (accessed 18 October 2019); See also: Christopher Knaus, 'The race to rescue Cambodian children from orphanages exploiting them for profit' *The Guardian*, 28 August 2017, Available at https://www.theguardian.com/world/2017/aug/19/the-race-to-rescue-cambodian-children-from-orphanages-exploiting-them-for-profit (accessed 26 July 2019).

100 Ian Milligan, Richard Withington, Graham Connelly & Chrissie Gale, *Alternative child care and deinstitutionalisation in sub-Saharan Africa: Findings of a desk review*, Centre for Excellence for Children's Care and Protection, 2016, p. 30.

101 ACCI Relief, *Changing mindsets and practice: Engaging Christian faith based actors in deinstitutionalisation and child welfare systems reforms*, ACC International, 2016.

102 Linda Richter, 'Inside the thriving industry of AIDS orphan tourism', *Human Sciences Research Council: Review*, 2010, pp. 6-8.

heavily rely on 'paying volunteers' – a system which cannot ensure that children are safe in care.[103]

'Voluntourism' is the term used to describe travellers and tourists who want to 'give back' or 'do something good' while they are on a vacation or holiday. According to a 2014 report on international volunteering in **Guatemala**, the most popular volunteer destinations are 'orphanages'. As a result of their popularity with volunteers and the donations they bring in, owning an 'orphanage' has become a booming business – where children are the commodity.[104] A report by Lumos found that since the 2010 earthquake in **Haiti**, well-intentioned efforts of some international donors and volunteers have caused the expansion of the orphanage system, in which an estimated 30,000 children are now living.[105] Contemporary evidence from different country contexts demonstrates situations in which orphanages have been central participants in a web of trafficking of children.[106]

Also, in the category of unregistered institutions (and extremely dangerous for children), are the existence of 'faith or prayer camps'. The former Special Rapporteur on Torture, Juan Méndez, observed a number of women and children in **Ghana** who were held in concrete cells and subjected to a prayer and fasting regime, which can reportedly last for up to two weeks. At least one child appeared to be under 10 years of age.[107]

103 Tess Guiney, 'Orphanage Tourism: The need for Protection and Policy', Claire Freeman, Paul Tranter & Tracey Skelton, *Risk, Protection, Provision and Policy,* Singapore, Springer, 2016, pp. 287-307; JaneReas, 'So, Child Protection, I'll Make a Quick Point of It Now: Broadening the notion of child abuse in volunteering vacations', *Tourism Review International,* Vol. 18(4), 2015, pp. 295–309.

104 Disability Rights International, *Still in Harm's Way: International voluntourism, segregation and abuse of children in Guatemala,* Washington DC, Disability Rights International, 2018.

105 Georgette Mulheir & Mara Cavanagh, *Orphanage Entrepreneurs: The trafficking of Haiti's Invisible Children,* Lumos, 2017.

106 US State Department, *Trafficking in Persons Report,* 2017, Available at https://www.state.gov/wp-content/uploads/2019/02/271339.pdf (accessed 13 August 2019).

107 UN General Assembly, *Follow up report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, on his follow-up visit to the Republic of Ghana,* A/HRC/31/57/Add.2, 25 February 2015.

4. Conditions in Institutions

4.1 Solitary Confinement and Use of Restraints

While there are many ways in which children have their freedom of movement limited in institutions, some measures are more overt examples of deprivation of liberty. The first of these is the use of solitary confinement or isolation. The CRC-Committee has described solitary confinement and isolation to be forms of mental violence against children.[108] Many institutions use solitary confinement or isolation to punish children – some even do this as an 'introduction' into the institution. Former Special Rapporteur on Torture, Juan Méndez, has made it clear that 'even very short periods of detention can undermine the child's psychological and physical well-being and compromise cognitive development. Children held in detention are at risk of post-traumatic stress disorder, and may exhibit such symptoms as insomnia, nightmares and bed-wetting. Feelings of hopelessness and frustration can be manifested in acts of violence against themselves or others'.[109] He went on to state that the imposition of solitary confinement, of any duration, on children constitutes cruel, inhuman or degrading treatment or punishment or even torture.[110]

The use of restraints is another egregious direct measure that deprives children of liberty. The Guidelines for Alternative Care contain restrictions against the use of restraints, requiring authorisation and confining their use to when strictly necessary, and indicating that the use of medical restraint should be based on therapeutics needs and shall never be employed without evaluation and prescription by a specialist.[111] However, a 2008 report of former Special Rapporteur Manfred Nowak has found there can be no therapeutic justification for the prolonged use of restraints, which may amount to torture or ill-treatment.[112] A 2015 report of Juan Méndez stated that restraints or force should only be used when the child poses an immediate threat of injury to his or her own person or to others. In such cases, the restraints should only be used if all other means of control have been exhausted –

108 Cf. CRC/C/GC/13, *op. cit.*, para 21.

109 UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan Méndez*, A/HRC/28/68, 5 March 2015, para 33.

110 Ibid., para 44. See further: A/66/268, paras. 77 & 86, and A/68/295, para. 61.

111 Cf. A/RES/64/142, *op. cit.*, para. 97. See criticism of this by Eric Rosenthal, 'A Mandate to End Placement of Children in Institutions and Orphanages: The Duty of Governments and Donors to Prevent Segregation and Torture Center for Human Rights and Humanitarian Law', *Protecting Children against Torture in Detention: Global Solutions for a Global Problem*, Washington DC, Center for Human Rights and Humanitarian Law, 2017.

112 UN General Assembly, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak*, A/63/175, 2 July 2008.

and then only briefly. The European Committee for the Prevention of Torture, noting that the risks and consequences of restraints are more serious for minors, has proposed that children below the age of 16 years 'should in principle never be subjected to restraint.' They recommend that '[i]n extreme cases, where it is necessary to intervene physically to avoid harm to self or others, the only acceptable intervention is the use of physical (manual) restraint, that is, staff holding down the minor until he or she calms down'.[113] A 2013 Report by the former Special Rapporteur on Torture Juan Méndez, which focused on Health Care, called for an absolute ban on restraints for children or adults with mental disabilities in all places of detention.[114] The CRPD-Committee, in its guidelines on Article 14 CRPD concerning the right to liberty and security of persons with disabilities, calls on States parties to protect the security and personal integrity of persons with disabilities who are deprived of their liberty, including by eliminating the use of forced treatment,[115] seclusion and various methods of restraint in medical facilities, including physical, chemical and mechanical restraints.[116]

Although solitary confinement and use of restraints are the most obvious forms of extreme deprivation of liberty there are many more subtle ways of how freedom of movement and personal liberty are restricted. Not being able to leave the institution at all, or being confined to only part of the institution, is a common practice. Children are often cut off from the community, many do not even leave the institution to attend school. Many are placed far away from home and have limited contact with their families. The Special Rapporteur on the Right to Health puts it this way: 'Many other daily forms of "organised hurt" are perpetrated through no less pernicious means. Children's creativity, communication, sleeping, waking, playing, learning, resting, socialising and relationships are compulsively controlled in detention and transgressions punished, while those administering the punishment enjoy impunity'.[117]

113 Cf. Rosenthal, *op. cit.*, p. 340 who suggests that the 2013 (see note below) and 2015 (see note above) reports of the Special Rapporteur on Torture can and should be read in a manner consistent with this more specific standard of the European Committee for the prevention of Torture.

114 UN Human Rights Council, *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez*, A/HRC/22/53, 1 February 2013.

115 Cf. CRPD/C/PER/CO/1, paras. 30 & 31; CRPD/C/HRV/CO/1, para. 24; CRPD/C/TKM/CO/, para. 32; CRPD/C/DOM/CO/1, para. 31; CRPD/C/SLV/CO/1, paras. 33-34; CRPD/C/SWE/CO/1, paras. 37-38.

116 CRPD-Committee, *Guidelines on article 14 on the right to liberty and security of persons with disabilities,* September 2015, para. 12.

117 Cf. A/HRC/38/36, *op. cit.*, para 66.

4.2 Violence

'I remember one day there was this boy who got beaten by a heavy wooden stick, and he was beaten so badly that he almost lost his left eye. Then there was this other boy who was once beaten by one of these heavy cast iron chains you would use for a padlock around a gate. It's horrific to see that and you're so powerless to help.'

'Not just me in my flesh but I was also suffering from seeing the other children suffering, even if I was not being beaten at one point in time but I could see another one being beaten. I was so powerless, that made me really suffer and I could feel a lot of pain because of that.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

Violence within institutions has been identified in countries across the globe. Studies have notably revealed:

- emotional and psychological abuse in the guise of 'corrective actions';[118]
- adults and children subjected to torture and abuse in drug detention centres where they were, chained to beds, beaten, and forced to do physical exercise to the point of utter exhaustion;[119]
- sexual violence against girls with disabilities; the use of caged beds; inappropriate use of psychotropic medication;
- the shackling of children with disabilities;
- pouring cold water over children's heads;
- and the use of physical binding of children to cribs or wheelchairs.[120]

A multiple country study published in 2014 found that children living in institutions were beaten, forced to do physical exercise and deprived of sleep.[121] In another study, violence by institutional staff, for the purpose of 'disciplining' children was found to include beatings with hands, sticks and hoses, hitting children's heads against the wall, restraining children in cloth sacks, tethering them to furniture, locking them in freezing rooms for days at a time

118 Cf. SOS Children's Villages International & the University of Bedfordshire (2014), *op. cit.*, p. 36.

119 Cf. Center for Human Rights and Humanitarian Law (2017), *op. cit.*

120 Ibid.

121 Cf. SOS Children's Villages International & the University of Bedfordshire, (2014), *op. cit.*, p.37.

and leaving them to lie in their own excrement. The same survey found that children in one country were regularly subject to corporal punishment, deprivation of food, and additional duties.[122] In 2015, Disability Rights International reported that conditions were inhumane in government-funded facilities for people with disabilities, including one institution that locked children in cages.[123] In 2017, of 405 young people who spent their childhoods in institutions interviewed by Human Rights Watch, 197 reported violations of their rights, including neglect, physical abuse, psychological abuse, and sexual abuse or exploitation.[124]

In **Chile** the living conditions that children endure under State care in the National Service for Minors (SENAME) network are in dire need of improvement. Between January and June 2016, 34 children died under SENAME's care. At time of writing, the public prosecutor was investigating the deaths of 259 children in the last decade. The victims were living in SENAME centres when they died.[125] In 2018, the CRC-Committee concluded its first inquiry under the 3rd Optional Protocol on a communications procedure. Following a visit to **Chile** by two members of the Committee, a finding was made that there were 'grave and systematic violations of the rights of children in residential centres under the direct or indirect control of SENAME'. The Committee found that the system breached several articles of the Convention. A harrowing account was included in the report of a testimony provided by a child who had formerly been detained in a centre. He said, in order to avoid sexual abuse, 'during the night I stain myself with shit so they do not come for me'.[126]

Abuse of children in institutions by both staff and peers has been confirmed in multiple studies. Children in institutions are vulnerable to violence from their peers, particularly when conditions and staff supervision are poor. Lack of privacy and respect for cultural identity, frustration, overcrowding, and a failure to separate particularly vulnerable children from older, more aggressive children often lead to peer-on-peer violence. Staff

122 Cf. SOS Children's Villages International & the University of Bedfordshire (2014), *op. cit.*

123 Disability Rights International, *No Justice: Torture, Trafficking and Segregation in Mexico*, Washington DC, Disability Rights International, 2015, p. 10. A report released in July 2019 by Human Rights Watch also points to children with disabilities in Kazakhstan experiencing isolation and abuse in institutions. The Human Rights Watch calls on Kazakhstan to 'make it a priority to move children with disabilities out of closed residential institutions and provide support for children with disabilities to live with their families, or in other family settings in the community. All forms of violence in closed institutions and the use of restraints as a form of punishment, control, or retaliation, or as a measure of convenience for staff, should be prohibited'. Cf. Human Rights Watch, *Kazakhstan: Children in Institutions Isolated, Abused*, 2019, Available at https://www.hrw.org/news/2019/07/17/kazakhstan-children-institutions-isolated-abused (accessed 19 July 2019).

124 Cf. HRW, *World Report* (2018), *op. cit.*, p. 134.

125 Ibid.

126 Although inquiries under OPIC are confidential, the Government of Chile has agreed to the Report of the Committee being made public. See Comité de los Derechos del Niño, *Informe de la investigación relacionada en Chile en virtud del artículo 13 del Protocolo facultativo de la Convención sobre los Derechos del Niño relativo a un procedimiento de Comunicaciones*, 1 de junio de 2018. (Official English translation not yet available). Report in Spanish (advance, unedited), Available at https://www.ohchr.org/Documents/HRBodies/CRC/CRC_C_CHL_INQ_1.pdf (accessed 13 August 2019).

may sanction or encourage peer abuse amongst children – either to maintain control or simply for amusement.[127] According to recent research, younger children and children with disabilities are more at risk of abuse and boys are more at risk of harsh punishments.[128]

4.3 Neglect

Children deemed 'too disabled to learn' have been found tied to beds, receiving little or no attention or education and in some instances denied health care and adequate nutrition.[129] In **Guatemala**, serious and pervasive abuses have been reported, including hundreds of children tied to wheelchairs and furniture and locked in cages. In some facilities, their heads are shaved, they do not go outside, and they languish in inactivity.[130]

Research found that in one institution children with disabilities under three years of age who were described as 'discharged' had in fact died. The mortality rate in institutions was found to be 100 times higher for babies with disabilities than for those without disabilities.[131] Neglect is a common factor in countries with a large number of children with disabilities in institutions where they are often under-resourced and the children's needs neglected. For example, a report in 2010 following inspections by the **Bulgarian** Government and the Bulgarian Helskinki Committee of institutions found that 238 children had died between 2000 and 2010. The report suggested that at least three-quarters of those deaths were preventable – due to causes such as starvation, neglect, poor hygiene, hypothermia. Despite Government efforts, a further 300 children died between 2010 and 2014.[132] In 2013 the European Court of Human Rights awarded damages in respect of the deaths of several children more than a decade earlier, in a home for children with severe mental health disabilities in the village of Dzhurkhovo, Bulgaria.[133]

127 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*, p. 189.

128 Lorraine Sherr, Kathryn J. Roberts & Natasha Gandhi, 'Child violence experiences in institutionalized/orphanage care', *Psychology, Health & Medicine,* Vol. 22(1), 2017, pp. 31-57.

129 Human Rights Watch, *Abandoned by the State: Violence, Neglect, and Isolation for Children with Disabilities in Russian Orphanages,* 2014, pp. 31-34.

130 Disability Rights International, *Still in Harm's Way: International voluntourism, segregation and abuse of children in Guatemala,* Washington DC, Disability Rights International, 2018, p. v.

131 Lumos, *Putting Child Protection and Family care at the Heart of EU External Action,* 2017, Available at: https://www.wearelumos.org/resources/putting-child-protection-and-family-care-heart-eu-external-action/ (accessed 13 August 2019).

132 Bulgarian Helsinki Committee, *Alternative Report to the Committee on the Rights of Persons with Disabilities*, 2017, pp. 29-30, Available at https://tbinternet.ohchr.org/Treaties/CRPD/Shared%20Documents/BGR/INT_CRPD_ICO_BGR_27646_E.pdf (accessed 26 July 2019).

133 European Court of Human Rights, *Nencheva and others v. Bulgaria*, No. 48609/06, ECHR 2013/20, 18 June 2013.

4.4. Exploitation

A number of institutions lack sufficient funding or are neither registered nor funded by the State. While most children in institutions have parents and are not orphans, children in these institutions are vulnerable to facilities portraying them as orphans (paper orphans) and using them to raise funds. Such fundraising strategies, include among others, (a) entertaining tourists with traditional dances, (b) separating children from their families to attract fee-paying volunteers, (c) keeping children in a state of poverty, (d) keeping children malnourished to attract more donations and sending children out at night to hand out flyers advertising their orphanage.[134]

Children in institutions are being made to work through 'the act of selling time with orphanages through orphanage tourism programs, and the use of orphans' photographs and stories to elicit donations and sponsorship'. Case evidence shows that children in institutions are left highly vulnerable to systematic sexual abuse, and in some cases, there is evidence to conclude that some orphanages have been established with the purpose of conducting child sexual exploitation.[135] In 2015, the **Lithuanian** Government initiated investigations into official complicity and negligence related to allegations of sex trafficking of girls and boys in State-run orphanages. The widespread nature of this abuse resulted in the decision to phase out the orphanage system in favour of a foster care system.[136]

4.5 Contact with Family

In his 2015 report, the Special Rapporteur on Torture noted that children deprived of their liberty in institutions are often 'not allowed to maintain regular contact with their families and friends'. Article 37(c) CRC provides that children separated from their parents have the right to maintain regular contact with parents, except in exceptional circumstances. Human Rights Watch has documented that staff in some institutions for children with disabilities either actively deny children's contact with relatives or fail to take measures to facilitate such contact. Staff at two institutions reported that they do not attempt to

134 UNICEF, *Residential Care in Cambodia,* 2011, Available at, http://unitingforchildren.org/wp-content/uploads/2013/03/Fact-sheet-residential-care-Cambodia.pdf (accessed 13 August 2019); UNICEF (South Asia), *Volunteering in orphanages,* Available at https://www.unicef.org/rosa/what-we-do/child-protection/volunteering-orphanages (accessed 13 August 2019); Forget me not Australia, *Expert Paper: Voluntourism and Child Trafficking into Orphanages,* 2016, Available at https://www.ecpat.org/wp-content/uploads/2016/10/Voluntourism-and-child-trafficking-into-orphanages.pdf (accessed 13 August 2019).

135 Kathryn Van Doore, 'Paper Orphans: Exploring Child Trafficking for the purpose of Orphanages', *International Journal of Children's Rights,* Vol. 24, 2016, pp. 378-407.

136 US State Department, *Trafficking in Persons Report, Lithuania,* 2018, Available at https://www.refworld.org/docid/5b3e0aee4.html (accessed 27 July 2019).

contact children's parents and discourage visits, claiming that children tend to be 'spoiled' by special treatment by their parents, and return from family visits prone to misbehaviour.[137]

Children have a right to maintain relationships with their families. Siblings should not be separated, and in any case, every effort should be made to enable siblings to maintain contact with one another. For children in institutions, contact with their family, as well as with other persons close to them, should be encouraged and facilitated, in keeping with the child's protection and best interests. For that reason, children placed in institutions should be within a manageable distance away from their family. Distance can make it impossible for parents to visit, portraying them as disinterested in their children, which in turn may impact on the children's psychological wellbeing. The Guidelines for the Alternative Care of Children crucially note that 'Restriction of contact with members of the family and other persons of special importance to the child should never be used as a sanction.'[138] In many indigenous cultures traditional lands have a deep spiritual meaning to families and communities and are a strong component of their world view. Separating children from their traditional land, family and communities is challenging to them, but worse still is the inability to visit lands, community and family or receive visits from parents, because placement is hundreds of kilometres away.[139]

4.6 Staff

The Global Study on Violence Against Children stated that there is a heightened risk of violence from a variety of sources to children in care institutions. The greatest amount of evidence concerns violence of various kinds by staff, including neglect, and violence by children against other children. Although the State is responsible for protecting children from violence irrespective of who is providing their care, staff violence has been documented in institutions around the world, including those run by the State, by faith-based organisations, and by private entrepreneurs or enterprises.[140]

Observations with regard to staff, include:

- unqualified and poorly remunerated staff are widely recognised as a key factor linked to violence within institutions;

137 Cf. Center for Human Rights and Humanitarian Law (2017), *op. cit.*

138 Cf. Guidelines for the Alternative Care of Children, *op. cit.*, s 10, 16, 50, 80, 81 & 95.

139 Cf. Declaration on the Rights of Indigenous Peoples, *op. cit.*, Art 2.

140 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*, pp. 187-188.

- low pay and status frequently result in poorly motivated employees and rapid staff turnover, and under-staffing is a serious problem;
- relatively few staff in care institutions receive any special training in child development or rights, or information about issues of violence;
- in institutions for children with disabilities, inadequately trained staff can be quick to lash out at the children;
- overwhelmed staff may resort to violent measures to maintain discipline, particularly when supervision is lacking;
- staff 'burnout' results in increasingly negative attitudes towards children and in patterns of physical and impulsive responses to confrontation;
- individuals with histories of violence against children, including sexual abuse and exploitation, may seek out jobs that allow them easy access to children, and
- failure to supervise staff properly is also a serious problem. A study of abuse in residential care in the UK identified ineffective management and minimal contact by managers with staff as significant features common to abuse cases.[141]

A major element in protecting children from violence is to ensure that suitable and competent staff care for them. This involves a twofold commitment on the part of States and others to ensure that, (1) only *suitable candidates* are recruited to responsible positions caring for children, and (2) that they possess *adequate qualifications and training* to fulfil their role.[142] Children in institutions are also vulnerable to physical and psychological violence from peers, particularly when conditions and staff supervision are poor, including lack of privacy, boredom, frustration, and overcrowding, among others.

4.7 Care Plans

Plans and programmes to support development, educate, rehabilitate, and address trauma for children is either extremely poor, or simply lacking in many instances. Every child should have an individualised care plan that stipulates interventions that are tailored to the child's needs. It is important to recognise that many children will have complex needs, that specialist services will often be required, and that caregivers will require support and skills in meeting the individual needs of these children. It is also essential to ensure that care

141 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*, pp. 187-188.

142 Cf. SOS Children's Villages International (2014), *op. cit.*, p. 56.

plans focus on what is in the best interests of the child throughout their placement in the institution, and this requires on-going evaluations of progress and special developmental needs. Evidence from the country assessments indicated that in most of the countries, assessments and care planning were inadequate to protect children and provide them with individualised quality care. In **Croatia**, the country assessment indicated that social welfare staff did their best to draw up a plan for each child, but they admit the failure to do so in every single case. The 2011 Report by the Ombudswoman for Children in **Croatia** clearly recognised this problem, and questioned how care plans are drawn up for each child in placement, given that centres often do not monitor children placed in social welfare homes.[143] A further example is **Malawi**, where there are regulations regarding the regular review of care plans, but still many organisations had not developed them: on average, only 9.2% of the children surveyed in a country assessment had a care plan while only 2.3% of children had had their care plan reviewed in the previous three months.[144]

Planning and support for children leaving care is a crucial aspect, whether it is preparation to return to the child's own or extended family, another placement, or moving from care to independent living. This is an under-funded and under-studied area of work.[145]

4.8 Experiences of Children in Institutions

In a study on young people's account of their stay in institutions[146], the young people described denial of personal choice in relation to everyday actions, a lack of autonomy, a lack of care (particularly with regard to food), restrictions on free time as well as on leaving the building, compulsory participation in activities, lack of opportunity to socialise with friends (social isolation), forced dependency on the institution, and blanket rules with very little flexibility related to individual needs.

143 Cf. Annual Report by the Ombudswoman for Children in Croatia, 2011.

144 Cf. SOS Children's Villages International (2014), *op. cit.*, p. 52.

145 See also a 12 country (4 region) study on detailing the ways in which young people with alternative care backgrounds cope with the challenges of becoming self-reliant and how they are supported by the State and other actors on their path towards decent work and social inclusion: Claudia Arisi, Claire Cameron & Hanan Hauari, *Decent work and social protection for young people leaving care: Gaps and responses in 12 countries worldwide*, SOS Children's Villages International & University College London, 2014. Available at https://www.sos-childrensvillages.org/getmedia/842a5811-fdb7-41c4-a0b2-45b0e5e79090/SOS_LeavingCare_web.pdf (accessed 13 August 2019).

146 Sarah Frankenberg, Sandy Chidley & Fatima Husain, *Experiences of the care system: Young people's accounts of living in institutions*, London, NatCen Social Research, 2018.

'If you're hungry your mother can ask you, "What would you like to eat?"If you're in an institution, you're just given some food and nobody bothers whether you like it or not. You're given the food that you have to eat.'

'These children in institutions are not able to choose anything in their life. They can't choose what to eat, what to wear, anything.'

'You go out, anybody has a social life. In our case, we have to write a letter to ask for permission to go out. It sometimes takes one or two months for them to get the letter. Why? Well, because we live in a protected centre, so they need to know where you are. Very often, they just don't give us permission to leave.'

'It's a mass institution, so it means mass care. That means mass solutions. What one child may need, all of a sudden applies to all the children, but you, you may not need that kind of solution, only it's a blanket solution that they apply to all the children. It is not so in real life. Sometimes some children need more time to understand certain things, to learn certain things. You don't get that personalised care.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

Children, and particularly infants, need to develop a long-term and secure relationship with at least one primary caregiver to promote the successful development of their self-esteem, emotional stability, and capacity to form social relationships.[147] Care within institutions was typified by a lack of affectionate relationships. Close relationships with members of staff at institutions were considered limited and had an emotional risk attached. The lack of protection from both emotional and physical harm and the long-term damage caused by these were recurring themes in the young people's narratives. In some institutional contexts, young people experienced incidents of outright violence and abuse. They described also witnessing cruelty in the form of beatings and other types of violent and degrading treatment. Inadequate access to education and training was identified by young people as an important issue which affected their ability to economically and socially integrate into wider society upon reaching adulthood. For example, young people from **Haiti** described being denied access to basic education while living in an institution and were required to work around the institution during the day instead. As a consequence, they felt left behind in their educational development.

147 SOS Children's Villages International, *A Solid Investment: Integrating Children without Parental Care into the Post-2015 Development Framework, Innsbruck*, SOS Children's Villages International, 2014.

At my age I should be in the two last or the last year at secondary school, because I'm *, but in fact I'm in the * Grade primary school because I missed out on all these years of education. Children who are in institutions have not the right to education. It's not something that the institution will provide'.

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

4.9 The Impacts of Institutionalisation

For almost 100 years, observational studies have documented stunted physical, intellectual, emotional, and social development among children separated from family environments and placed in institutions. Recent neuroscience research confirms earlier behavioural science research on attachment,[148] indicating that the most profound disruption to the child's healthy brain development is the separation of the children from their parents and other significant adults during childhood.[149] Juan Méndez noted that chief among such adverse psychological impacts are 'higher rates of suicide and self-harm, mental disorder, and developmental problems'.[150] In the cross-cutting study on health impacts undertaken for this Global Study, it was found that the strongest and most consistent evidence of the negative impact of institutional care is apparent in relation to mental health, particularly with regard to high rates of psychiatric symptoms, and emotional and behavioural problems. Cognitive development was also found to be negatively affected.[151]

4.10 Children under 5 Years of Age

Evidence has shown that institutionalisation of babies harms their early brain development, can result in developmental delays and permanent disability, and may have long-lasting effects on their social and emotional behaviour.[152] Violence that children may experience in institutions is often long-term and can lead to severe developmental delays, various

148 Christie Schoenmaker, Femmie Juffer, Marinus van IJzendoorn, & Marian J. Bakermans-Kranenburg, 'Does family matter? The well-being of children growing up in institutions, foster care and adoption', *Handbook of child well-being,* Netherlands, Springer, 2014, pp. 2197-2228. Nathan A. Fox, Charles A. Nelson & Charles A. Zeanah, 'The Effects of Psychosocial Deprivation on Attachment: Lessons from the Bucharest Early Intervention Project', *Psychodynamic Psychiatry,* Vol. 45(4), 2017, pp. 441-450.

149 Cf. Nathan Fox, Charles Nelson & Charles Zeanah, *op. cit.*, pp. 2-3.

150 Cf. A/HRC/28/68, *op. cit.*, para 16.

151 See Chapter 6 on Impacts on Health of Children Deprived of Liberty.

152 Human Rights Council, *The right to health and indigenous peoples, with a focus on children and youth, Draft study of the Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/EMRIP/2016/ CP8-1, 7 July 2016.

disabilities, irreversible psychological harm,[153] and increased rates of suicide and criminal activity in later life. Even brief deprivation of liberty can undermine a child's psychological and physical wellbeing and compromise his or her cognitive development. 'Medical literature establishes that children experience pain and suffering differently than adults, and that the long-term damaging effects of mistreatment tend to cause even greater, or irreversible damage in children than in adults.'[154] In his 2015 report, Juan Méndez noted that: 'One of the most egregious forms of abuse in health and social care settings is unique to children. Numerous studies have documented that a child's healthy development depends on the child's ability to form emotional attachments to a consistent care-giver [...] Unfortunately, this fundamental need for reconnection is consistently not met in many institutions, leading to self-abuse.' The Special Rapporteur on the Right to Health, Dainius Pūras, has called for an end to the institutionalisation of children below the age of 5 years.[155]

4.11 Adolescence

'It's because what they missed during their life in the children's home, they have not their own values, so they sometimes think that they are bad, so they do bad things. It's because they have no place in the society, in the life, like around people they have nowhere they are, who they are, so that their value is really low.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

'Since the entry into force of the CRC, neuroscience research has revealed that the brains of adolescents are still developing in many critical ways. This calls into serious question the rationale for punitive, closed environments and methods of control. Corporal punishment, humiliation, coercion and the denial of supportive environments that would ensure healthy, non-violent relationships and physical comfort can never elicit positive, long-term change in a child's behavior.'[156] The CRC-Committee, in its General Comment No. 20 on the Implementation of the Rights of Adolescents, observe '[t]here is significant evidence of poor outcomes for adolescents in large long-term institutions, as well as in other forms of alternative care, such as fostering and small group care, albeit to a much lesser degree. These adolescents experience lower educational attainment, dependency on social welfare

153 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*

154 Cf. Center for Human Rights and Humanitarian Law (2017), *op. cit.*

155 Cf. A/HRC/38/36, para. 58.

156 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*

and higher risk of homelessness, imprisonment, unwanted pregnancy, early parenthood, substance misuse, self-harm and suicide'.[157] However, it is particularly important to engage fully with young people themselves in decisions about their care, and to include options that move adolescents safely towards independent living.

4.12 Impact beyond the Child

The impact goes beyond the child. Dainius Pūras has observed that 'the current structures of confinement produce a vast geography of pain that transcends borders, resource settings and political systems. This is intimately linked to the right to health and wellbeing, not only of those deprived of liberty, but also of communities, families, children and future generations. It is vital to consider the cyclical and transgenerational harm these systems produce'.[158] The Canadian Truth and Reconciliation Commission (TRC) identified the residential school period in which first nations children were removed and cut off from their families, communities and culture, as the beginning of an intergenerational cycle of trauma and neglect. The emotional and mental health issues that stem from **Canada's** legacy of institutionalised discrimination and the social determinants of health in First Nations communities continue to worsen. Indigenous peoples continue to experience intergenerational trauma secondary to removal of children from families, and residential schooling. The health impacts of these practices are profound, including mental illness, physical and sexual abuse, self-harm and suicide, and drug or alcohol addiction.[159]

157 Cf. CRC/C/GC/20, *op. cit.*, para 52.

158 Cf. A/HRC/38/36, *op. cit.*, para 17.

159 UN Human Rights Council, *Draft Study on the Right to Health and Indigenous Peoples, with a Focus on Children and Youth, Human Rights Council, Expert Mechanism on the Rights of Indigenous Peoples*, A/HRC/EMRIP/2016/CP8-1, 7 July 2016.

5. States' Obligations

5.1 Prevention

Many families live in circumstances that compromise the caregivers' abilities to provide responsive nurturing. 'What is required of the state, therefore, is the provision of a set of promotive and protective services comprising material support, psycho-social support, and a range of parenting support programs which meet the needs of parents facing different challenges.'[160]

The Center on the Developing Child at Harvard University has recently undertaken a study which applies the best of global scientific findings of child development in child welfare systems. Its over-arching finding is that, no matter what other adversity may have been experienced, children who 'end up doing well' are most often those who have had at least one stable and responsive relationship, with a parent, caregiver or other adult. Relationships characterised by responsive nurturing provide support and scaffolding that protects the child and helps build capacities that allow them to deal with adversity and overcome it.[161]

Due to the potential harm in institutions, the negative short- and long-term consequences to a child's wellbeing, and relevant provisions of international law on the rights of the child, States have an obligation to prevent the placement of any child in an institution for the purposes of treatment, health, protection, education, or rehabilitation.

States' foremost obligation is to prevent abandonment, relinquishment and separation of the child from his/her family.[162] This means that States have an obligation to develop and sustain prevention strategies at the macro and micro levels to keep children in their families and communities. These measures would include, for example, social income strategies, job creation, accessible health care and inclusive education, community safety strategies, and affordable inclusive day care.

The second obligation of States is to prevent placement in an institution, and if this option is employed, justify this on the basis that all other more suitable alternative care measures exist and have been exhausted.

160 Department of Social Development, *Draft Child Care and Protection Policy,* South Africa, 2018.

161 Center of the Developing Child, *Applying the science of Child Development in Child welfare Systems,* Harvard University, 2016.

162 Cf. A/RES/64/142, *op. cit.*, guideline 32.

This means that States have an obligation to develop and sustain a range of alternative care options, such as community-based kinship care, respite care, foster care, and other forms of care that are integrated within the community.

If removal from the family can be justified States have the obligation to assess the needs of the child and to place the child in the most suitable alternative care option that meets the individual needs of the child and avoids any form of deprivation of liberty. States shall make every effort to place the child in the family or, failing that, in the community in a family setting, bearing in mind the best interests of the child and taking into account the child's will and preferences.[163]

Children should not be placed in facilities that have the characteristics of an institution. States must ensure that any existing institution is immediately assisted to conform to international child rights law and guidelines.[164] States must monitor the child's protection and development while in the institution, and must as soon as possible return the child to their family, or appropriate family and community-based alternative care.[165]

5.2 Gatekeeping

Gatekeeping effectively determines whether a child will be placed in alternative care – and if so, for how long. It is an essential decision-making authority and process based upon a national legal framework in compliance with international law and standards, together with the necessary assessment and review frameworks. It is intended to ensure that any placement of a child is necessary, is the least restrictive, is suitable and is guided by the principles of the CRC, in particular children's best interests, their views and wishes, and, where relevant, the CRPD.

'Gatekeeping involves vetting all potential admissions to formal alternative care provision and, if it is deemed that a given admission is indeed necessary, determining the most appropriate setting in which that care should be provided. It also "opens gates" for children to exit the formal care system when a review of the placement demonstrates that it is no

163 The *Guidelines for the Alternative Care of Children* (A/RES/64/142) indicate that decisions made on the placement of a child should consider the best interests principle in identifying 'the most suitable forms of alternative care' while promoting 'the child's full and harmonious development' (guideline 2(b)). Moreover, it stipulates that all alternative care should be provided in a way that is 'best suited to satisfying [a child's] needs and rights' (guideline 7).

164 CRC, CRPD, the Guidelines for Alternative Care for Children, UN Guidelines for the Prevention of Juvenile Delinquency ('Riyadh Guidelines').

165 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*

longer necessary. To be effective, gatekeeping should be assured by a body (e.g. a committee, or team) *vested with the authority* to make final decisions.'[166]

Any decision-making should be based on '...rigorous assessment, planning and review, through established structures and mechanisms, and should be carried out on a case-by-case basis [...] It should involve full consultation with the child at all stages, according to his/her evolving capacities, and with his/her parents or legal guardians'.[167]

Research suggests certain fundamental requirements for gatekeeping:[168]

- ***A dedicated mechanism made up of experts*** who together review individual cases and make recommendations for how children's interests can best be met in each case through a coordinated and regulated process.
- ***A legal and normative framework***, in line with international human rights standards, in particular the CRC, the CRPD and *Guidelines for the Alternative Care of Children* (A/RES/64/142).
- ***Tools, protocols and standards for gatekeeping*** tailored to the specific context, especially those that ensure decision-making is well informed through a *comprehensive assessment* process and build on local positive care beliefs and practices.
- ***A continuum of diverse and high-quality services from which to choose***.
- ***Human and financial resources***, including a sufficient number of qualified and well-trained personnel.
- ***Effective oversight, coordination, monitoring and regulation***.
- ***Research, data collection and information management systems*** to support the handling and monitoring of individual cases, and to identify trends in children's care situations in order to learn, develop solutions and allocate resources effectively.
- ***Local understanding and support for appropriate gatekeeping.*** All those involved in the care of children need to respect the principles enshrined in international human rights law, particularly with regard to the primacy of family-based care, and the right of children to be cared for adequately and to participate in decisions affecting them.

166 Cf. SOS Villages International & European Union (2017), *op. cit.*

167 Ibid.

168 Better Care Network & UNICEF, *Making decisions for the better care of children: The role of gatekeeping in strengthening family-based care and reforming systems*, 2015, pp. 51-61, Available at https://bettercarenetwork.org/library/principles-of-good-care-practices/gatekeeping/making-decisions-for-the-better-care-of-children-the-role-of-gatekeeping-in-strengthening-family (accessed 13 August 2019).

5.3 Monitoring

> 'When children are placed in institutions, they enter a different world; for those who are not part of that world, it is often a case of "out of sight, out of mind". Because society does not see these children, it needs to ensure that others see them. Effective external and independent oversight can serve as a check on those who would abuse children. Too often, however, there was little oversight of any kind brought to bear on the daily activities, the level of discipline and the quality of care that children received.'

Source: Law Commission of Canada, Restoring Dignity: Responding to Child Abuse in Canadian Institutions, 2000.

In some countries, there are considerable concerns about the capacity of governments to effectively register and monitor care and detention institutions.[169] These are often unregulated and closed to outside scrutiny, especially those run by private agencies, faith-based organisations, and NGOs, or that are situated in isolated areas. For example, a study found that in **Togo** and **Malawi**, 50% or more of the operating institutions were not registered with the authorities.[170] In such circumstances, violence may continue for years until an extreme incident brings it to light. Moreover, individuals responsible for violence against children in care and justice systems are rarely held accountable for their actions. If cases are reported, they often are only investigated superficially and prosecutions are extremely rare. Those in a position to act may be complicit in the abuse, reluctant to discipline or prosecute a colleague, or fearful of negative publicity or loss of financial support. They may respond by blocking access to the institutions; and/or punishing or threatening to dismiss workers if they speak out. The failure to hold perpetrators accountable only ensures that violence continues. Perpetrators go on to abuse other children, and their violent acts create a climate where violence against children becomes 'acceptable' and commonplace.[171]

Permitting or ignoring unregistered and unregulated institutions makes it impossible for those States to do effective gatekeeping, or to monitor (a) the decision-making that leads to placing children in such institutions, (b) the wellbeing of the child during placement, and (c) the standards of care and protection provided within such institutions. It is therefore an essential step in due diligence for States to set up some form of a national monitoring

169 Levison Chiwaula, Rebecca Dobson & Susan Elsley, *Drumming together for change: a child's right to quality care in Sub-Saharan Africa,* Glasgow, SOS Children's Villages International, CELCIS at the University of Strathclyde & University of Malawi, 2014, Available at http://www.soschildrensvillages.org/mwginternal/de5fs23hu73ds/progress?id=sUBgcxfX2owWJ8tGUpMWT4JYS94YxYZMIY_1Oc0Q-Tk,&dl (accessed 13 August 2019).

170 Levison Chiwaula, Rebecca Dobson & Susan Elsley, *Drumming together for change: a child's right to quality care in Sub-Saharan Africa,* Glasgow, SOS Children's Villages International, CELCIS at the University of Strathclyde & University of Malawi, 2014.

171 Cf. Paulo Sergio Pinheiro (2006), *op. cit.*

system, in which other than the ongoing work of monitoring, can identify, review and register *all institutions* of any kind in their country and then go on to review placements of individual children, particularly noting places and placements which deprive children of liberty. The latter could alternatively be undertaken by the gatekeeping authority if it is a separate authority to that of the monitoring authority.

The OPCAT applies to all institutions in which children can be deprived of their liberty. Such institutions must be closely monitored, stating that '*a system of regular visits*' must be undertaken by independent National Preventative Mechanisms (NPMs) with the aim 'to prevent torture and other cruel, inhuman or degrading treatment or punishment'. It is essential that all institutions, including psychiatric hospitals, treatment centres, and custodial educational facilities, are monitored through direct visits from independent monitoring bodies established nationally, and /or internationally.[172]

Oversight is essential to guarantee that child rights law, principles and standards are applied, to prevent any forms of violence and protect children against any form of abuse.[173] A key aspect of monitoring is that visits occur regularly. Without regular visits monitoring is likely to be less effective as a prevention against violence, deprivation of liberty, discrimination, abuse and other forms of harm.

The CRC-Committee has also underscored the importance of independent and qualified inspectors who should conduct inspections on a regular basis and undertake unannounced inspections on their own initiative. These inspectors 'should place special emphasis on holding conversations with children in the facilities, in a confidential setting'.[174] This role points at the significance of confidentiality and the opportunity of children to talk to the inspectors about anything they find important. Article 25 CRC is clear that children who are looked after by government or under government authority have the right to have these living arrangements examined regularly to see if they are the most appropriate. Article 19 CRC speaks to States' responsibility to protect children from all forms of abuse, violence, neglect, or exploitation, including by any person who has care of the child. The latter includes staff in institutions. Article 19(2) specifically speaks to the States' responsibility to identify, report, refer, investigate and follow-up as appropriate for 'judicial action'.

172 Benoit Van Keirsbilck & Sarah Grandfils, *Deprivation of Liberty of Children: The Importance of Monitoring*, Center for Human Rights and Humanitarian Law, 2017, pp. 208-211.

173 Ibid.

174 Cf. *General Comment No. 24 on Children's rights in the child justice system*, 2019, para. 95.

A fundamental component of effective monitoring is a disaggregated data collection system to make children visible and the establishment of a centralised database with key information on children living outside of their own family. Governments should ensure that all placements and movements of children in institutions (and the broader alternative care system) are collected, registered and centrally reported.[175]

5.4 Accountability for Implementation

'... For people in institutions – it's kind of hard to go to be in a community with other people because they think you are bad; you have stolen things, kind of like this, so destroy this black mark or something [...] society should know what it means to be in a children's home because it depends, but most people think that you are in the children's home because you've stolen things and you are a criminal.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

Despite the extensive and detailed nature of international law on this subject, children continue to be deprived of their liberty in very large numbers and continue to suffer violence, intimidation, isolation and multiple breaches of their rights in institutions. It is essential that States intensify their efforts towards better implementation of international standards.[176] The Committee on the Rights of the Child has set out, in General Comment No. 5, the legal and non-legal measures necessary to secure greater implementation of CRC standards. Although this is specific to the CRC, research and practice indicates that the measures identified by the Committee are applicable to the implementation of international standards more generally. These measures include:

1. Giving legal effect to these standards at domestic level.
2. Incorporating core principles into national law.
3. Raise awareness about their rights among children and their carers, and provide systematic children's rights education and training to all those who work with and for children.

175 Development Initiatives & SOS Children's Villages International, *Briefing Paper: The Care of Children in Data. Evidence, Gaps and Opportunities for Change in the SDGs. SOS Children's Villages International and Development Initiatives*, 2017, Available at https://www.sos-childrensvillages.org/getmedia/881d3ec2-92a9-4a3b-9425-6d074be04c27/SOS-Children-s-Villages_The-care-of-children-in-data.pdf (accessed 13 August 2019).

176 Ursula Kilkelly, 'Translating International Children's Rights Standards into Practice: The Challenge of Youth Detention', *Protecting Children from Torture in Detention: Global solutions for a global problem*, Center for Human Rights and Humanitarian Law, 2017, pp. 39-56.

4. Ensure monitoring of detention/institutional services, regardless of whether they are publicly or privately managed.

5.5 Access to Justice and Complaints

Access to justice for children has been described as 'the right to obtain a fair, timely and effective remedy for violations of rights, as put forth in national and international norms and standards, through adapted processes that protect children's dignity and promote their development'.[177] Access to justice is considered an 'integral component of any good rule of law framework' which is 'a prerequisite for sustainable development, the eradication of poverty, and greater equality'.[178]

Very few States consistently record placement of children in alternative care and even fewer report and record incidents of violence in these settings. Moreover, research reveals that very few countries have reliable and robust mechanisms to collect data on children in alternative care, making the reporting of violence much more challenging, if not impossible.[179] The CRC-Committee has specifically recommended to **Norway** that the Government improve their complaints mechanism, as it is inadequate and not readily available to children, suggesting that the Children's Ombudsman should be given the mandate to receive complaints from children, and resources to follow up in a quick and efficient way. In **Kenya**, research has found that, while there is a policy on complaints mechanisms for children, abuse was rarely reported to the authorities. In **Zambia**, a study found that a lack of a regulatory framework for ensuring that complaints could be made openly and that there was no independent system to provide oversight when addressing grievances.[180]

For children deprived of their liberty, the right to make requests and lodge complaints is particularly relevant. 'Without access to complaint mechanisms, these children face an increased risk of suffering abuse of authority, humiliation, ill-treatment and other unacceptable deprivation of rights', according to the High Commissioner for Human Rights.[181] It is precisely because of this that international human rights standards recognise the right to make requests and lodge complaints as an essential feature of the legal status of the

177 UNICEF & IDLO, *Children's equitable access to justice: Central and Eastern Europe and Central Asia,* 2015 pp. 13, n.1.

178 Ibid., pp. 18.

179 Cf. Development Initiatives & SOS Children's Villages International (2017), *op. cit.*

180 SOS Children's Villages International & University of Bedfordshire (2014), *op. cit.*, p. 55.

181 UN Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights on access to justice for children,* 16 December 2013, A/HRC/25/35, para 27.

child deprived of liberty.'[182] The right to make requests and file complaints is recognised in all international human rights instruments affecting individuals deprived of liberty, including children, and this can be regarded as the most prominent recognition of access to justice.[183]

Complaint mechanisms offer a remedy against unlawful or arbitrary treatment by institutions such as serious human rights violations, ill-treatment, denial of family contact, the use of disciplinary measures and the use of or inadequate protection against violence by staff or peers. Children must be granted opportunities to lodge a formal complaint before an independent and impartial authority. Failure to investigate allegations of serious human rights violations and to offer effective participation in investigative procedures can in itself constitute a violation of international human rights law.[184]

182 Ton Liefaard, 'Access to Justice for Children Deprived of Their Liberty', *Protecting Children from Torture in Detention: Global solutions for a global problem*, Centre for Human Rights and Humanitarian Law, 2017, pp. 57-80.

183 Complaints may be brought to international treaty body complaints procedures at the regional or international level.

184 Cf. Kilkelly (2017), *op. cit.* pp. 53.

6. Promising Practice

6.1 Deinstitutionalisation and System-wide Reforms

A World Health Organisation survey gathered information from 78 health professionals from around the world who had been involved in programmes towards deinstitutionalisation of children and adults in mental health care facilities.[185] The survey identifies five principles for deinstitutionalisation:

1. Community based services must be in place;
2. the workforce in the institutions must be committed to change – they can be an asset or a liability;
3. political support at the highest and broadest levels is crucial;
4. timing is key to the success of the deinstitutionalisation – (eg. leadership changes were found to provide opportunities for deinstitutionalisation in the countries studied);
5. even though institutional care is inefficient and costly, a process of effective deinstitutionalisation needs additional resources (and not merely a reallocation of resources), at least in the short term.

The fact that additional funds are needed in the transitional period of responsible deinstitutionalisation is supported by Eurochild and Hope and Homes for Children in their report on deinstitutionalisation in **Europe**.[186] They propose that it is essential to ring-fence the funds and re-invest them into quality alternative care, social services and family support in the community. At minimum these funds should correspond with the amount that was allocated for each child living in an institution.

Several examples of deinstitutionalisation are found in the successor states of the Soviet Union and other former Communist States in **Central** and **Eastern Europe** and **Central Asia**.[187] Efforts in these countries show that for successful deinstitutionalisation to occur an individualised and flexible child care system that follows the best interests of the child needs to be established. Changes in legislation, administrative structures, available services, funding mechanisms, inter-sectoral cooperation, empowerment of children and families, involvement of communities and families, and changes in the hearts and minds of professionals, are needed in order to support the establishment of/reform of child

185 World Health Organisation, *Innovation in deinstitutionalization: A WHO Survey*, 2014, pp. 13-14.

186 Eurochild & Hope and Homes for Children, *Deinstitutionalisation and Quality Alternative Care for Children in Europe*, 2014, p. 5.

187 UNICEF, *15 years of De-Institutionalisation Reforms in Europe and Central Asia. Key results achieved for children and remaining challenges*, 2018.

care systems.[188] Reforms in this regard have come about through efforts such as aligning national laws and policies with international standards; closure of institutions happening in tandem with the up-scaling of social welfare and family-based care services; improving the quality of family and community based care services through the development and implementation of required standards, guidelines and monitoring tools.[189] Examples of some deinstitutionalisation processes in countries in this region are set out below.

The deinstitutionalisation process in **Bulgaria** has been successful in that between 2010 and 2017 the number of children in institutional care decreased from more than 7,500 children to under 1,000 children.[190] This is due to reforms in the child care system that have resulted in foster families increasing ten-fold since 2010.[191] In 2017, there was a network of approximately 2,500 foster families caring for more than 2,300 children.[192] Community based services for children increased from 241 in 2010 to 605 in 2017.[193] However, the overall success must be considered against the fact that the number of children placed in small group homes or family type placement centres increased from 48 in 2010 to 283 in 2017.

In the deinstitutionalisation process undertaken in **Moldova**, a notable problem in the implementation of the first phase was a four-year delay in adopting a regulation to redirect Government finance from residential institutions to community-based support services. The Government of **Moldova's** target, set out in a detailed strategic plan, was to reduce the number of children in institutions by at least 50%, and this was achieved between 2007 and 2012.[194] Of the children who left institutional care, the majority were returned to families, with a relatively small number being placed in foster care and others being accommodated in smaller 'family like homes'.[195] As there still remained a significant number of children in institutions, even at the end of the first phase, the Government is continuing with a second phase.

188 UNICEF, *15 years of De-Institutionalisation Reforms in Europe and Central Asia. Key results achieved for children and remaining challenges*, 2018.

189 Ibid., p. 1.

190 Ibid., p. 2. In total, between 1990 and 2017, the number of children in institutions in Bulgaria decreased from 27,401 to under 1,000. For the detailed statistics between 1990 and 2014 see: UNICEF Europe and Central Asia Regional Office, TransMonEE (2014) Database, www.transmonee.org (accessed 19 October 2019).

191 UNICEF (2018), p. 2.

192 Ibid.

193 Ibid.

194 The number of children in institutions in Moldova decreased by 62 percent between 2005 and 2012. The Government of Moldova was supported by UNICEF and Lumos. See: Charlee Alexander *et al.*, *Reaching and Investing in Children at the Margins: Summary of a Joint Workshop by the National Academies of Sciences, Engineering, and Medicine; Open Society Foundations; and the International Step by Step Association (ISSA),* 2016, p.18. Available at https://bettercarenetwork.org/sites/default/files/Reaching%20and%20Investing%20in%20Children%20at%20the%20Margins.pdf (accessed 9 September 2019). In total, between 1989 and 2014, the number of children living in institutions in Moldova decreased by 83%. For the detailed statistics see: UNICEF Europe and Central Asia Regional Office, *op. cit.*

195 Peter Evans, *Evaluation of implementation of the national strategy and action plan for the reform of the residential child care system in Moldova 2007-2012,* UNICEF, 2013. Evans notes that in 2007, Moldova had more than 11,000 children living in 67 residential institutions. Of these children, more than 60 % were older than 12 years.

North Macedonia has seen the number of children in institutional care drop by 28% in the period 2005 to 2012 and the number of foster families increased by 60% in the same period.[196] The number of children in institutional care in **Serbia** dropped from 2,672 to 743 in the last 15 years and the number of children in foster care increased from 1,173 to 5,320 in the same period.[197] There has also been significant progress in the reform of children care systems in **Croatia** and **Romania**, which aim to create comprehensive legal frameworks to improve the quality of care that children receive.[198] In 2010, **Georgia** took the decision to accelerate the reform of its child care system.[199] This resulted in the closure of 16 large institutions for children over 5 years.[200] Challenges remain across **Europe** and **Central Asia** in that children with disabilities are still over represented in institutional care. Children from vulnerable groups, such as the Roma children, are also at risk of being placed in institutional care.[201]

In 2014, **Lithuania** adopted a 7-year action plan for the transition of children with disabilities and children removed from parental care, from institutional care to family and community-based services. In the second phase of the reform, following an initial restructuring of service provision in terms of availability and accessibility, the Government established a Child Protection and Adoption Department under the Ministry of Social Security and Labour, integrating regional child protection agencies. Thanks to the centralisation, the Government has also created a service of case management to tackle and identify the child protection issues and to take action to address them efficiently. Recent data shows that the majority of children entering care in **Lithuania** are connected with potential harm related to child abuse and neglect (1,894 out of 2,524 cases). The number of institutions for children have decreased from 96 in 2017 to 90 in 2018, while the number of institutions for children with disabilities remain the same (four). However, the number of children in these institutions has significantly decreased from 460 in 2016 to 165 in 2017. Children under the age of three are not taken into institutional settings, but placed in professional foster care. This form of alternative care was legally recognised in March 2018 and according to the new legislation, each municipality in Lithuania has the duty to develop the network of care centres required to seek for, train and provide support to professional foster carers.[202]

196 Cf. UNICEF (2013), *op. cit.*, p. 2.

197 Ibid.

198 Ibid.

199 Ibid.

200 Ibid.

201 Ibid., p. 3.

202 Opening Doors campaign, *Fact sheet: Lithuania*, 2015, Available at: https://www.openingdoors.eu/wp-content/uploads/2013/05/Facts-and-figures-Lithuania-2015-.pdf (accessed 23 August 2019).

Good Practices of Deinstitutionalisation

STATES	%
GEORGIA	97.78
BULGARIA	96.43
MONTENEGRO	85.19
NORTH MACEDONIA	84.53
MOLDOVA	83.10
LITHUANIA	75.91
POLAND	75.13
SERBIA	72.19
BELARUS	67.26
AZERBAIJAN	58.06
ARMENIA	57.60
ROMANIA	54.56
CROATIA	50.93
HUNGARY	50.52
RUSSIAN FEDERATION	46.07
SLOVAKIA	41.23
SLOVENIA	38.21
BOSNIA AND HERZEGOVINA	29.46
ESTONIA	28.94
UKRAINE	17.46
KAZAKHSTAN	15.23
TAJIKISTAN	9.52

Source: CRC State party reports, UNICEF/TransMonEE Database, UNICEF, responses to the Global Study questionnaire, official State statistics

6.2 Inquiries Regarding Children Abused in Care leading to Reform

Some governments have taken the initiative to investigate the situation of children in institutions, often including a historical perspective. For example, the Royal Commission into Institutional Responses to Child Sexual Abuse, was set up by the **Australian** Government in 2012. The Commission was established 'in response to allegations of sexual abuse of children in institutional contexts that had been emerging … for many years … and the reluctance of the institution involved to address the issue'.[203] In 2000, the Commission to Inquire into Child Abuse was established in **Ireland** to investigate the abuse of children in institutions in the State.[204] In **Canada**, a Truth and Reconciliation Commission was established to enquire into the system of residential schools for indigenous children. The final report was issued in 2015, and compensation claims are still being dealt with. The reports coming out of these investigations made damning findings and recommendations for systemic change. Other governments continue to carry out investigations into the care of children in institutions. The Government of **Scotland** established, in 2015, its first statutory national inquiry into the historical abuse of children in care in **Scotland** with the aim to make recommendations on changes to practice, policy and/or the law.[205] Further inquiries are being carried out into the historical abuse allegations at institutions across the **United Kingdom** that will ultimately make recommendations on the reform of the protection system.[206] In June 2019, a Committee established in the **Netherlands** – De Winter Committee – called for system wide reforms to ensure better care and protection of children in alternative care, following findings of violence and abuse over a lengthy period since 1945. The Committee recommended more support to victim support organisations. Placement in secure institutions must be avoided, group sizes must be reduced and independent confidential advisors must be made available to children.[207] Field visits and meetings with children must form part of the supervision function of the Inspectorate for Health and Youth Care.[208]

203 Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report: Preface and Executive Summary*, Commonwealth of Australia, 2017, Available at https://www.childabuseroyalcommission.gov.au/final-report (accessed 19 July 2019).

204 See the Commission to Inquire into Child Abuse, 2009, Available at http://www.childabusecommission.ie/ (accessed 19 July 2019). Truth and Reconciliation Commission, *Honouring the truth, reconciling for the future, 2015*, Available at http://www.trc.ca/assets/pdf/res-Honouring_the_Truth_Reconciling_for_the_Future_July_23_2015.pdf (accessed 26 July 2019)

205 Scottish Government, *Inquiry into Historical Child Abuse,* 2015, Available at https://www.childabuseinquiry.scot/ (accessed 19 July 2019).

206 BBC News, 'Historical child abuse: Key investigations', 1 December 2015, Available at https://www.bbc.com/news/uk-28194271 (accessed 19 July 2019) and Independent Inquiry into Child Sexual Abuse, Available at https://www.iicsa.org.uk/ (accessed 19 July 2019).

207 De Winter Committee, *Inadequately protected: violence in Dutch youth care institutions from 1945 to the present day,* 2019.

208 Ibid.

6.3 Family and Community-based Initiatives

> 'The realistic and transformative potential of family-based care continues to exist as an exception. This current status quo is a failure of imagination on a grand scale. Our societies must try harder for children to be living in loving families.'

Source: Dainius Puras, Special Rapporteur on the Right to Health, during the consultative process of the drafting of this chapter.

Social assistance programmes are important in ensuring that poverty is not a pathway into institutions. The Bolsa Família Program was created by the **Brazilian** Federal Government in 2004 and includes Fome Zero (Zero Hunger), which is a public policy aimed at ensuring the human right to adequate nutrition. This programme promotes food and nutritional safety and contributes towards achieving citizenship for sectors of the population most vulnerable to hunger. The Family Grant, depending on the family income per person, and on the number and age of children, gives benefits to families. The programme has three main areas: income transfer, conditioning factors and supplementary programmes. According to the Ministry of Social Development, income transfer seeks to promote immediate poverty relief; the conditioning factors reinforce access to basic social rights in the areas of education, health and social assistance; and the supplementary programmes are aimed at family development, so that beneficiaries are able to move out of their situation of vulnerability. A programme that links to the Bolsa Familia is the Pro-Adolescent policy that focuses on strengthening family and community life, keeping children in education and linking them to citizen participation and work opportunities.

Social safety net programmes have also been successful in some African countries such as **Tanzania** Social Action Fund. Other programmes, such as microcredit and cash transfers are being increasingly applied nationally to particularly vulnerable households to mitigate the impacts of poverty and its associated negative outcomes. **South Africa's** child support grant (a targeted poverty alleviation measure) was paid to over 12 million beneficiaries in 2017. Research has shown that the grant promotes child health and welfare. Although these measures are aimed a poverty alleviation, such measures are good examples of how poor families can be assisted to provide the basic elements of care for their children, primarily nutrition. Such measures should form part of a social floor of protection. For example, the **South African** child support grant goes together with free health care for pregnant mothers and children below six, access to non-fee charging Government schools, and school feeding schemes. A cash grant which is larger in amount than the child support grant is paid to caregivers of children with disabilities – but the uptake of this grant falls well below the number of children eligible to receive it, probably due to the fact that the medical model

of disability is still used in assessing eligibility, despite the Departments of Education and Social Development having moved to a social justice definition of disability.

At a regional consultation on children deprived of liberty in institutions, held in Pretoria in 2018, the National Association of Child Care Workers presented a project that it has piloted and rolled out with the **South African** Department of Social Development. The project is called *Isibindi*: A Family Strengthening Approach, specifically targeting children who are at risk. In this approach, Child and Youth Care Workers (CYCW's) work directly in the 'life-space' of the child and family *in the community*. CYCW's identify vulnerable children through referrals, door-to-door campaigns, safe parks that they establish at Isibindi sites, community events and spaces, and self-referrals by children and caregivers. Using this family strengthening approach, *Isibindi* operates on the basis of two consistent principles: (1) cultural competence, where CYCW's are recruited from the communities in which they work, (2) consistency, where CYCW's are required to build trust relationships with families in order to successfully promote change. Interventions within this approach include working with,

- family as a whole,
- the caregiver,
- the child through the caregiver with the CYCW's support, and
- the child directly.

Examples of these interventions include strengthening the family's ability to manage its finances; facilitating a trust relationship between family members; improving behaviour of family members; strengthening caregivers' parenting skills; modelling desired roles and behaviour; strengthening ties within the community. Activities used by CYCW's during home visits include Life-Space Counselling, training, homework supervision, conflict resolution, family reunification work, family conferences, and assistance in caring for children with disabilities. The work of *Isibindi* has resulted in positive outcomes such as improved school performance; improved health status, improved economic status, and a reduction in child abuse and violence.

SOS Children's Villages, CELCIS and Eurochild started a project, in 2017, to assist children leaving their alternative care placement to start an independent life as young adults.[209] This is done to ensure that they have adequate preparation and after-care support for full and positive inclusion in society. The two-year project Prepare for Leaving Care (2017-

209 This information was provided by SOS Children's Villages International on 26 March 2019. See: SOS Children's Villages International, 'Prepare for Leaving Care', Available at: https://www.sos-childrensvillages.org/prepare-for-leaving-care (accessed 9 September 2019).

2018) offered a good practice to scale up concrete tools. The project aimed to develop and deliver training for care professionals and elaborate policy guidelines to help ensure that child protection systems adequately support young people leaving alternative care. A 'Prepare for Leaving Care Practice Guidance' has been developed, including a training methodology and manual based on evidence collected at the start of the project. Young experts, aged 16-27, have provided input throughout all the project activities, drawing on their personal experience and the challenges they faced while preparing to leave care. In total, 169 young people with care experience have been involved in project activities, of which 19 have engaged as co-trainers at national level, co-delivering the training together with highly qualified Master Trainers. To date, 433 care professionals have received the training in the five partner countries (**Croatia**, **Latvia**, **Lithuania**, **Italy** and **Spain**). The key findings of the training assessment suggest the Prepare for Leaving Care Training is having positive outcomes on the support being offered to care leavers. In particular, the results indicate that the relationship between professionals and care leavers is improving. For example, participants believe that they have significantly improved their ability to listen and communicate with the children and young people they are supporting through the leaving care process. They are more aware of the emotions and feelings of individual care leavers and feel better able to respond to their worries and concerns.

Some of the States which replied to the questionnaires for this Study have reported making commendable advances in the drive to provide children and families with prevention and/or early intervention services. This is done to strengthen families as they care for children and to ensure that the environments that children live in are free from violence, abuse and neglect. **El Salvador**[210] has established a radio programme and a campaign aimed at equipping families to provide care to children by non-violent means. 'Habláconmigo' (Talk to me) is a radio programme that aims to teach families about positive parenting in order to promote 'the development of people that are valued and respected, with personal autonomy and great self-control'. 'La protección comienza en el hogar' (protection starts at home) is a campaign that aims to raise awareness about the use of non-violent methods of parenting. It aims to replace practices that are rooted in cultural traditions that can damage the personal integrity of children.

Australia's Northern Territory has introduced a programme that refers families to early support services; is developing a child safety and wellbeing framework for the prevention of child abuse and neglect; and has a dedicated helpline to connect families experiencing

210 UN Global Study Questionnaire, El Salvador (State Reply).

difficulties, e.g. parenting problems, family relationships etc, with support services and resources.[211]

In **Denmark** a number of municipalities are currently re-organising their support for disadvantaged children, young persons and their families to ensure an early and preventive effort. An example of such efforts can be found in Herning where a comprehensive restructuring began in 2013. Herning has developed a model to ensure that children and young people receive the support they need and that assistance is provided early on to prevent problems from increasing. An evaluation conducted in 2017 showed that Herning has seen an increase in preventive support measures and a decrease in the number of children being placed in care outside the home. The evaluation also showed that more children were placed in foster families and fewer are placed in institutions.[212]

Ireland provides a range of home-based support services to families caring for children with disabilities. These include: respite care; home sharing models of support; home support services; therapeutic support; after-school care; Saturday clubs; and summer clubs.[213]

States recognise that it is sometimes necessary to separate children from family contexts that are violent, abusive or neglectful. However, care is taken to ensure that family-based or community-based care is the first option for the placement of children in these situations. **Bosnia and Herzegovina's** Republika Srpska has introduced a programme to develop the capacity of experts on foster care and to improve the competencies of, provide training to and assess the general fitness of foster families. This is done to improve quality performance in order to meet the specific needs of children in foster care.[214]

Mauritius, in a drive to improve its own systems and advance deinstitutionalisation efforts, has embarked on a project to professionalise foster care. The State is in the process of categorising the types of foster care services offered. It offers foster care givers financial assistance per child, it implements an empowerment programme for foster care parents, and adopts a multi-agency approach to encourage stable placements.[215]

211 UN Global Study Questionnaire, Australia (State Reply).

212 UN Global Study Questionnaire, Denmark (State Reply).

213 Un Global Study Questionnaire, Ireland (State Reply). States also provided the following information about recently established or on-going projects to provide prevention and/or early intervention services. Estonia has developed an evidence-based program, the 'Multidimensional Family Therapy (MDTF) Program', in order to provide 11 to 18-year-old children and their families support in order to prevent institutionalisation. Lao carries out awareness raising campaigns to prevent the detention of children and reduction of the number of children in institutions. Switzerland provides support for parenting; intensive outpatient services; social or professional integration measures; professional pre-training programs; and youth prevention programs to reduce risky behaviour.

214 UN Global Study Questionnaire, Bosnia and Herzegovina (State Reply).

215 UN Global Study Questionnaire, Mauritius (State Reply).

New South Wales in Australia is in the process of implementing an intensive therapeutic care model to replace all forms of residential or congregate out of home care. The model aims to ensure that children and young people who have extremely complex care needs will live more successfully in the community and aims to reduce the need for therapeutic secure care services as the model is implemented.[216]

The **State of Monaco** has adopted community-based interventions through school-based interventions and the use of the services of health professionals or psychologists. Children with psychological difficulties attending school have access to the 'Centre Plati'. It is a medical and psychological centre that has a child psychiatrist, a psychologist and education specialist. It provides assistance to young people refusing medical care or those with addiction related risks.[217]

Kuwait has a programme that places a child whose parents are unknown in a **Kuwait** family willing to take care of the child under the supervision of the Family Custody Department according to specific conditions.[218]

Children in the **Netherlands** can be placed under supervision, if a judge grants a supervision order. This means that the child remains in the care of the parents but the family is assigned a 'family supervisor' who supports the child and helps the parents address child-rearing issues. The purpose of a supervision order is to enable the parents to resume raising their child independently after a while.[219]

Croatia aims to promote the wellbeing of persons living with disabilities, children without adequate parental care and children with behavioural difficulties through adopting deinstitutionalisation policies that promote the replacement of institutional care and access to community-based care services. These services include return to families with support, foster care, adoption, provision to services in communities that meet individual needs of beneficiaries. In addition, services such as early intervention, counselling and assistance to children leaving the care system and their families, psychosocial support, integration into mainstream pre-school and school education programmes are also provided.

Argentina's COFENAF (Federal Board of Childhood, Adolescence, and Family) established guidelines to align with the paradigm of integral protection of children. This has resulted in different jurisdictions in **Argentina** developing minimum standards for the quality of

216 UN Global Study Questionnaire, Australia (State Reply).

217 UN Global Study Questionnaire, Monaco (State Reply).

218 UN Global Study Questionnaire, Kuwait (State Reply).

219 UN Global Study Questionnaire, Netherlands (State Reply).

assistance, intervention protocol and registry systems for the area of infancy, a federal system of monitoring and evaluation, and national surveys concerning the situation of children and adolescents who are deprived of parental care, including those in alternative care.[220]

Croatia has a number of policy documents that aim to advance a deinstitutionalisation and transformation agenda. Importantly, **Croatia** is developing an operational plan that supports the adoption of a new Foster Act to promote specialised, professional foster care.[221] Austria's National Action Plan on Disability 2012 – 2020 has deinstitutionalisation as a guiding principle.[222] Portugal recently amended its Child Rights Law (Law No. 142/2015) that states that if it is necessary to place a child under the age of 6 years in alternative care then placement in a foster family must be considered before placement in residential care.[223]

7. Conclusions

'When I came to the children's home, there were many people, so that was the biggest problem. We had four people in my family, and now in this institution there was, I don't know, 20, 25 or something like that, so that was the difference between the size of the family, and that was the biggest problem for me.'

Source: Sarah Frankenberg, Sandy Chidley & Fatima Husain, Experiences of the care system: Young people's accounts of living in institutions, London, NatCen Social Research, 2018.

- **Failure by many States to uphold international law regarding separation of children from their family environment**

International law is clear that the removal of a child from his or her family should only occur where the child cannot be allowed to remain there on the basis of a best interests determination, and any separation should be for the shortest possible duration. Furthermore, international law requires States to support families and provide equal access to quality services, including social welfare, health, education, justice, social protection which prevent situations where children become separated from their families. Despite these international provisions, the majority of States are failing to provide preventive,

220 UN Global Study Questionnaire, Argentina (State Reply).

221 UN Global Study Questionnaire, Croatia (State Reply).

222 UN Global Study Questionnaire, Austria (State Reply).

223 UN Global Study Questionnaire, Portugal (State Reply)

protective and supportive mechanisms, strong gatekeeping, and large numbers of children are separated from their families, contrary to the principle that separation of children and placement in alternative care should be a last resort, and only on the basis of necessity.

- **Children keep being institutionalised to receive care, education, rehabilitation or treatment.**

Every decision that results in the separation of a child from his or her parents must strictly respect the principle of legality and be in accordance with due process guarantees. In addition, children should not be placed in institutions in order to receive care, education, rehabilitation or treatment. Institutions are recognised as having certain characteristics of the living arrangements that are inherently harmful to children. The characteristics include, but are not limited to: separation from families and the wider community; depersonalisation; instability of caregiver relationships; lack of caregiver responsiveness; fixed routines not tailored to children's needs and preferences.

- **Children should not be deprived of liberty in institutions**

Even if children are placed in institutions, the principles of the best interests of the child and of a measure of last resort in Articles 3 and 37(b) CRC require States to ensure that they are not deprived of liberty.

- **Pathways into institutions**

There are a number of pathways created by systemic failures that lead children to be separated from their parents or families and placed in institutions. These include:

a. Socio-economic conditions, poverty and lack of support marginalise parents and children in ways that create potential for children to be abandoned, relinquished or separated from their family.

b. Attempts to access services for their children by parents not offered a full range of community-based services – e.g. children from low income households or children with disabilities are often institutionalised in an attempt to access education or health care, due to lack of inclusive service provision.

c. Discrimination, stigmatisation and marginalisation: certain groups of children are over-represented, for example, children without parental care, children with disabilities and children from racial, ethnic minorities and indigenous groups.

d. Family violence: Many children end up in institutions because of violence in their families and communities, including psychological, physical and sexual violence.

e. Lack of a coherent, integrated and proper range of quality services, including family and community-based support services.

f. Rehabilitation: Children are deprived of their liberty in the name of 'treatment' or 'rehabilitation' from drug dependence or as a misguided means of 'managing disabilities'.

g. Incorrect application of the child's best interests standard, and a lack of understanding of the harmful impact of separation from families and placement in institutions.

h. Commodification or profit motive – children end up in unregistered 'orphanages' through e.g. 'orphan tourism' and active recruitments.

i. Faith-based funding of institutions.

j. The use of residential religious schools and 'faith camps'.

k. Despite the harm caused to children in and by institutions, many States continue to allow or actively encourage the placement of children in institutions for the purposes of treatment, health, protection, education, or rehabilitation.

l. There is broad failure by the majority of States to provide adequate gatekeeping. This is an essential decision-making process based upon a national legal framework compliant with international law, together with the necessary assessment and review frameworks. Absent or inadequate gatekeeping fails to prevent the placement of a child in care outside of the immediate family, ensure that any such placement is the least restrictive possible, and is suitable to meet the child's needs and avoids deprivation of liberty.

m. States are failing in their legal obligation to provide a range of options that will provide for children's needs and preferences, starting with the child's own immediate family, wider family, kinship groups; indigenous models of care, foster care and adoption or kafalah options and other suitable forms of family-based or family-like community integrated care.

n. Once these options are in place, there must be a clear obligation for a case-by-case exhaustion of these options before a suitable placement is made, always undertaking every effort to provide care within the family or extended family, or failing that, within the community in a family setting, bearing in mind the best interests of the child, as well as his or her preferences.

- **Children currently in institutions and the experience of deinstitutionalisation**

In addition to the general harmful effects of institutions, the conditions in many institutions put the health, psychological conditions and lives of children at enhanced risk. Violence, abuse and neglect are widespread. Inadequate monitoring and complaints mechanisms raise the risks. These conditions have gravely detrimental effects on children that may last a life time. Many States fail to provide support for safe transitioning out of care and for after-care services, hindering child development towards independence and reintegration of children back to their families or alternative family-based care and communities.

State failure to register, authorise and regulate all agencies and facilities whether run by the State or by private entities, as well as poor record keeping and tracking, results in children who are invisible in the system and at great risk of physical and psychological harm, many of whom can be reunited with their families, or placed in other forms of family care. Many States lack an independent monitoring system, or if it does exist, it does not include all institutions that require monitoring. Lack of adequate child friendly complaints mechanisms, and scarce promotion of existing ones, cause children to have limited avenues for complaint and redress.

Deinstitutionalisation efforts have shown positive results in the form of significantly reducing the number of children in institutions in many countries, notably in **Central and Eastern Europe** and **Central Asia**, and there is clearly an urgent need for any State that has not already embarked on such a strategy to plan and execute one. However, the experiences also show that care must be taken to ensure that deinstitutionalisation does not lead to children being placed in other kinds of smaller institutions that still have the same characteristics that define an institution. It is also important to invest in family strengthening and support before and during deinstitutionalisation, as well as working to increase the quality of care, in family and community-integrated alternative care models.

8. Recommendations

It is recommended that a universal vision, based on the principle outlined in the Preamble of the CRC that **'every child should grow up in a family environment, in an atmosphere of happiness, love and understanding'**, be developed and pursued globally.

1. To achieve this vision, States are urged to consciously and **actively target the identified causes of children being separated from their families**, and to provide the necessary measures to prevent this through **support for families** and strengthened child protection and social support systems. States should invest in a well-planned, trained and supported social service workforce as well as integrated case management systems, which are fundamental for effective needs assessment, monitoring of child wellbeing, gatekeeping, care planning, referral/access to services, and preventing family separation.

2. **States are urged to develop and implement a strategy for progressive deinstitutionalisation** that includes significant investments in family and community-based support and services, which shall be put in place alongside the plan to **deinstitutionalise**. States should **prioritise the closure of large-scale institutions** and those where children are formally deprived of liberty. They should also avoid the creation of any new institutions, by ensuring that no new institutions are built and only renovating existing institutions where it is necessary for the protection and safety of children.

3. States should prioritise a process to assess children presently in institutions and make all efforts to return them safely to their immediate family, extended family, or into other families through foster care, Kafalah or adoption. In some cases, it may be necessary to provide quality temporary, specialised care in a small group setting organised around the rights and needs of the child in a setting as close as possible to a family, and for the shortest appropriate period of time. States have an obligation to ensure that **every decision is based on the best interests of each individual child, that children and their families are involved in any decisions that affect them, and that the views and preferences of children are fully considered**.

4. While prevention and deinstitutionalisation are being carried out, States should ensure that all **alternative care options** respect the rights of all children and implement measures that **guarantee the full participation of all children, including children with disabilities**. States should provide effective support for safe and well-prepared transitioning out of care into independent living, after care services, and reintegration of children back to their families and communities.

5. States are also urged to map all institutions within the country, whether private or public, whether presently registered or not, and regardless of how children arrived there, **conduct an independent review of each institution**. States should operationalise a system of registration, licensing, regulation and inspection, which ensures that providers of alternative care meet internationally recognised standards. These efforts should form part of a broader data collection system of the administration of all alternative care services, and should be used to measure progress on the implementation of the Guidelines for Alternative Care.

6. States should take immediate measures to **stop exploitation of children** through orphan tourism, and using children as a commodity to run institutions as a business. States should encourage faith-based organisations and donors to reinvest their efforts towards prevention of separation of children from families, family based or other community integrated models of quality care and towards safe, planned deinstitutionalisation.

7. States are further encouraged to ensure that children being placed in hospitals, psychiatric facilities and rehabilitation (including substance abuse) centres are properly counted and are included in **systemic transformation** and **deinstitutionalisation** efforts.

CHAPTER 13

CHILDREN DEPRIVED OF LIBERTY IN THE CONTEXT OF ARMED CONFLICT

© Terre des Hommes, Former child soldier, who has been reunited with his family, is going back to school with the wish of becoming a doctor to help his community in Labrah, South Sudan

Sani's Story

Nigeria

'We could bathe once a week, but we had no soap', Sani recalls of a detention centre he was sent to in **Maiduguri, northeast Nigeria.** Prior to his arrest, Sani survived an attack on his village by Boko Haram, an armed group termed violent extremist. The **15-year-old** boy was forced to flee for his life – running into the bush with only the clothes on his back. 'They killed people in front of children. I saw people killed', he said. 'They slaughtered so many, I couldn't count.'

Managing to stay alive in the bush for weeks by consuming fruit and dirty water, Sani and a few other people from his village eventually decided to return home. They were however arrested by government soldiers on suspicion of belong to the same armed group that attacked their village. As a result, Sani was taken to a military detention centre in Maiduguri. 'There wasn't enough food, no education, no activities.'

The conditions at the detention centre were horrific. 'The hardest part was the smell of the toilet. When the smell was very bad, it made me want to faint. We used our clothes to cover our nose and mouth, but our clothes were very dirty, so it didn't help much.' They were constantly told by the guards that they would never get out of prison without confessing to belonging to the armed group.

Sani never confessed – nor was he ever taken to court. After a year in detention, he was finally released, never having been formally charged with a crime. Today, Sani looks to the future, hoping to go back to school in order to become a doctor. But he cannot afford the registration fees. He still believes however that the Government can help children affected by conflict. 'I want the Government to return all the children to school.'

For data protection and confidentiality reasons, the names have been altered.

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1. Introduction

An estimated 420 million children – **more than 1 in 6 worldwide** – lived in a conflict zone in 2017.[1] In many of these conflict areas, armed forces and armed groups recruit children to serve as combatants, guards, spies, messengers, cooks, and for other roles, including sexual exploitation.[2] Where such recruitment takes place, children face a heightened risk of detention for suspected involvement with fighting forces. At any given time, governments and armed groups detain thousands of children in the context of armed conflict, often holding them for weeks, months, or even years.

MORE THAN 1 OUT OF 6 CHILDREN LIVED IN A CONFLICT ZONE IN 2017.

The Optional Protocol to the Convention on the Rights of the Child on children in Armed Conflict (OPAC) prohibits the use of children under the age of 18 in direct hostilities, and any recruitment of children by non-state armed groups. International standards recognise children involved in armed conflict primarily as victims entitled to assistance for their rehabilitation and reintegration. Yet in at least 16 conflict countries, authorities detain children in the context of armed conflict. Most often, authorities detain children for alleged association with armed groups, though research for this Study also found that many children in armed conflict settings are detained because of alleged activity by their family members, their religion or ethnicity, for punishment, as hostages, or for sexual exploitation.

According to UN data, at least 4,471 children were detained in the context of armed conflict in 2017, a fivefold increase from 2012.[3] The dramatic increase in numbers has been driven largely by an increase in children detained on national security grounds for association with armed groups (children detained on national security grounds in countries where armed conflicts

1 Gudrun Østby, Siri AasRustad & Andreas ForøTollefsen, 'Children affected by Armed Conflict, 1990-2017,' *Conflict Trends*, Peace Research Institute of Oslo (PRIO), 2018.

2 United Nations, 'Report of the Secretary-General on Children and Armed Conflict,' S/2018/465, 16 May 2018.

3 Ibid.

are taking place on the territory are recorded in this section). Particularly in conflicts involving non-State armed groups designated as 'terrorist', governments have become more likely to detain children than to provide them with rehabilitation and reintegration.

In addition to the number of children detained in child facilities, prisons, or other facilities, tens of thousands of children of alleged ISIS fighters were deprived of liberty in camps in **Iraq** and in **Syria** in early 2019.[4] In total, the Study estimates a minimum of 35,000 children deprived of liberty in the context of armed conflict.

The true number of children deprived of liberty in armed conflict is likely higher. Many cases are never documented or recorded, including children held in camps, military barracks, intelligence facilities, and makeshift centres run by military or government-aligned militias. Access is often restricted for monitors and child protection actors. In addition, some children are deprived of liberty by non-state armed groups, and not reflected in the UN data.

4 UNICEF, 'Protect the Rights of Children of Foreign Fighters Stranded in Syria and Iraq', *Statement of the UNICEF Executive Director, Henrietta Fore,* 21 May 2019, Available at https://www.unicef.org/press-releases/protect-rights-children-foreign-fighters-stranded-syria-and-iraq (accessed 8 June 2019).

This chapter addresses children deprived of liberty in countries addressed by the Secretary-General's annual report to the UN Security Council on children and armed conflict.[5] The countries considered include both those on the Security Council's agenda, as well as other 'situations of concern' in which apparent violations of international norms and standards for the protection of children affected by conflict are considered to be 'of such gravity' as to warrant international attention.[6]

The primary source of data for this chapter is the United Nations' Monitoring and Reporting Mechanism on children and armed conflict. The UN Security Council established the mechanism in 2005 in order to collect 'timely, objective, accurate, and reliable' information on grave violations against children in armed conflict.[7] At the field level, country task forces on monitoring and reporting, co-chaired by UNICEF and the highest UN representative in country, are mandated to collect and verify information on violations against children. The Special Representative of the Secretary-General on children and armed conflict (SRSG CAAC) analyses the data and uses it to help prepare the annual report of the Secretary-General on Children and Armed Conflict and country-specific reports of the Secretary-General on children and armed conflict.[8] In 2018, the monitoring and reporting mechanism was active in 14 countries. Although the UN Security Council does not consider detention of children a 'grave violation,' the mechanism has systematically collected data on detention in the context of armed conflict since 2012.

Very few respondents to the questionnaire for the Global Study on Children Deprived of Liberty provided data regarding children detained in the context of armed conflict. To supplement the data from the UN's monitoring and reporting mechanism, research for this chapter also included reviews of other available UN reports, non-governmental, academic, and media sources.

5 The 2017 report included information on violations against children in Afghanistan, Central African Republic, Colombia, the Democratic Republic of Congo, India, Iraq, Lebanon, Libya, Mali, Myanmar, Nigeria, Pakistan, Philippines, Somalia, South Sudan, Sudan, Syria, Thailand, and Yemen.

6 Cf. S/2018/465, *op. cit.*, para. 3.

7 UN Security Council, *Security Council Resolution 1612 (2005) on Children and Armed Conflict*, S/2005/1612, 26 July 2005, para. 2(a).

8 See 'Monitoring and Reporting on Grave Violations', website of the *Special Representative to the Secretary-General on Children and Armed Conflict*, Available at https://childrenandarmedconflict.un.org/tools-for-action/monitoring-and-reporting/ (accessed 17 May 2019).

2. Legal Framework

International standards recognise that children who have been involved in armed conflicts are entitled to special treatment, placing a priority on their rehabilitation and reintegration into their communities. These standards recognise these children primarily as victims of violations of international law, not perpetrators, and reject the use of detention, save in exceptional cases where children may have committed serious offenses or pose a serious threat to a state's security. Even in such exceptional cases, international law still requires the application of due process and international child justice standards and does not allow exceptions based on national emergency or the seriousness of the offense.

2.1 International Humanitarian Law

International humanitarian law (IHL), specifically the Geneva Conventions of 1949 and their Additional Protocols as well as customary IHL, governs the conduct of parties engaged in armed conflict, including the actions of both government forces and non-state armed groups. The protocols explicitly prohibit the recruitment of children under the age of 15 or their participation in hostilities by national armed forces and non-state armed groups and require special protection for children: 'Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.'[9]

IHL distinguishes between international armed conflict (generally conflicts between two or more States) and non-international armed conflict, where the parties to conflict are government forces and one or more non-state armed groups (or a conflict between non-state armed groups). In an international armed conflict, captured combatants (and in some cases, civilians) may be held by the opposing power as prisoners of war (POWs) until the cessation of hostilities. In practice, child POWs are very rare and no cases have been registered since World War II.[10]

9 International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),* 8 June 1977, 1125 UNTS 3, Article 77; International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* 8 June 1977, 1125 UNTS 609, Article 4, para. 3.

10 Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *Children and Justice During and in the Aftermath of Armed Conflict,* Working Paper No. 3, September 2011, p. 30.

In an international armed conflict, States parties are permitted to place civilians, including children in administrative detention (internment) only 'if the security of the Detaining Power makes it absolutely necessary.' In general, internment of a child should be an exceptional measure and is only permissible if the State has legitimate reason to believe that the child is a serious threat to the State and if the security of the State may not be secured through other means.[11] Authorities designated by the detaining power must review the decision to detain a child as soon as possible and at least twice a year. Children interned in an international armed conflict also have the right to challenge the decision to detain them.[12]

In a non-international armed conflict, IHL contains fewer rules. Common Article 3 refers to detention, but not specifically to internment. Additional Protocol II (which also may govern non-international armed conflicts, if a State is a party) mentions internment, but does not contain the relevant grounds for internment or set out relevant procedural safeguards. According to the International Committee of the Red Cross (ICRC), detention of children in non-international armed conflicts – those which take place on the territory of a State between its armed forces and non-state armed groups – is generally governed by domestic law and informed by the State's human rights obligations, as well as the relevant IHL rules.[13]

2.2 Human Rights Law

International human rights law is applicable at all times, including during times of armed conflict, subject to lawful derogations and restrictions. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) allows States to derogate from its provisions during times of public emergency, which include armed conflicts. Article 4(2) prohibits derogations from a limited number of human rights, such as the right to life, the prohibition of torture, slavery and servitude, the prohibition of detention for debt or the prohibition of retroactive criminal laws. However, the Human Rights Committee, in a well-known General Comment on states of emergency, interpreted this provision in a broader way and found that fundamental requirements of fair trial, such as the presumption of innocence, and of the right to personal

11 Jean Pictet (ed.), *Geneva Convention IV, Commentary,* ICRC, Geneva, 1958, p. 258.

12 International Committee of the Red Cross (ICRC), *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention),* 12 August 1949, 75 UNTS 287, Article 43.

13 International Committee of the Red Cross (ICRC), *Internment in Armed Conflict: Basic Rules and Challenges ICRC Opinion Paper,* ICRC, November 2014, Available at https://www.icrc.org/en/document/internment-armed-conflict-basic-rules-and-challenges (accessed 17 May 2019).

liberty, such as *habeas corpus* proceedings, must be respected during a state of emergency.[14] The CRC does not contain a similar derogation clause and allows only very limited and specific restrictions.[15] Therefore, the key provisions of the CRC continue to apply to all children in situations of armed conflict. Most importantly, deprivation of liberty of children shall be used only as a measure of last resort and for the shortest appropriate period of time.[16]

States also have a duty to take measures to prevent the deprivation of liberty by third parties. According to the Human Rights Committee, States parties to the ICCPR must protect individuals against abduction or detention by individual criminals or irregular groups, including armed or terrorist groups, operating within their territory.[17]

The CRC repeats the prohibition on the recruitment and use of children under the age of 15 set out in the additional protocols to the Geneva Conventions, and says that when recruiting children between 15 and 18, States must give preference to the oldest.[18] It further obliges States parties to take 'all appropriate measures' to promote the physical and psychological recovery and social reintegration of child victims, including children affected by armed conflicts. The Convention states that 'such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.'[19]

In 2000, the UN General Assembly adopted an Optional Protocol to the CRC on the involvement of children in Armed Conflict (OPAC), raising the minimum age for recruitment and use in hostilities. The OPAC prohibits all forced recruitment or conscription of children under the age of 18; requires States parties to take all feasible measures to ensure that members of their armed forces under the age of 18 do not take a direct part in hostilities; and states that non-state armed groups shall not, under any circumstances recruit or use in hostilities, children under the age of 18.[20] States are required to take all feasible measures to prevent the recruitment and use of children by armed groups, including by criminalising

14 Human Rights Committee, *CCPR General Comment No. 29: Article 4: Derogations during a State of Emergency*, 31 August 2001, CCPR/C/21/Rev.1/Add11, paras. 15 & 16. See also: Manfred Nowak, *U.N. Covenant on Civil and Political Rights – CCPR Commentary*, 2nd ed., N.P. Engel Publisher, Kehl/Strasbourg/Arlington, 2005, pp. 96 f.& 1150 f.

15 See notably Article 10 on family reunification, Article 13 on freedom of expression, Article 14 on freedom of religion, and Article 15 on freedom of association and assembly.

16 Article 37(b) CRC. See above (Chapter 4 on Right to Personal Liberty) and also CRC-Committee, *General Comment* 24. *op. cit.*

17 Human Rights Committee, *General Comment No. 35, Article 9 (Liberty and Security of Person)*, 16 December 2014, CCPR/C/GC/35, para. 7.

18 Article 38 CRC.

19 Ibid., Article 39.

20 OHCHR, *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, A/RES/54/283, 25 May 2000.

such recruitment.[21] A large majority of States parties have deposited declarations stating that they observe a minimum age of voluntary recruitment of at least 18 years of age.[22]

The OPAC, which had 168 States parties by 2019, underlines the importance of rehabilitation and reintegration of children who have been involved in armed conflict. Article 6 requires States parties to take all feasible measures to ensure that children recruited in violation of the protocol are demobilised or released from service, and 'when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.'[23] It also calls on States parties to cooperate in the rehabilitation and reintegration of children recruited in violation of the OPAC, including through technical cooperation and financial assistance.[24]

The African Charter on the Rights and Welfare of the Child also addresses the recruitment and use of child soldiers, but sets a higher threshold for recruitment, requiring States parties to take all necessary measures to ensure that no child (defined as any person below the age of 18) takes a direct part in hostilities, and not to recruit children. It also called on States parties to take all feasible measures 'to ensure the protection and care of children who are affected by armed conflicts.'[25]

2.3 International Criminal Law

The Rome Statute for the International Criminal Court covers genocide, crimes against humanity, war crimes and aggression. The International Criminal Court's definition of war crimes includes the conscription, enlistment, or use of children under the age of 15 to participate actively in hostilities. Both the International Criminal Court and the **Special Court for Sierra Leone** have convicted individuals for the war crime of recruiting and using child soldiers.[26] Individual States also have an obligation to investigate alleged war crimes committed by their nationals, including members of the armed forces, and prosecute those responsible.[27]

21 Ibid., Article 4.

22 Cf. United Nations Treaty Collection, status of treaties deposited with the Secretary-General, Available at https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-b&chapter=4&clang=_en (accessed 18 May 2019).

23 Cf. A/RES/54/283, *op. cit.*, Article 6.

24 Ibid., Article 7.

25 Organisation of African Unity, *African Charter on the Rights and Welfare of the Child*, CAB/LEG/24.9/49, 11 July 1990, Article 22.

26 Between 2005 and 2008, the International Criminal Court issued arrest warrants against six individuals from the DRC and Uganda for the enlistment or conscription of children under the age of 15, convicting Thomas Lubanga in 2012. The Special Court for Sierra Leone convicted nine individuals for recruiting and using child soldiers.

27 Cf. ICRC, Customary International Humanitarian Law, *Rule 156: Definition of War Crimes*, Available at https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule156 (accessed 19 May 2019).

International law allows for the prosecution of individuals for offenses committed before reaching the age of 18 years, including in the context of armed conflict. However, any prosecution of children who were under the age of 18 at the time of their offense should be conducted in line with international child justice standards, including the use of detention only as a measure of last resort and for the shortest appropriate period of time. The age threshold limitations proscribed by the CRC[28] and set by national law continue to apply. Accordingly, no child below the minimum age of criminal responsibility can be prosecuted.

The Rome Statute for the International Criminal Court explicitly states that the Court does not have jurisdiction over children who were under the age of 18 at the time of the alleged commission of a crime.[29] Neither the **International Criminal Tribunal for the former Yugoslavia (ICTY)** nor the **International Criminal Tribunal for Rwanda (ICTR)** charged or prosecuted any persons for crimes committed before reaching the age of 18 years. The Special Court for Sierra Leone – a hybrid national/international court – had jurisdiction over persons who were aged 15 or older at the time of the alleged crime, but the Prosecutor was directed to consider alternative mechanisms, such as Sierra Leone's Truth and Reconciliation Commission, for dealing with child perpetrators. The prosecutor took a decision not to prosecute children, focusing instead on perpetrators responsible for the recruitment of children.[30]

Only one international tribunal – the **East Timor Tribunal** – is known to have tried a former child soldier. The tribunal (a Special Panel of the Dili District Court) was established as a hybrid international-East Timorese court to try war crimes, crimes against humanity and other serious crimes committed in **East Timor** in 1999. In 2002, the court convicted a member of the Sakunar militia of killing three people when he was 14 years old. The law allowed sentences of up to 15 years for the crime, but the judges sentenced the defendant to 12 months, recognising as mitigating factors his young age and the fact that he had acted under orders from a superior. In their judgement, the judges said the defendant 'was like a tool on the hand' of those responsible for campaigns of violence against the civilian population.[31]

28 Cf. Article 40.3CRC.

29 UN General Assembly, *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, Article 26.

30 The New Humanitarian (formally known as IRIN), 'Special Court will not indict children – prosecutor,' *IRIN*, 4 November 2002, Available at http://www.irinnews.org/report/35524/sierra-leone-special-court-will-not-indict-children-prosecutor (accessed 01 August 2019).

31 East Timorese Public Administration, Dili District Court, Special Panel for Serious Crimes, *Prosecutor v. X,* Case No. 04/2002, 2 December 2002, para. 57, Available at http://www.worldcourts.com/un_etta/eng/decisions/2002.12.02_Prosecutor_v_X.pdf (accessed 19 May 2019).

2.4 UN Security Council

Since 1999, the UN Security Council has adopted a series of resolutions on children and armed conflict that call on Member States to ensure the rehabilitation and reintegration of children recruited in violation of international law. These include resolutions 1261 (1999), 1314 (2000), 1379 (2001), 1460 (2003), 1539 (2004), 1612 (2005), 1882 (2009), 1998 (2011), 2225 (2015), and 2427 (2018).

Resolution 2427 addresses detention specifically, emphasising that no child should be deprived of his or her liberty unlawfully or arbitrarily and calling on all parties to conflict to cease unlawful or arbitrary detention as well as torture or other cruel, inhuman or degrading treatment or punishment imposed on children during their detention.[32] It encourages States to establish 'standard operating procedures for the rapid handover of these children to relevant civilian child protection actors' and to:

> [C]onsider non judicial measures as alternatives to prosecution and detention that focus on the rehabilitation and reintegration for children formerly associated with armed forces and armed groups taking into account that deprivation of liberty of children should be used only as a measure of last resort and for the shortest appropriate period of time, as well as to avoid wherever possible the use of pretrial detention for children, and calls on Member States to apply due process for all children detained for association with armed forces and armed groups.[33]

2.5 Voluntary International Principles

In 1997, a symposium in **South Africa** organised by UNICEF and the NGO Working Group on the CRC elaborated a set of strategies to prevent the recruitment of children and for demobilising them and reintegrating them into society. Known as the *Cape Town Principles and Best Practices*, these guidelines define child soldiers to encompass children involved in any armed forces or groups 'in any capacity,' not only children who carry arms.[34] The Principles emphasise the importance of demobilisation at all stages of conflict and the provision of special assistance, including education, vocational training, and recreation. They place particular emphasis on family reunification, and state that 'institutionalisation

32 United Nations Security Council, *Resolution 2427*, S/RES/2427, 9 July 2018.

33 Ibid., paras. 19-21.

34 UNICEF, *Cape Town Principles and Best Practices*, adopted at the symposium on the prevention of recruitment of children into the armed forces and on demobilisation of social reintegration of child soldiers in Africa, 27-30 April 1997, Available at https://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf (accessed 19 May 2019).

should only be used as a measure of last resort and shortest appropriate period of time, and efforts to find family-based solutions should continue.'[35]

At an international conference in Paris in February 2007, UNICEF and the **French Government** launched a set of international guidelines entitled the 'Paris Commitments to protect children from unlawful recruitment or use by armed forces or armed groups' and the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups* (Paris Principles).[36] By 2019, 110 States had endorsed the Paris Principles.

The Paris Principles set forth a wide range of principles relating to the protection of children from recruitment or use in armed conflict, their release, and their successful reintegration into civilian life. Like the Cape Town Principles, the Paris Principles adopted a broad definition of child soldiers, i.e. 'any person below 18 years of age who is or who has been recruited or used by an armed force or armed group in any capacity, including but not limited to children, boys, and girls used as fighters, cooks, porters, messengers, spies or for sexual purposes. It does not only refer to a child who is taking or has taken a direct part in hostilities.'[37]

The Paris Principles state that release and rehabilitation measures should be carried out without any conditions. During release, children should be handed over to 'an appropriate, mandated, independent civilian process,' and the majority of children should be returned to their family and community or a family and community environment as soon as possible after their release.[38] The Paris Principles state that while children may be interviewed in order to ascertain eligibility for release programs and facilitate family tracing, such interviews should never be conducted to collect information for military purposes.[39]

The Paris Principles further state that children who have been associated with armed forces or armed groups should not be prosecuted or punished or threatened with prosecution or punishment solely for their membership of those forces or groups.[40]

When children are accused of crimes committed while they were associated with armed groups, the Paris Principles state that they should be considered primarily as victims

35 UNICEF, *Cape Town Principles and Best Practices*, adopted at the symposium on the prevention of recruitment of children into the armed forces and on demobilisation of social reintegration of child soldiers in Africa, 27-30 April 1997, Available at https://www.unicef.org/emerg/files/Cape_Town_Principles(1).pdf (accessed 19 May 2019).

36 UN Children's Fund, *The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007, para. 8.7, Available at http://www.unicef.org/protection/files/ParisPrinciples310107English.pdf (accessed 25 May 2019).

37 Ibid., para. 2.1.

38 Ibid., paras. 3.11, 7.21, 7.45, 8.7, 8.8, & 8.9

39 Ibid., para. 7.25.

40 Ibid., para. 8.7.

of offenses against international law; not only as perpetrators. They must be treated in accordance with international law in a framework of restorative justice and social rehabilitation, which offers children special protection through numerous agreements and principles. Wherever possible, alternatives to judicial proceedings must be sought, in line with the CRC and other international standards for child justice.[41]

The Paris Principles further state that 'If national judicial proceedings take place, children are entitled to the highest standards of safeguards available according to international law and standards and every effort should be made to seek alternatives to placing the child in institutions.'[42]

The *Vancouver Principles on Peacekeeping and Preventing the Recruitment and Use of Child Soldiers* set out political commitments by Member States to enhance the training, planning, and conduct of their own forces as they relate to the recruitment and use of child soldiers. The Principles, initiated by the Government of **Canada**, were launched on November 15, 2017 and had 80 endorsing States by early 2019. Regarding detention, endorsers pledge:

> To ensure that all children apprehended and/or temporarily detained in accordance with mission-specific military rules of engagement are treated in a manner consistent with international norms and standards, as well as the special status, needs and rights of children and to ensure that detention is used as a measure of last resort, for the shortest period of time, and with the best interests of the child as a primary consideration, and that they are handed over expeditiously to child protection actors and civilian authorities in line with the established policies and guidance.[43]

Prosecution of children for offenses in the context of armed conflict should take place in civilian courts, as military courts rarely have child justice safeguards. The UN Committee on the Rights of the Child has stated that 'the conduct of criminal proceedings against children within the military justice system should be avoided.'[44]

41 UN Children's Fund, The Paris Principles. *Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007, paras. 8.7 & 3.6., Available at http://www.unicef.org/protection/files/ParisPrinciples310107English.pdf (accessed 25 May 2019).

42 Ibid., para. 8.9.1.

43 Government of Canada, *Vancouver Principles on Peacekeeping and Preventing the Recruitment and Use of Child Soldiers*, 15November 2017, Principle 9, Available at https://www.vancouverprinciples.com/wp-content/uploads/2017/11/17-204-Vancouver-Principles-Doc-EN-v3.pdf (accessed 19 May 2019).

44 UN Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties Under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Concluding Observations (United States of America),* CRC/C/OPAC/USA/CO/1, 25 June 2008, Available at https://www.refworld.org/publisher,CRC,,USA,50ffbce591,,0.html (accessed 26 May 2019).

3. Pathways to Detention

3.1 Association with armed groups

Children who have been associated with armed groups may be captured during hostilities and apprehended during military operations, or surrender themselves to government forces. Although international standards call for transfer to child protection authorities for rehabilitation and reintegration as soon as possible, many children are detained for weeks, months, or even years before handover. Others, particularly those associated with groups considered to be terrorist or violent extremist groups such as Al-Shabab, Boko Haram, or the Islamic State (ISIS), may be charged with national security offenses, and in some cases, criminally prosecuted.

In many cases, children cannot escape suspicion of association with armed groups or forces. The United Nations University refers to the 'fallacy of neutrality' in situations where armed groups are the only employer and exert physical control over a populace, or where the

State assumes that all adolescent boys in a given territory are affiliated with rebel groups.[45] For example, Kurdish forces in **Syria** have detained children for suspected association with ISIS, citing as 'evidence' the fact that the child had not joined Kurdish militia.[46] In other cases, discussed below, children are arrested and detained if they come from an area where armed groups are active, or if they are perceived of fighting age.

In **Iraq**, thousands of boys have been arrested for suspected association with ISIS. They are often apprehended at Government checkpoints, where security forces check their names against 'wanted lists' of tens of thousands of names compiled by various security agencies. Names could be included on these lists for involvement with ISIS in any capacity, including as a driver, cook or other non-combatant role, or if a relative – however distant – was involved with ISIS. Children may also be arrested in cases of mistaken identity, i.e. if their name is the same as an ISIS suspect on the 'wanted list.'[47]

Children may be detained for association with armed groups regardless of their reasons for joining, the length of time spent with the armed group, or the role that they played. For example, in a survey conducted by the United Nations University, one 16-year old boy said that he had joined ISIS at the suggestion of friends and attended a training camp for only one day before changing his mind and fleeing to a refugee camp near Mosul, where he was detained by Kurdish security forces and subsequently charged with terrorism.[48] Another boy, aged 17, said he had joined ISIS because he had a heart condition and ISIS promised to arrange surgery that he could not otherwise afford. He was later detained and charged with terrorism.[49]

In a single conflict, children may be subjected to detention by a range of actors, including government forces, militias, non-state armed groups, or international forces. For example, between January 2013 and June 2017, the UN estimated that at least 94 children were detained in connection with the conflict in **Mali** by government authorities, international forces, and non-State armed groups, including al-Qaeda in the Islamic Maghreb (AQIM) and

45 Siobhan O'Neil & Kato van Broeckhoven (eds.), *Cradled by Conflict: Child Involvement with Armed Groups in Contemporary Conflict*, United Nations University, 2018, p 18.

46 Independent International Commission of Inquiry on the Syrian Arab Republic, *Human rights abuses and international humanitarian law violations in the Syrian Arab Republic, 21 July 2016-28 February 2017*, A/HRC/34/CRP.3, 10 March 2017, para. 94.

47 Interviews conducted by Amnesty International with members of female-headed households who fled ISIS, as well as with staff members of humanitarian organisations and other monitors present at screening sites in December 2017 and January 2018. Amnesty International, *The Condemned: Women and Children Isolated, Trapped and Exploited in Iraq*, 17 April 2018, p 17. See also, Human Rights Watch, *'Everyone Must Confess': Abuses against Children Suspected of ISIS Affiliation*, March 2019, pp. 13-14.

48 Mara Revkin, 'I am Nothing without a Weapon,' Siobhan O'Neil & Kato van Broeckhoven (eds.), *op. cit.*, p. 132.

49 Ibid. p. 119.

other extremist groups.[50] Various authorities across **Somalia** have detained thousands of children, at times prosecuting them in military courts, for their alleged ties to Al-Shabab. Between January 2014 and July 2016, the UN verified the detention of at least 931 children by the Somali National Army, the National Intelligence and Security Agency (NISA), and regional security forces.[51] In **Iraq**, both the Iraqi Government and Kurdish Regional Government detain children for suspected ISIS association.[52] Because of lack of coordination between the two governments, a child may be detained twice for the same alleged offense (See box.)

'Karim' said he was arrested by Kurdish Regional Government (KRG) forces at a checkpoint when fleeing his home in Mosul, **Iraq**, in March 2016, when he was 16. He said that KRG intelligence officers interrogated him until he confessed to joining ISIS for one day. He was detained in the Kurdistan region for over a year before he was released without charge in April 2017 for lack of evidence. Only ten days after he returned home to Baghdad-controlled territory, he was arrested again by Iraqi intelligence officers while applying for a new identity card, and was told that his name was on a 'wanted list' of ISIS suspects. He said, 'I told them I had served a sentence in Erbil [Kurdistan] and had a paper ordering my release. They said they don't care, they don't recognise the Kurdistan Regional Government.' Karim said he was detained in a prison for 45 days, where interrogators repeatedly beat him and hung him from his hands bound behind his back. While torturing him, they told him to confess to having joined ISIS for three days, which he finally did. He was transferred to another prison in Baghdad and finally released in December 2017 after he was taken before another judge. He told the judge he had been tortured during interrogations, and that he had already served a sentence in the reformatory in Kurdistan. In total, he was imprisoned for almost two years.

Source: Human Rights Watch, 'Everyone Must Confess': Abuses against Children Suspected of ISIS Affiliation, March 2019. p. 39.

50 Office of the High Commissioner for Human Rights and UN Multidimensional Integrated Stabilisation Mission in Mali, *Human Rights and the Peace Process in Mali: January 2016-June 2017*, February 2018, p. 3, Available at https://www.ohchr.org/Documents/Countries/ML/ExecutiveSummaryFeb2018_EN.pdf (accessed 19 May 2019).

51 UN Secretary-General, *Report of the Secretary-General on children and armed conflict in Somalia*, S/2016/1098, 22 December 2016, para. 32.

52 Cf. S/2018/465, *op. cit.*, para. 76.

In **Asia**, children have been detained for alleged association with armed groups in **Afghanistan**, **Myanmar, the Philippines,** and **Thailand.** In 2017, the Afghan Government detained 171 children in child rehabilitation centres on national security-related charges, including association with the Taliban and other armed groups.[53] In 2017, the UN Special Rapporteur on human rights in **Myanmar** reported that at least 20 children were arrested and detained for their alleged affiliation with armed groups under the Unlawful Associations Act of 1908.[54]

In **Thailand**, children who are suspected of participating in or supporting 'any act that constitutes an emergency situation' are subject to the application of the 1914 Martial Law Act or the 2005 Emergency Decree on Public Administration in a State of Emergency, which allows indefinite detention without charge.[55] Approximately 127 children were detained between 2005 and 2017 in Thailand's southern border provinces. At least 16 of these children were prosecuted, primarily for alleged membership in the Barisan Revolusi Nasional (BRN, National Revolutionary Front).[56] The **Philippines** army has arrested and detained children between the ages of 10 and 17 as suspected soldiers in the New People's Army (NPA) or Abu Sayyaf Group (ASG), although local and international NGOs have found that the designation of these children as soldiers is often false. In 2017, the UN documented the detention of 12 children who were arrested and detained for their alleged association with armed groups in the Philippines.[57]

In **Africa**, government forces and armed groups have detained children for alleged association with armed groups in **Cameroon**, **the Democratic Republic of Congo**, **Mali**, **Niger**, **Nigeria**, **Somalia**, **and South Sudan**. In **Nigeria**, government forces detained 1,903 children in 2017 for alleged involvement with Boko Haram, and in **Somalia**, 217 children were detained for alleged involvement with Al-Shabab.[58]

Although government forces detain the vast majority of alleged child soldiers, armed groups have also detained children associated with government forces or other armed groups.

53 Cf.S/2018/465, *op. cit.*

54 UN Special Rapporteur on the situation of human rights in Myanmar, *Report of the Special Rapporteur on the situation of human rights in Myanmar*, A/HRC/37/70, Advance Unedited Version, 9 March 2018, para. 37, Available at https://www.ohchr.org/EN/HRBodies/SP/CountriesMandates/MM/Pages/SRMyanmar.aspx (accessed 19 May 2019).

55 United Nations Country Team Thailand, *Universal Periodic Review (UPR): UNCT, Thailand Submission*, 2016, para. 37. Available at https://www.upr-info.org/sites/default/files/document/thailand/session_25_-_may_2016/rco_upr25_tha_e_main.pdf (accessed 19 May 2019).

56 Information provided by email from the Hearty Support Group (Duay Jai), 17 May 2018. Data for 2005-2014 was obtained from the Southern Border Provinces Police Operation Centre, and the date for 2015-2017 was obtained from Hearty Support Group's reports.

57 Cf. S/2018/465, *op. cit.*

58 Ibid.

For example, in **Syria**, the opposition Syrian Democratic Forces have detained children for alleged affiliation with ISIS, including 166 children detained during advances on ISIS-held territory in the second half of 2017.[59]

3.2 Security Sweeps

In many conflicts, government forces conduct security sweeps, including house raids and checkpoint searches, in areas where armed groups are known to operate. They often arrest and detain children in these sweeps, regardless of whether or not the children have actually been involved with armed groups. In some cases, boys are arrested and detained solely because they appear to be of fighting age. Once children are arrested, security forces may torture them to extract confessions of involvement with armed groups. Children have reported making false confessions, simply to stop the torture.

In **Nigeria**, government forces have carried out large sweeps in areas of Boko Haram activity, arresting children and others en masse. Nigerian troops, often with the support of the government-allied Civilian Joint Task Force (CJTF), rely on informants, house raids, and checkpoint searches to make arrests of suspected Boko Haram members and their relatives.[60] In December 2017, for example, journalists reported that the Nigerian military arrested 400 people, including 173 children, in a two-week operation near Lake Chad.[61] A United Nations University study found that arrests of children were most often arbitrary, as 'the degree of suspicion security forces have about a child's involvement' with Boko Haram is 'often infer[ed] based on how and where children or their parents are found.'[62]

In **Cameroon**, government forces have arrested children as young as five from Qur'anic schools suspected of being used as fronts for Boko Haram.[63] For example, in December 2014, a joint force of Cameroonian police, gendarmes, and armed forces arrested 84 children from a Qur'anic school in the town of Guirvidig. Eighty-one of the children were under the age of 15 and 47 were under the age of 10. The children were loaded onto trucks and detained in the gendarmerie headquarters for four days, before being transferred to

59 Cf. S/2018/465, *op. cit.*, para. 187.

60 Amnesty International, *Stars on their shoulders. Blood on their hands: War crimes committed by the Nigerian military*, 3 June 2015, pp. 75-76, Available at https://www.amnesty.org/en/documents/afr44/1657/2015/en/ (accessed 19 May 2019).

61 Haruna Umar, 'Scores of Boko Haram fighters arrested in huge raid by Nigerian armed forces,' *The Independent*, 16 December 2017, Available at https://www.independent.co.uk/news/world/africa/boko-haram-fighters-nigeria-lake-chad-400-arrested-fighters-wives-children-security-forces-a8114096.html (accessed 18 May 2019).

62 Hilary Matfess, Graeme Blair & Chad Hazlett, 'Beset on All Sides: Children and the Landscape of Conflict in North East Nigeria,' Siobhan O'Neil & Kato van Broeckhoven, *op. cit.*, p. 201.

63 Amnesty International, *Cameroon: End six-month illegal detention of 84 children held following Qur'anic school raid*, 19 June 2015.

a children's centre in Maroua, where they were held for more than six months without charge before most were released.[64]

> 'We were reading the Qur'an when the security forces stormed our school. They asked for ID cards and interrogated us. They said they would dig our grave and throw us into it. We were scared. Then they roughed up our teachers . . . some among them had blood all over their faces'.
>
> child arrested in a raid on a Qur'anic school in **Cameroon**.

Source: Amnesty International, Cameroon: End six-month illegal detention of 84 children held following Qur'anic school raid, 19 June 2015.

In **Myanmar**, government security forces have rounded up hundreds of Rohingya men and boys in Rakhine state on suspicion of involvement with the Arakan Rohingya Salvation Army (ARSA).[65] For example, following an attack by ARSA in northern Rakhine State on October 9, 2016, Myanmar security forces rounded up men and boys from their villages, and according to witnesses, transported them in vehicles that varied from relatively small minibuses to large military trucks.[66]

After members of ARSA launched attacks on an army base and 30 Border Guard Police posts in northern Rakhine State in August of 2017, **Myanmar's** Anti-Terrorism Central Committee declared ARSA a terrorist organisation. The Myanmar military and security forces then conducted further 'clearance operations.'[67] Witnesses described seeing men and boys being taken away during military attacks on villages, during searches of villages for alleged ARSA members, and, in some instances, during their flight to Bangladesh.[68] Security forces arrested an unknown number of people and held them in incommunicado detention under

64 Amnesty International, *Cameroon: End six-month illegal detention of 84 children held following Qur'anic school raid*, 19 June 2015.

65 Office of the High Commissioner for Human Rights, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016*, 3 February 2017, Available at https://www.ohchr.org/Documents/Countries/MM/FlashReport3Feb2017.pdf (accessed 19 May 2019).

66 Ibid., p. 19.

67 Cf. A/HRC/37/70, para. 42.

68 Amnesty International, *'We Will Destroy Everything': Military Responsibility for Crimes Against Humanity in Rakhine State, Myanmar*, 27 June 2018, p. 37.

the 2013 Counter-Terrorism Law. According to the Special Rapporteur on the situation of human rights in Myanmar, anyone considered a 'supporter' of the ARSA was deemed responsible for acts of terrorism.[69]

Somalian forces also use mass sweeps or house raids to arrest men and boys suspected of involvement with Al-Shabab. Others are detained by police or intelligence personnel on their way home from school.[70]

In **Syria**, intelligence and security forces detain children in large-scale house raids conducted during sweep operations in residential neighbourhoods, as well as at roadside checkpoints.[71] Authorities systematically detain males considered to be of fighting age, particularly Sunni, who are believed to be associated with opposition groups.[72]

3.3 Alleged Association by Family Members

Some government forces and armed groups detain children in armed conflict, not because of the child's actions, but because of their family members' alleged involvement with armed groups. In **Nigeria**, for example, a total of 1,365 children were held in Government custody in 2016 for suspected involvement with Boko Haram, with the vast majority — 1,128 (545 boys and 583 girls) — held on the basis of their parent's alleged affiliation. 1,029 of these children were released prior to the year's end, largely due to advocacy by the UN.[73] The average period in which children remained in detention throughout 2016 varied from three to four months, although some children held in the military detention facility at Giwa barracks were detained for up to three years.[74]

In **Iraq**, thousands of women and children are detained *de facto* in camps for internally displaced persons based on the perception that they are related to men who were involved with the Islamic State.[75] According to Amnesty International, which visited eight of these

69 Cf. A/HRC/37/70, para. 42.

70 Human Rights Watch, *'It's Like We're Always in a Prison': Abuses Against Boys Accused of National Security Offenses in Somalia,* 21 February 2018, p. 2, Available at https://www.hrw.org/report/2018/02/21/its-were-always-prison/abuses-against-boys-accused-national-security-offenses (accessed 1 August 2019).

71 Syrian Network for Human Rights, *No less than 4,082 Cases of Arbitrary Arrest in Syria in the First Half of 2018,* 5 July 2018, p. 1, Availablehttp://sn4hr.org/blog/2018/07/05/52380/ (accessed 1 August 2019).

72 Independent International Commission of Inquiry on the Syrian Arab Republic, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,* A/HRC/30/48, 13 August 2015, para. 72, Available at https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx (accessed 19 May 2019).

73 United Nations Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, A/72/361-S/2017/821, 24 August 2017, para. 208.

74 Cf. Blair & Hazlett, *op. cit.*, p. 201.

75 Cf. Amnesty International, *The Condemned* (2018), *op. cit.*

camps in 2017 and 2018, the women and children were detained based on the perception that they are 'related, however distantly, to men who were somehow involved with ISIS, or for fleeing from areas believed to be ISIS strongholds.' Iraqi security forces prevented the women and children from leaving the camps and returning home; those that do manage to leave are likely to be arrested at checkpoints and returned to the camp, or be detained by the police.[76]

At the end of 2017, hundreds of civilians in **Libya**, mostly women and children, remained held without charge in two prisons in Tripoli and Misrata, and in a camp run by the Libyan Red Crescent for their apparent link to alleged Islamic State fighters. According to Human Rights Solidarity, a Libyan rights organisation, at least 100 children were being held in Mitiga Prison in Tripoli as of March 2017.[77]

In **Syria**, state forces and pro-Government groups also detain children who have relatives believed to be associated with opposition armed groups,[78] including to pressure their relatives to turn themselves in.[79] In **South Sudan**, government forces arbitrarily detained and tortured children throughout early 2017 allegedly because they were perceived to be children of opposition fighters.[80] Reports also indicate that children in **Somalia** have been detained due to suspicions that one or more of their family members are Al-Shabab affiliates.[81] In **Thailand**, children whose family members have been suspected of participating in or supporting 'any act that constitutes an emergency situation' are also subject to detention.[82]

76 Cf. Amnesty International, *The Condemned* (2018), *op. cit.*

77 Abdulkader Assad, 'Human Rights Solidarity blames Libyan authorities for prison abuse against women,' *The Libya Observer*, 9 March 2017, Available at https://www.libyaobserver.ly/news/human-rights-solidarity-blames-libyan-authorities-prison-abuse-against-women (accessed 18 May 2019).

78 Cf. S/2018/465, *op. cit.*, para. 193.

79 Human Rights Watch, *World Report 2016: Syria*, Available at https://www.hrw.org/world-report/2016/country-chapters/syria (accessed 18 May 2019).

80 Commission on Human Rights in South Sudan, *Report of the Commission on Human Rights in South Sudan*, A/HRC/37/71, 13 March 2018, p. 8, para. 45,
Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22691&LangID=E (accessed 19 May 2019).

81 UN Secretary-General, Report of the Secretary-General on children and armed conflict in Somalia, S/2016/1098, 22 December 2016, para. 32.

82 Cf. Universal Periodic Review (UPR): UNCT, Thailand Submission, para. 37.

'Yusuf' [not his real name], a 17-year-old high school student from **Yemen**, said he was in a car with a relative when about six Houthi fighters wearing civilian clothes pointed guns at them, ordered them out of the car, and drove them to a detention facility in 2016. The armed men separated Yusuf from his relative, blindfolded him, 'took him somewhere underground,' where he was detained in a cell with adults. Four days later, two men interrogated him for an hour while he was blindfolded and handcuffed, asking him questions about his family members and their ties to opposition parties. Yusuf said they beat him and told him that if he didn't answer their questions, they would tie both his arms to a window and hang him above the group, or rip out his fingernails. Two weeks later, Yusuf was interrogated again, this time by four men for five hours. Yusuf said they beat him, pulled his hair, and yelled and threatened him. They again asked about his family's links to opposition parties. Yusuf was interrogated once again three days later for about two hours, during which time he said the men slapped and insulted him. Yusuf spent nearly a month in detention without charge before Houthi authorities released him.

Source: Human Rights Watch, Yemen: Abusive Detention Rife Under Houthis, 17 November 2016

3.4 Religion, Ethnicity and Place of Origin

Children are also targeted for arrest and detention based on their religion, ethnicity, tribal identity, or place of origin. In **Syria**, for example, children belonging to minority religious groups — including Alawite, Ismaili, Shi'a, Druze, and Christian families — are particularly vulnerable to arrest and detention by opposition forces.[83] According to the Independent International Commission of Inquiry on the Syrian Arab Republic, hundreds of individuals belonging to religious minorities, primarily women and children, were in the custody of armed groups in Douma alone in early 2018.[84]

83 Independent International Commission of Inquiry on the Syrian Arab Republic, *Detention in the Syrian Arab Republic: A Way Forward*, 8 March 2018, para. 4.

84 Ibid.

ISIS has targeted children from religious and ethnic minorities, and abducted thousands of Yazidi women, girls and boys from northern **Iraq** and detained them in **Syria**, subjecting many to systematic sexual violence and rape, forced marriage, and coerced abortions.[85]

In **Libya**, the Libyan National Army has carried out mass arrests of men and boys solely on the basis of their tribal identity. In March 2017, for example, armed groups allied with the Government rounded up dozens of men and boys from the Magharba tribe during house raids in the towns of Ajdabiya, Bishi, and Brega.[86]

Government forces may also detain children because of their place of origin. In both **Iraq** and **Syria**, women and children who have escaped or left areas held by the Islamic State have been detained in camps on suspicion of involvement with or support for ISIS.[87] In Iraq, for example, families who fled ISIS-held areas arrived at screening sites, where men and boys over the age of 13 were separated from the women and other children. In some areas, authorities have arrested men and boys who fled areas perceived to be ISIS strongholds apparently indiscriminately. In Syria, authorities from the Syrian Democratic Council, a civilian authority operating in areas retaken from ISIS, and the Kurdish Autonomous Administration established displacement camps in Raqqa and al-Hasakeh governorates in Northeast Syria where they detained thousands of people who escaped from ISIS-held areas. They confiscated residents' identification documents and arbitrarily prevented them from leaving the camps. In several cases, people said the Syrian Democratic Forces offered to let their families out of the camp if they or a relative agreed to conscription. Both sets of authorities completely ban the movement of Syrian families whose relatives are ISIS suspects.[88]

85 Independent International Commission of Inquiry on the Syrian Arab Republic, *Detention in the Syrian Arab Republic: A Way Forward,* 8 March 2018, para. 19.

86 Office of the United Nations High Commissioner for Human Rights and the United Nations Support Mission in Libya, *Abuse Behind Bars: Arbitrary and unlawful detention in Libya,* April 2018, p. 19.

87 Human Rights Watch, *Syria: Thousands of Displaced Confined to Camps,* 01 August 2018, Available at https://www.hrw.org/news/2018/08/01/syria-thousands-displaced-confined-camps (accessed 19 May 2019); Cf.Amnesty International, The Condemned (2018), *op. cit.*

88 Cf. HRW, *Syria: Thousands of Displaced Confined to Camps* (2018), *op. cit.*

3.5 Punishment

Some armed forces and groups detain children as punishment. In **Yemen**, for example, Houthi forces have arbitrarily detained activists, journalists, tribal leaders, political opponents, and members of the Baha'i community as part of crackdowns on dissent in areas under their control. In this context, children have been arrested and detained with their parents or other relatives, who are themselves targeted for challenging, or being critical of the Houthis.[89] Although Houthi forces most frequently detain boys for their alleged association with opposing parties in the conflict, children are also subject to mass detention, reportedly to instill fear among the wider population. Between July 1, 2016 and June 30, 2017, OHCHR documented at least nine instances of mass detention, including men, women, and children.[90]

In **Syria**, Kurdish forces detained at least 172 children between January 2015 and mid-2018, in some cases reportedly because the children refused to fight for the Syrian Democratic Forces.[91] The UN Commission of Inquiry reported in March 2018 that cases of such detention have been documented throughout Al Hassaka, northern Raqqa, and Aleppo.[92]

In **Libya**, the national army and affiliated forces have arrested and detained children from families or regions deemed to be critical or insufficiently supportive of the Libyan National Army.[93] In **Myanmar**, armed forces and police arrest and detain children for alleged 'desertion' from the Government armed forces. Between 2014 and mid-2017, the UN country team documented 31 cases of children held in military detention for being 'away without leave.'[94]

89 Amnesty International, *Yemen: Opposition targeted, detained arbitrarily and kidnapped by Huthis and Saleh-loyalists*, 19 May 2015, p. 3, Available at https://www.amnesty.org/download/Documents/MDE3116862015ENGLISH.pdf (accessed 19 May 2019).

90 UN High Commissioner for Human Rights, *Report on the Situation of human rights in Yemen, including violations and abuses since September 2014*, A/HRC/36/33, 13 September 2017, para. 64, Available at https://www.ohchr.org/en/hrbodies/hrc/regularsessions/session36/pages/listreports.aspx (accessed 17 May 2019).

91 Syrian Network for Human Rights, *The Most Significant Human Rights Violations by Kurdish Democratic Union Party and the Kurdish Self-Management Forces*, 18 January 2016, p. 6, Available at https://reliefweb.int/sites/reliefweb.int/files/resources/Violations_by_the_Kurdish_Self_Management_Forces_en.pdf (accessed 19 May 2019).

92 Independent International Commission of Inquiry on the Syrian Arab Republic, *Detention in the Syrian Arab Republic: A Way Forward*, 8 March 2018, para. 16.

93 Cf. Office of the United Nations High Commissioner for Human Rights and the United Nations Support Mission in Libya, *Abuse Behind Bars* (2018), *op. cit.*, p. 19.

94 United Nations, Report of the Secretary-General on Children and armed conflict in Myanmar, S/2017/1099, 22 December 2017, para. 33.

3.6 Hostage-taking and Ransom

In several country situations, children are held by government forces or armed groups as hostages. In **Libya**, for example, the Libyan National Army has detained women and girls for the purpose of prisoner exchanges, and various armed groups, militias, and criminal organisations have held children to extort money from the children's relatives.[95] In several cases, children's bodies were found after the families failed to pay the requested ransom. For example, in late 2015 an armed group abducted an 11-year old boy on his way to school, and held him for 68 days. After his family reportedly failed to pay ransom, his body was found in the Sayad area of Tripoli, showing signs of torture.[96]

In **Myanmar**, members of the army and Border Guard Police have detained boys to extort money from Rohingya families, or threatened arrest unless their relatives paid bribes. For example, a 37-year-old farmer in Buthidaung Township reported that the military demanded one million kyat (approximately US$700) to release his 14-year-old son from Buthidaung prison in August 2017. The boy had been detained on suspicion of involvement with ARSA. The father paid the sum to the military through the ethnic Rakhine Village Administrator, and the boy was released.[97]

In **Syria**, ISIS has abducted women and children for ransom and as leverage in negotiations with the Syrian Government. On July 25, 2018, for example, ISIS abducted 20 women and 16 children of the Druze minority community in an attack on Al-Shabki village in Swaida governate. According to witnesses, ISIS then contacted the hostages' families, sending pictures and videos, and making ransom demands.[98] According to the Independent International Commission of Inquiry on the Syrian Arab Republic, Syrian government forces have also abducted children to extract ransom.[99]

95 United Nations Secretary-General, *Report of the Secretary-General on the United Nations Support Mission in Libya*, S/2016/452, 16 May 2016, pp. 7-8, para. 39,
Available at https://unsmil.unmissions.org/sites/default/files/N1613214.pdf (accessed 18 May 2019).

96 Ibid., para. 39.

97 Cf. Amnesty International, *'We Will Destroy Everything'* (2018), *op. cit.*

98 Human Rights Watch, *Syria: ISIS Holding Children Hostage*, 25 August 2018.

99 Independent International Commission of Inquiry on the Syrian Arab Republic, *Detention in the Syrian Arab Republic: A Way Forward*, 8 March 2018, para. 4.

In **Yemen**, the UN reports that Houthi and other armed groups have abducted and held children for ransom.[100] In **South Sudan**, Government soldiers have detained children to compel their parents to surrender for suspected involvement with armed groups.[101]

3.7 Sexual Exploitation

Both government forces and non-state armed groups have detained girls for sexual exploitation. In **South Sudan**, for example, the Sudan People's Liberation Army has abducted and held girls for sexual violence, including rape.[102] In **Libya**, the Secretary-General reported that groups allied with ISIS held women and girls captive in early 2017, and that they were subjected to torture, rape, and other forms of sexual violence.[103] As mentioned above, ISIS also abducted and held thousands of Yazidi women and children for systematic sexual violence.[104]

Refugees from **Myanmar** who had fled to Cox's Bazar in **Bangladesh** told an OHCHR rapid response mission in September 2017 that Myanmar security forces rounded up 'the most beautiful girls' in the village, separated them from their families and took them away to unknown destinations.[105] Accounts from medical personnel indicate that girls who returned had been subjected to rape and other sexual abuse while in the custody of the security forces.[106]

100 United Nations Secretary-General, *Report of the Secretary-General on Children and armed conflict,* A/70/836-S/2016/360, 20 April 2016, p. 27, para. 166,
Available at http://www.un.org/ga/search/view_doc.asp?symbol=s/2016/360&referer=/english/&Lang=E (accessed 18 May 2019).

101 Human Rights Watch, *'Soldiers Assume We Are Rebels': Escalating Violence and Abuses in South Sudan's Equatorias,* 1 August 2017, Available at https://www.hrw.org/report/2017/08/01/soldiers-assume-we-are-rebels/escalating-violence-and-abuses-south-sudans (accessed 18 May 2019).

102 Commission on Human Rights in South Sudan, *Report of the Commission on Human Rights in South Sudan,* A/HRC/37/CRP.2, 23 February 2018, p. 39, para. 193,
Available at https://www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx (accessed 18 May 2019). See also: Amnesty International, *'We Are Still Running': War Crimes in Leer, South Sudan*, 7 September 2015, pp. 34-35,
https://www.amnesty.org/download/Documents/AFR6544862016ENGLISH.pdf (accessed 17 May 2019).

103 United Nations Secretary-General, *Report of the Secretary-General on the United Nations Support Mission in Libya*, S/2017/283, 4 April 2017, p. 8, para. 44.

104 Independent International Commission of Inquiry on the Syrian Arab Republic, *Detention in the Syrian Arab Republic: A Way Forward,* 8 March 2018, para. 19.

105 UN Office of the High Commissioner for Human Rights, Mission report of OHCHR rapid response mission to Cox's Bazar, Bangladesh: 13-24 September 2017, 24 September 2017, p. 7.

106 Ibid., p. 7.

'The attack started in the morning . . . They were about 20 men wearing different things, non-uniform and uniform. The uniform is for the SPLM [political wing of the SPLA] . . . and some wore black . . . They stayed with us eight days. They mistreated me . . . they were sleeping with us [raping us]. They beat us if we refused to sleep with them. They beat me with a stick on the head and the back. All over the body. For three days two men raped me. The other days it was one man. The two men were working together. They made us milk cows, cook food, get water, carry property . . . After eight days we were taken to Koch [on foot]. We were made to carry clothes and many things on the way. There were many girls and women taken with me . . . [in Koch] we were put in the headquarters and surrounded by cows . . . after three days we were released. There we were beaten if we refused to be raped. They were raping in the evening . . . a few people were not allowed to be released but the rest of us went home . . . I've been feeling sick since I came back with joint pain, headache, and diarrhoea.'

– Mary, 14-year old girl abducted by SPLA soldiers in **South Sudan.**

Source: Amnesty International, 'We Are Still Running': War Crimes in Leer, South Sudan, 7 September 2015, p. 34.

3.8 Foreign Children Associated with Terrorist or Violent Extremist Groups

The International Centre for the Study of Radicalisation estimates that over 40,000 foreigners, including up to 4,640 children, travelled to **Iraq** or **Syria** from more than 80 countries to join ISIS both before and after the declaration of the caliphate in June 2014.[107] Many of these children travelled with their families, while others travelled alone. Over half of the children originated from either **Western** or **Eastern Europe**. Of countries with data, those with the largest number of children who left to join ISIS are **France** (460-700), **Morocco** (391), **Kazakhstan** (390), **Tajikistan** (293) and **Germany** (290).[108] In addition, thousands of children were likely born to international parents inside the Caliphate.[109] An unknown number of children were killed in the conflict, while more than 1,000 children associated with ISIS are believed to have returned to their home countries.

107 Joana Cook & Gina Vale, *From Daesh to Diaspora: Tracing the Women and Minors of Islamic State*, International Centre for the Study of Radicalisation, 2018, p 3.

108 Ibid. p 28.

109 Ibid.

Thousands of foreign women and children are detained in **Syria**, **Iraq** and **Libya** because their fathers or husbands are known or alleged ISIS members. In Syria alone, UNICEF estimated in 2019 that there were close to 29,000 foreign children, most of them under the age of 12. Some 20,000 children were from Iraq while more than 9,000 were from around 60 other countries.[110] In Iraq, a judge from the High Court of Baghdad confirmed in March 2018 that 900 children and 560 foreign wives of ISIS fighters were being detained. Their husbands/fathers were largely assumed to be dead, detained or missing.[111] At least 185 of the children had been convicted of terrorism charges.[112]

In 2018, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism highlighted the detention of minors who were the children of **French nationals** who had travelled to **Syria** or elsewhere to fight alongside terrorist organisations. She said that the children were held in detention camps or pending trial in territories overseas, where there are 'significant concerns as to the fairness of trial, the access to meaningful legal representation and the risk of torture, inhuman and degrading treatment including sexual violence while in custody or detention.'[113]

110 UNICEF, 'Protect the Rights of Children of Foreign Fighters Stranded in Syria and Iraq', *Statement of the UNICEF Executive Director, Henrietta Fore,* 21 May 2019, Available at https://www.unicef.org/press-releases/protect-rights-children-foreign-fighters-stranded-syria-and-iraq (accessed 8 June 2019).

111 Heather Murdock, 'Foreign Wives of Islamic State Fighters Sentenced to Death in Iraq', *Voice of America,* 20 March 2018. Available at https://www.voanews.com/a/foreign-wives-islamic-state-death-in-iraq/4308150.html (accessed 19 May 2019).

112 Raya Jalabi, *Forgotten victims: The children of Islamic State*, Reuters, 21 March 2019, Available at https://www.reuters.com/investigates/special-report/iraq-islamicstate-children/ (accessed 19 May 2019).

113 United Nations Office of the High Commissioner for Human Rights, *Preliminary findings of the visit: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to France,* 23 May 2018, Available at https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23128&LangID=E (accessed 19 May 2019).

4. Deprivation of Liberty in Practice

4.1 Data: The Number of Children Deprived of Liberty

Available data regarding children deprived of liberty in the context of armed conflict comes primarily from the UN Monitoring and Reporting Mechanism (MRM) on children and armed conflict. This mechanism was established at the request of the UN Security Council to gather credible, verified information on grave violations against children in armed conflict.[114] Although the Security Council has not identified deprivation of liberty as a 'grave violation' against children, the mechanism has systematically collected data on the detention of children since 2012. The Special Representative of the Secretary-General on children and armed conflict receives and analyzes the data from the MRM and uses it to help prepare the Secretary-General's country specific and annual reports to the Security Council on children and armed conflict.

In 2017, the United Nations documented the detention of at least 4,471 children in 16 conflict countries,[115] more than a fivefold increase from 2012.[116] The actual number is certainly higher, as children are frequently held in a wide range of both official and unofficial detention sites with limited or no access for monitors or child protection actors. These include makeshift centres and camps run by military, intelligence forces, and government-aligned militias. For example, in **Afghanistan**, the Secretary-General reported that 258 boys were held in child facilities in 2014 for national-security offenses, but interviews conducted by the UN of conflict-related detainees across a range of facilities (including detention centres run by the army, local and national police, National Directorate of Security, and other authorities) suggested that the true number of conflict-related child detainees during that time period was closer to 900.[117]

The countries with the largest number of detained children include **Syria**, **Nigeria**, **Iraq**, **Israel**, **the Democratic Republic of Congo**, and **Somalia**. In several countries, the detention of children in the context of armed conflict has increased significantly, often in the context of counter-terrorism measures. For example, the UN verified more than twice as many cases of child detention in Iraq and Nigeria in 2017 as in 2016.[118] The Special Representative of the Secretary-General for Children and Armed Conflict informed the UN Security Council in July 2018 that in Syria, the detention of children had 'exponentially increased.'[119]

114 Cf. S/2005/, *op. cit.*, para. 2(a).

115 Cf. S/2018/465, *op. cit.*

116 United Nations, *Report of the Secretary-General on Children and Armed Conflict*, S/2013/245, 15 May 2013.

117 Cf. United Nations, *Report of the Secretary-General on Children and Armed Conflict*, S/2015/409, 5 June 2015, para. 29; See also: UNAMA/OHCHR, *Update on the Treatment of Conflict-Related Detainees in Afghan Custody*, February 2015. Available at https://www.ohchr.org/Documents/Countries/AF/UNAMA_OHCHR_Detention_Report_Feb2015.pdf (accessed 18 May 2019). UNAMA conducted random interviews with 790 conflict-related detainees, of which 105 (13 percent) were under the age of 18. The total conflict-related detainee population was 7,555.

118 United Nations, *Report of the Secretary-General on Children and Armed Conflict*, S/2018/465, 25 June 2018.

119 Office of the Special Representative of the Secretary-General for Children and Armed Conflict, *SRSG's Briefing to the Security Council on the situation of children in Syria*, 27 July 2018, Available at https://childrenandarmedconflict.un.org/srsgs-briefing-to-the-security-council-on-the-situation-of-children-in-syria/ (accessed 17 May 2019).

Known Countries to detain Children in the context of Armed Conflict

Source: United Nations, Report of the Secretary-General on Children and Armed Conflict, S/2018/465, 16 May 2018. Figure for Syria reported by UNICEF.

In addition to the number of children detained in child facilities, prisons, or other facilities, tens of thousands of children of alleged ISIS fighters were deprived of liberty in early 2019 in camps in **Iraq** and **north-eastern Syria**.[120] In total, the Study estimates a minimum of **35,000** children deprived of liberty in the context of armed conflict.

The number of children detained over time can be substantial. For example, according to Military Court Watch, since **Israel** imposed martial law on the West Bank in 1967, an estimated 46,512 **Palestinian** children have been arrested and detained by the Israeli military for alleged security offences.[121] According to the Violations Documentation Center in Syria, at least 1,567 children have been detained by parties to the **Syrian** conflict between 2012 and 2019 (not including foreign children of ISIS fighters held in various camps).[122] In **Nigeria**, the United Nations University found that it was 'plausible that thousands of minors are or have been detained' on suspected Boko Haram affiliation.'[123]

4.2 Gender and Age

According to available information, boys make up the overwhelming majority of children detained for association with armed groups, while girls are at heightened risk for detention for sexual violence and because of suspected activities by family members. In cases where disaggregated data is available, girls typically represent a small portion of children detained for suspected involvement with armed groups. For example, the UN's monitoring and reporting mechanism on children and armed conflict found that in 2017, girls accounted for just one to three percent of detained children in **DRC**, **Iraq**, and **Palestine**.[124] In **Syria**, girls accounted for 10 percent of the 293 cases of children deprived of liberty documented by the UN between November 2013 and July 2018.[125]

Girls are more likely to be detained for suspected activity of family members than for their own alleged association with armed groups. In **Nigeria**, for example, girls made up 51 percent of the 1,128 children detained in 2016 for their parents' suspected involvement in

120 UNICEF, 'Protect the Rights of Children of Foreign Fighters Stranded in Syria and Iraq', *Statement of the UNICEF Executive Director, Henrietta Fore,* 21 May 2019, Available at https://www.unicef.org/press-releases/protect-rights-children-foreign-fighters-stranded-syria-and-iraq (accessed 8 June 2019).

121 Military Court Watch, *Monitoring the Treatment of Children Held in Israeli Military Detention: Annual Report – 2017-2018*, 14 June 2018, p 3.

122 Violations Documentation Center in Syria, *Detainees*, Available at http://www.vdc-sy.info/index.php/en/detainees (accessed 18 March 2018).

123 Cf. Blair & Hazlett, *op. cit.*, p 201.

124 Cf. S/2018/465, *op. cit.*

125 United Nations Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in the Syrian Arab Republic,* 30 October 2018, S/2018/969, para. 22.

Boko Haram.[126] The UN has also documented the detention of girls by the Libyan National Army for questioning regarding their male relatives' involvement in the Libyan conflict.[127]

As detailed above, girls have been detained for purposes of rape and sexual violence, including in **Libya**, **Myanmar**, and **South Sudan**. Although less information is available, boys are also subjected to sexual violence while in detention.

Although most children detained in the context of armed conflict are adolescents, they also include younger children. For example, the UN Commission of Inquiry for **Syria** has reported both boys and girls as young as 11 detained in more than four state security-run detention facilities in Damascus alone.[128] The UN also found children as young as 10 detained in **Libya**, and as young as eight detained in the **DRC**.[129] In **Israel**, authorities have detained children of age 12 in military facilities for alleged security offenses.[130] In **Cameroon** and **Nigeria**, children as young as five have been detained as suspected members of Boko Haram. Babies and young children have been held with mothers detained for suspected Boko Haram activities in Nigeria, and among those detained for ties with ISIS in camps in **Iraq** and **Syria**.[131]

4.3 Conditions

Authorities often hold children detained in the context of armed conflict in conditions marked by overcrowding, poor sanitation, insufficient health care, and inadequate food. Education, recreation, and other services for children are rarely available. In **Libya**, for example, OHCHR and the UN Support Mission in Libya (UNSMIL) reported that detainees in Mitiga were subjected to arbitrary and incommunicado detention, inhuman detention conditions, denial of adequate medical treatment, prolonged solitary confinement, and torture. Cells lacked adequate washing and sanitation facilities, and were severely overcrowded. Detainees described having to sleep in shifts due to the lack of space.[132]

In the **Democratic Republic of Congo**, the Human Rights Committee has noted inadequate conditions and severe overcrowding in prisons, and found insufficient health care, poor

126 United Nations Secretary-General, *Report of the Secretary-General on Children and Armed Conflict in the Syrian Arab Republic*, 30 October 2018, S/2018/969, para. 208.

127 Cf. Office of the United Nations High Commissioner for Human Rights and the United Nations Support Mission in Libya, *Abuse Behind Bars* (2018), *op. cit.*, p 35.

128 Independent International Commission of Inquiry on the Syrian Arab Republic, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/30/48, 13 August 2015, para. 72, Available at https://www.ohchr.org/EN/HRBodies/HRC/IICISyria/Pages/Documentation.aspx (accessed 18 May 2019).

129 Cf. Office of the United Nations High Commissioner for Human Rights and the United Nations Support Mission in Libya, *Abuse Behind Bars* (2018), *op. cit.*, para. 63.

130 United Nations, *Report of the Secretary-General on Children and Armed Conflict*, S/2017/821, 24 August 2017, para. 87.

131 United Nations, *Report of the Secretary-General on children and armed conflict in Nigeria*, S/2017/304, 10 April 2017, para. 37.

132 Cf. Office of the United Nations High Commissioner for Human Rights and the United Nations Support Mission in Libya, *Abuse Behind Bars* (2018), *op. cit.*, p. 4.

sanitation, and inadequate food.[133] The Committee on the Rights of the Child noted that children suspected of association with armed groups are 'especially [...] ill-treated by the police' and detained in dire conditions.[134]

In **Syria**, former detainees interviewed by non-governmental organisations reported seriously overcrowded cells, with space so limited that they were forced to organize shift systems to sleep in turns. Former detainees described sanitary facilities and health care in detention as being grossly inadequate, recalling widespread skin conditions including scabies, lice, and abscesses, and other infectious conditions, such as diarrhoea. Most of the survivors interviewed said that they had witnessed children in the detention facilities, and that authorities gave no consideration for their particular needs. Children, like adults, were not allowed to leave their cells except at designated times to use the bathroom.[135]

Deaths of children in custody have been reported in the **DRC**, **Iraq**, **Libya**, **Nigeria**, **South Sudan**, and **Syria**. For example, in **Nigeria**, prisoners have died as a result of starvation, dehydration, and communicable diseases. Between February and May 2016, at least 149 people died in the military detention facility at Giwa barracks, according to Amnesty International. Among the dead were at least 12 children, 11 of whom were under the age of six, including five babies.[136] In **Iraq**, at least seven foreign children linked to ISIS have reportedly died in custody.[137]

In the **Democratic Republic of Congo**, the Human Rights Committee found that poor health care, sanitation and inadequate food had reportedly led to a 'significant' number of deaths in custody. The Committee also expressed concern that 'a worrying percentage' of deaths in detention were due to acts of torture or ill-treatment.[138] In **Syria**, the UN Commission of Inquiry reported that children as young as seven years old have died in the custody of state forces.[139] In **Libya**, unlawful killings have reportedly resulted in scores of deaths in custody.[140]

133 Human Rights Committee, *Concluding Observations on the fourth periodic report of the Democratic Republic of Congo*, CCPR/C/COD/CO/4, 30 November 2017, para. 33.

134 Committee on the Rights of the Child, *Concluding Observations on the combined third to fifth periodic reports of the Democratic Republic of Congo*, CRC/C/COD/CO/3-5, 28 February 2017, para. 23.

135 Amnesty International, *'It Breaks the Human': Torture, Disease and Death in Syria's Prisons*, 18 August 2016, p. 38, Available at https://www.amnesty.org/en/documents/mde24/4508/2016/en/ (accessed 17 May 2019).

136 Amnesty International, *'If you see it, you will cry': Life and death in Giwa barracks*, 11 May 2016, p. 5, Available at https://www.amnesty.org/en/documents/afr44/3998/2016/en/ (accessed 18 May 2019).

137 Raya Jalabi, 'Forgotten Victims: The children of Islamic State,' *Reuters*, 21 March 2019, Available at https://www.reuters.com/article/us-iraq-islamic-state-children-special-r/special-report-forgotten-victims-the-children-of-islamic-state-idUSKCN1R2134 (accessed 19 May 2019).

138 Cf.CCPR/C/COD/CO/4, *op. cit.*, para. 33.

139 The Independent International Commission of Inquiry on the Syrian Arab Republic, *'Out of Sight, Out of Mind': Deaths in Detention in the Syrian Arab Republic*, A/HRC/31/CRP.1, 3 February 2016, para. 22, Available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf (accessed 19 May 2019).

140 Cf. Office of the United Nations High Commissioner for Human Rights and the United Nations Support Mission in Libya, *Abuse Behind Bars* (2018), *op. cit.*, p. 4.

Authorities have detained children in makeshift facilities where conditions may be particularly abysmal. For example, government forces in **South Sudan** arrested dozens of men and boys near the town of Leer in October 2015 and forced them into a shipping container on a church compound adjacent to the office of the area commander. Temperatures during the time reached up to 37 degrees Celsius (98 degrees Fahrenheit) according to members of the community, and the shipping container had no form of ventilation. Witnesses said that they could hear the detainees screaming and crying while they were being held in the container, and that they later saw their bodies being carried out by Government soldiers. At least 62 men and boys died in the container. The lone survivor was a 12-year old boy.[141]

Authorities often detain children suspected of association with armed groups together with adults. In **Syria**, the UN Commission of Inquiry has reported that children 'suffer the same inhumane conditions of detention as adults.'[142] The Committee Against Torture noted that in June 2017, at least 160 children were held in detention facilities throughout Parwan province in **Afghanistan**, including in the adult maximum-security facility, with and under the same conditions as adult detainees.[143]

Children detained in the context of armed conflict are often denied access to family members. In **Somalia**, authorities frequently do not contact parents to inform them of their child's detention for suspected affiliation with Al-Shabab, and relatives who have been able to see or visit their child in the custody of the National Intelligence and Security Agency (NISA) have reported using personal connections within NISA, paying bribes, or both.[144] In **Iraq**, some children detained for alleged association with ISIS have not had contact with their families for two years or more.[145]

Children detained in the context of armed conflict rarely have access to education, recreation, or other programs. In **Iraq**, for example, security forces at several facilities holding children detained for alleged ISIS association stated that the children were not allowed outside of their cells, and that they had no opportunities for activities, exercise, or education.[146]

141 Amnesty International, *'Their Voices Stopped': Mass Killing in a Shipping Container in Leer, South Sudan,* 10 March 2016, Available at https://www.amnesty.org/download/Documents/AFR6535982016ENGLISH.pdf (accessed 17 May 2019).

142 Independent International Commission of Inquiry on the Syrian Arab Republic, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic,* A/HRC/30/48, 13 August 2015, p. 11, para. 72.

143 Committee against Torture, *Concluding observations on the second periodic report of Afghanistan,* CAT/C/AFG/CO/2, 12 June 2017, para. 17.

144 Cf. HRW, *'It's Like We're Always in a Prison'* (2018), *op. cit.*, p. 19.

145 Cf. HRW, *'Everyone Must Confess'* (2019), *op. cit.*

146 Ibid., p 21.

4.4 Torture and Ill-Treatment

Authorities frequently subject children detained in the context of armed conflict to ill-treatment, including torture. For example, in 2015 and 2016, the UN conducted random interviews with 85 conflict-related child detainees in detention facilities across **Afghanistan**. Most of the children were held for suspected association with the Taliban or other armed groups. Of the children interviewed, 45 percent gave credible accounts of torture while in the custody of security forces, primarily to extract confessions. Many reported that they confessed as a result of the ill-treatment.[147]

> 'They were very angry and upon my arrival, they started punching and kicking me and were frequently telling me that I was not telling the truth. On the first night an NDS Officer came to my cell and took me to another cell and told me that "if you don't confess, then I will sleep with you and you know what can I do with you." I was really scared and they started beating me with sticks, punches and kicks. The next night they wet me with tap water and then brought me to a cell and electrocuted me with a stick they had with them. This torture continued for several hours and still I didn't confess. On the third night the tall man hanged me on the window of the cell and told me next day "I will come to you and if you don't confess then I will really screw you," so I got scared and I had to confess. On the fourth day, they installed a camera and told me that they would tell me what to say and I should repeat it in front of the camera. Since I was scared I told everything and they also brought a document and I marked it with a finger print.'
>
> – child detained by the National Directorate of Security (NDS) in Farah province, **Afghanistan**
> interviewed by UNAMA in 2016

Source: UN Assistance Mission in Afghanistan and the Office of the UN High Commissioner for Human Rights, Treatment of Conflict-Related Detainees: Implementation of Afghanistan's National Plan on the Elimination of Torture, April 2017, p. 29.

147 United Nations Assistance Mission in Afghanistan and the Office of the UN High Commissioner for Human Rights, *Treatment of Conflict-Related Detainees: Implementation of Afghanistan's National Plan on the Elimination of Torture*, April 2017, pp. 6-7.

Both **Iraqi** security forces and Kurdistan Regional Government authorities have been reported to use torture against children suspected of ISIS involvement. The Committee against Torture described 'a consistent pattern', whereby alleged terrorist and other high-security suspects, including children, are arrested without a warrant, held incommunicado or in secret detention centres for extended periods, and 'severely tortured in order to extract confessions.'[148] In November 2018, Human Rights Watch investigated the treatment of children detained by Kurdish authorities for alleged terrorism-related offenses. It found that the majority of 23 children interviewed said that KRG intelligence officers tortured them during interrogation, often using plastic pipes, electric cables or rods to beat them all over their bodies. Several of the children said the officers used electric shocks or tied them into painful stress positions. Some boys said they were tortured over consecutive days. Nearly all of the boys said they ultimately made and fingerprinted confessions simply to stop the torture. None of the children were allowed to read the confessions, and many only learned what it said when they were read out in court. Several said that they told an investigative or trial judge that their confession was produced under torture, but that the judges appeared to ignore their statements.[149]

The vast majority of **Palestinian** children in detention are arrested and held in custody for allegedly throwing stones at Israeli soldiers or settlers in the occupied West Bank.[150] Reports of ill-treatment and physical abuse by **Israeli** security forces are widespread. In 2017 the UN obtained affidavits from 162 Palestinian boys between the ages of 12 and 17 who stated that they had been subjected to ill-treatment and breaches of due process.[151] Of 114 testimonies collected by Military Court Watch during 2017, 69 percent of children who had been detained reported various forms of physical abuse by Israeli forces during arrest, transfer, or interrogation, including beatings with batons and rifles, kicks in the genitals, and being shot with rubber bullets. Other children reported being left tied and blindfolded and exposed to extremely hot or extremely cold temperatures for extended periods of time before questioning.[152]

In **Somalia**, children are often subjected to intimidation, threats, and on occasion beatings and torture, primarily to obtain confessions but at times as a form of punishment.[153] One

148 Committee against Torture, *Concluding observations on the initial report of Iraq*, CAT/C/IRQ/CO/1, 7 September 2015, para. 16.

149 Human Rights Watch, *Kurdistan Region of Iraq: Detained Children Tortured*, 7 January 2019, Available at https://www.hrw.org/news/2019/01/08/kurdistan-region-iraq-detained-children-tortured (accessed 1 August 2019).

150 Military Court Watch, *Monitoring the Treatment of Children Held in Israeli Military Detention: Annual Report – 2017-2018*, 14 June 2018.

151 Cf. S/2018/465, *op. cit.*, para. 88.

152 Military Court Watch, 'Statistics – Palestinian 'security' prisoners in Israeli detention', *Military Court Watch Newsletter*, June 2018.

153 Cf. HRW, *'It's Like We're Always in a Prison'* (2018), *op. cit.*, p. 27.

boy, then 16 years old, was detained by security forces in mid-2015 and held incommunicado for two months. His mother described his condition: 'I found him in Mogadishu Central Prison. When I saw him, he couldn't walk. He said he was beaten every night, and especially beaten on his legs. He had injuries on his legs. His ankles and knees were swollen, he couldn't even stand to greet me. He had to be assisted by other prisoners.'[154] The father of another 16-year-old detained in 2016 said that his son was held in a house for 10 days' before being brought to the GodkaJilaow detention facility. He said that 'they threatened [my son] the first few days. The son told his father: "They said unless I confess to being with Al-Shabab they were going to beat me. To save my life, I confessed." Security officers recorded the boy's confession and coerced his signature on a written confession before also fingerprinting him.[155]

In **Syria**, State security and intelligence agencies often torture the children they arrest and detain, most often to extract information or to punish children accused of being affiliated with an opposition group or related to someone alleged to be a member of such a group.[156] The Secretary-General reported that of the 72 UN-verified cases of children detained throughout 2017, at least 38 were confirmed to have been 'ill-treated, tortured and/or raped' by government forces.[157] The Syrian Network for Human Rights reported that as of June 26, 2018, it had documented the names of 163 children who had died specifically due to torture in the custody of the Syrian military, security personnel, or local pro-Government militias.[158]

The Commission on Human Rights in **South Sudan** found that boys suffered the same abuse in custody as men, citing incidents of gang rape, forced sexual acts, castration, genital mutilation, severe harm to genital areas, and forced stripping.[159] In **Myanmar**, former detainees, including children, reported they were typically arrested at their homes or places or work, taken to a Border Guard Police or army base, and routinely tortured or otherwise ill-treated in order to extract information or force them to confess to involvement with ARSA.[160]

154 Cf. HRW, *'It's Like We're Always in a Prison'* (2018), *op. cit.*, p. 28.

155 Ibid., p. 30.

156 Independent International Commission of Inquiry on the Syrian Arab Republic, *Report of the Independent International Commission of Inquiry on the Syrian Arab Republic*, A/HRC/33/55, 11 August 2016, p. 15, paras. 93, 92, & 95, Available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/178/60/PDF/G1617860.pdf?OpenElement (accessed 18 May 2019).

157 Cf. S/2018/465, *op. cit.*, para. 186.

158 Syrian Network for Human Rights, *No less than 13,197 Individuals Died due to Torture, including 167 Children and 59 Women*, 26 June 2018, p. 3, Available at http://sn4hr.org/wp-content/pdf/english/Out_of_sight_en.pdf (accessed 17 May 2019).

159 Commission on Human Rights in South Sudan, *Report of the Commission on Human Rights in South Sudan*, A/HRC/37/CRP.2, 23 February 2018, para. 193, Available at https://www.ohchr.org/EN/HRBodies/HRC/CoHSouthSudan/Pages/Index.aspx (accessed 17 May 2019).

160 Amnesty International, *'We Will Destroy Everything'* (2018), *op. cit.*, p .25.

4.5 Prolonged Detention and Detention without Charge

Children detained in the context of armed conflict are often held without charge or for excessive periods of time before trial, with little or no access to legal counsel. In **Afghanistan**, for example, scores of children have been detained in the National Directorate of Security adult detention facility in Kabul without formally being charged and without any access to lawyers.[161] In **Cameroon**, children under the age of 10 have been held for more than six months without charge before being released.[162] In **Nigeria**, some children held for suspected Boko Haram association were detained in a military detention facility for up to three years.[163] In **Libya**, armed groups allied with the Libyan National Army have detained children without charge for more than three years in the military wing of al-Kuwiefiya Prison.[164]

4.6 Prosecution

Some governments have prosecuted children detained in the context of armed conflict for national security violations. In many cases, their trials fail to meet international child justice standards and children have been sentenced to excessive prison terms. In countries including **Iraq** and **Somalia**, children have been prosecuted solely for membership in an armed group, regardless of their actions with the group. In Iraq, legal experts estimate that by mid-2018, approximately 400 to 500 children had been tried in Iraq for ISIS affiliation, with many receiving sentences of 5 to 15 years.[165] According to the Iraqi Supreme Judicial Council, by the end of 2018, at least 185 foreign children, including 77 girls, had been convicted on terrorism charges and sentenced to prison terms of up to 15 years.[166] A 16-year old German girl, for example, was sentenced to six years in jail – five years for ISIS membership and one year for entering Iraq illegally.[167] In Somalia, five boys who were arrested when they were 14 or 15 for participation in Al-Shabab were sentenced by the military court to eight years imprisonment—the standard sentence applied to adults for Al-Shabab membership.[168]

161 Information provided by the Office of the Special Representative to the Secretary-General on Children and Armed Conflict, email communication, January 2019.

162 Amnesty International, *Cameroon* (2015), *op. cit.*

163 Cf. Blair & Hazlett, *op. cit.*, p. 201.

164 UN Working Group on Arbitrary Detention, *Opinions adopted by the Working Group on Arbitrary Detention at its seventy-eighth session, 19-28 April 2017,* A/HRC/WGAD/2017/6, 16 June, paras. 20-24.

165 Human Rights Watch, *Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials,* 21 June 2018.

166 National Iraq News Agency, *The Judiciary Reveals the Number of Foreigners Accused of Terrorism during the Current Year*, 31 December 2018.

167 Human Rights Watch, *Iraq: Change Approach to Foreign Women, Children in ISIS-Linked Trials,* 21 June 2018.

168 Cf. HRW, *'It's Like We're Always in a Prison'* (2018), *op. cit.*, p. 44.

4.7 Military Courts

Military courts rarely have specialised child justice expertise and often fail to meet basic standards of due process. The Human Rights Committee has expressed concern regarding the jurisdiction of military courts over children, noting violations of fair trial guarantees and fundamental safeguards, such as interrogation in the absence of a lawyer, torture and forced confessions, arbitrary sentences, and the limited right of appeal against military court decisions.[169] The Committee on the Rights of the Child has also recommended that the use of military courts for criminal proceedings against children be avoided.[170] Nevertheless, several States have prosecuted children in military courts for association with armed groups. In **Somalia**, for example, children have been being prosecuted for Al-Shabab-related crimes in military courts. Between January 2015 and February 2018, the military court in Mogadishu sentenced at least 16 boys between 14 and 17 years old to prison terms ranging from six years to life.[171] In August 2018, after sustained advocacy by the United Nations, the President of Puntland in north-eastern Somalia signed a decree to pardon 34 children who had been sentenced to various prison terms for their association with Al-Shabaab in Garowe since 2016. In November 2018, the children were transferred from Puntland to a rehabilitation centre in Mogadishu to be reunited with their families.[172]

Children arrested for security offenses by **Israeli** authorities are tried under military law in a special child military court that was established in 2009. Judges were appointed from the ranks of existing military judges and required to have 'appropriate training.'[173] A March 2018 report by the Israeli rights group B'Tselem concluded that despite reforms, the treatment of **Palestinian** children detained for security offenses fell short of meeting international standards, citing its failure to use detention as a last resort and to prioritise rehabilitation over legal proceedings.[174]

169 Human Rights Committee, *Concluding observations on the third periodic report of Lebanon*, CCPR/C/LBN/CO/3, 9 May 2018, paras. 31 & 43.

170 Committee on the Rights of the Child, *Concluding Observations on the United States of America,* CRC/C/OPAC/USA/CO/1, 25 June 2008, para. 30(g).

171 Ibid., p. 36.

172 United Nations, *Report of the Secretary-General on children in armed conflict in Somalia,* S/2018/1149, 21 December 2018, para. 77

173 Israeli Defence Forces Order No. 1644/2009, issued by Gadi Shamni, Commander of the IDF in the West Bank, 29 July 2009, Available at http://www.militarycourtwatch.org/files/server/Israeli_Military_Order_1644%20(2).pdf.

174 B'Tselem, *Minors in Jeopardy Violation of the Rights of Palestinian Minors by Israel's Military Courts,* March 2018, Available at https://www.btselem.org/publications/summaries/201803_minors_in_jeopardy (accessed 1 August 2019).

'Hamza,' (not his real name) a 15-year-old boy from the contested town of Merka in southern **Somalia**, was abducted by Al-Shabab in late 2015 and taken to one of the group's training camps. After two and a half months of rudimentary training with an AK-47 assault rifle, he was among at least 64 children sent to fight for Al-Shabab in an attack in Puntland in March 2016. Hamza, unlike many of the boys he trained with, survived the assault. He was captured by the Puntland military and taken to jail. Hamza said: 'Four Puntland soldiers beat me. They tied my hands behind my back and legs together with a very strong rope. They beat me with their gun butts and kicked me in the chest several times. Then they threw me into their vehicle. The rope was tight, and I was in pain. I still have a black scar on my arm.' Charged with insurrection and terrorism, Hamza spent six months in pre-trial detention in Garowe. He was taken before a military court without a lawyer, and described the trial: 'In court, I was asked if I was guilty, and I said, yes and that I had a gun but that I wasn't fighting. The judge said: "If you were carrying a gun, then you are part of Al-Shabab."' Hamza was given a 10-year sentence. He has since been transferred to a child rehabilitation centre, but his sentence has not been rescinded. He said, 'I feel afraid and let down. Al-Shabab forced me into this, and then the Government gives me this long sentence.'

– former child soldier from **Somalia**

Source: Human Rights Watch, 'It's Like We're Always in a Prison': Abuses Against Boys Accused of National Security Offenses in Somalia, 21 February 2018, p. 1.

4.8 Enforced Disappearances

In some cases, the arrest and detention of children in armed conflict constitutes enforced disappearance. Enforced disappearance is defined under international law as the arrest or detention of a person by State officials or by agents of the State or by persons or groups of persons acting with the authorisation, support or acquiescence of the State, followed by a refusal to acknowledge the arrest or to reveal the persons' fate or whereabouts.[175]

In **Syria**, according to the Syrian Network for Human Rights, at least 1,546 children were forcibly disappeared by Syrian Government and pro-government forces between March 2011 and August 2018.[176] The group also reported that the number of disappeared children increased markedly as more pro-Government armed factions emerged to fight against the Free Syrian Army.[177]

In **Iraq**, government security forces have arrested children from camps for displaced persons and refused to share their whereabouts with family members. For example, one man reported that his 17-year old brother had been arrested by police in September 2017 from Mammam al-Alil camp, but that when the family went to the police station, officers denied holding the boy. Over a year later, the family had no idea of the boy's whereabouts.[178]

In February 2017, OHCHR stated that the number of people, including boys, forcibly disappeared in **Myanmar** after being detained by Government forces could potentially exceed several hundred.[179] In **South Sudan**, government counter-insurgency tactics in communities believed to harbour opposition forces have included the enforced disappearance of children.[180]

175 United Nations, *International Convention for the Protection of All Persons from Enforced Disappearance*, 20 December 2006, Article 2.

176 Syrian Network for Human Rights, *No less than 95,000 Forcibly-Disappeared Persons in Syria since March 2011*, 30 August 2018, Available at http://sn4hr.org/blog/2018/08/30/52622/ (accessed 19 March 2019).

177 Ibid.

178 Cf. HRW, *'Everyone Must Confess'* (2019), *op. cit.*, p. 16.

179 Office of the High Commissioner for Human Rights, *Report of OHCHR mission to Bangladesh: Interviews with Rohingyas fleeing from Myanmar since 9 October 2016*, 3 February 2017, p 20.

180 Cf. HRW, *'Soldiers Assume We Are Rebels'* (2017), *op. cit.*

5. The Impact of Deprivation of Liberty

> 'I left [detention] and my body was a living account of the torture I had to experience. In one week's time, I moved to Lebanon because I didn't want this to happen again and I didn't want to serve in the military. One word for which I paid the price in bitter beating, torture, and arrest.'
>
> – a 17-year old arrested and detained in **Syria** in March 2018

Source: Syrian Network for Human Rights, No less than 13,197 Individuals Died due to Torture, including 167 Children and 59 Women, 26 June 2018, pp. 5-6.

For children deprived of liberty in the context of armed conflict, the consequences of detention can be profound. Many have already been exposed to extreme violence, trauma and deprivation as a result of the armed conflict or their association with armed groups. Once detained, they may be held with adults under inhumane, appalling conditions, leading to illness, malnutrition, and even death. Some are detained indefinitely without charge, creating extreme uncertainty regarding their future, how long they may be detained, and what charges they may face. Many experience torture and ill-treatment, adding further to their physical and mental trauma.

The **UN Commission of Inquiry on Syria** reported that children 'have suffered physical and mental trauma' due to torture and appalling detention conditions.[181] Regarding children previously associated with ISIS, the International Centre for the Study of Radicalisation has stated, 'The trauma experienced by minors (and adults) has not stopped with the physical liberation from ISIS. For some, placement in detention centres or segregated IDP camps not only prolongs physical isolation and deprivation, but also solidifies their new identity as "IS families"'.[182]

181 The Independent International Commission of Inquiry on the Syrian Arab Republic, *Out of Sight, Out of Mind': Deaths in Detention in the Syrian Arab Republic*, A/HRC/31/CRP.1, 3 February 2016, para. 22, Available at https://www.ohchr.org/Documents/HRBodies/HRCouncil/CoISyria/A-HRC-31-CRP1_en.pdf (accessed 15 March 2019).

182 Joana Cook & Gina Vale, *From Daesh to Diaspora: Tracing the Women and Minors of Islamic State*, International Centre for the Study of Radicalisation, 2018, p. 53.

Children detained in the context of armed conflict may miss out on years of schooling. Many left school when they became associated with armed groups, and then fell further behind in detention, where schooling often is not available. As a consequence, they find it difficult to either resume their education or find employment. Once arrested and detained, many children also carry the stigma of association with armed groups, whether they were involved or not, and face rejection and reprisals from their home communities, which might lead into re-recruitment by armed groups.

> 'I was a student before ISIS came, but then the schools closed and I just stayed home. I miss school, but now I am too old to go back. I don't know what will happen to my future'.
>
> —17-year old boy, detained in **Iraq** for more than a year for alleged ISIS affiliation

Source: Human Rights Watch, 'Everyone Must Confess': Abuses against Children Suspected of ISIS Affiliation, March 2019

6. Preventing Deprivation of Liberty

6.1 Handover Protocols

An effective way for States to avoid the detention of children in armed conflict is to adopt and implement handover protocols for the release and transfer of children associated with armed groups from Government custody to child protection agencies for rehabilitation and reintegration. Several countries, including **Chad**, **Mali**, **Niger**, and **Somalia** have adopted such protocols in recent years, although implementation remains uneven.

In 2013, the Government of **Mali** and UNICEF signed a national Protocol on the Release and Handover of Children Associated with Armed Forces and Groups, which highlights the responsibility of the Government to hand over children associated with armed forces and groups to either their agency in charge of child protection or to UNICEF within 48 hours. Immediately following the signing of the Protocol, 14 boys were transferred to two UNICEF-supported transit and care centres in Bamako. Under the Protocol, the Government released 72 boys, aged 13 to 17, from Government custody between January 1, 2014 and June 30,

2017, after they had been detained for their alleged association with armed groups.[183] The Protocol has not been implemented consistently, however, and the Government continued to detain some children.

In **Somalia**, the Federal Government adopted standard operating procedures in 2014 stipulating that children separated from, or formerly associated with, Al-Shabab or other armed groups would be released to UNICEF or other designated entities no later than 72 hours after entering into Government custody.[184] Although authorities have transferred approximately 250 children to rehabilitation centres supported by UNICEF since 2015, these 'handovers' have frequently taken place only after sustained advocacy efforts by the UN and other child protection advocates, and following the detention of children for considerable periods of time.[185] In March 2016, for example, 44 children were transferred to child protection actors after being captured and held for two months by the Galmudug Interim Administration of the autonomous Galmudug region.[186] In October 2016, Puntland authorities handed over 26 children, all between the ages of 12 and 14, after seven months in detention.[187]

In February 2017, the Government of **Niger** signed a Protocol with the United Nations system, recognising that in situations of conflict, numerous human rights violations are perpetrated and children are particularly exposed to serious violations, including their recruitment and use by armed and terrorist groups. Accordingly, the Protocol committed the Government:

- to ensure the protection of any child formerly associated with armed or terrorist groups on the national territory, in line with the best interests principle;
- to ensure that any child found on the national territory following association with armed or terrorist groups is handed over to child protection services, for their transfer to the interim care centre, except in cases in which flagrant crimes have been committed;
- to restrict exchanges of information related to the identity, origin and health conditions of the child; to protect children from media interest; and prohibit any interrogation of the child aimed at collecting military intelligence.[188]

183 UN Secretary-General, *Report of the Secretary-General on children and armed conflict in Mali*, para. 28, Available at http://www.un.org/ga/search/view_doc.asp?symbol=S/2018/136&Lang=E&Area=UNDOC (accessed 19 May 2019).

184 UN Secretary-General, *Report of the Secretary-General on children and armed conflict in Somalia*, S/2016/1098, 22 December 2016, para. 31.

185 Cf. HRW, *'It's Like We're Always in a Prison'* (2018), *op. cit.*, p. 5.

186 United Nations Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, A/72/361-S/2017/821, 24 August 2017, para. 135.

187 Ibid., para. 136.

188 UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups*, 2017, pp. 124-125.

6.2 Other Directives and Legal Protections

Some countries have adopted special laws or issued directives aimed at protecting children in armed conflict, including measures to avoid depriving children of their liberty. For example, on January 10, 2019, the Special Protection of Children in Situations of Armed Conflict Act[189] was signed into law in the **Philippines**, creating a comprehensive program for children involved in armed conflict, covering prevention, rescue, rehabilitation and reintegration. The law stipulates that when children involved in armed conflict have been rescued, surrendered, or taken into custody, authorities must transfer the child to child welfare authorities within 24 hours and ensure comprehensive rehabilitation and reintegration services. It specifies that all programs should ensure the involvement of children, their communities, faith-based groups and other concerned groups. The legislation criminalises the 'false branding' of children as child soldiers or labelling of children involved in armed conflict. It also criminalises arbitrary detention or unlawful prosecution of children allegedly associated with armed groups or armed forces.[190]

In the **Democratic Republic of Congo**, the Ministry of Defence and Veteran Affairs issued a directive in May of 2013, prohibiting government armed forces from, among other abuses, recruiting children and detaining them for association with an armed group, warning that severe disciplinary and penal sanctions will be taken against those who breach the orders.[191] The same day, the National Intelligence Agency issued a directive ordering its agents to release any children held for suspected association with armed groups, and to transfer them to child protection agencies.[192] Although representing good practices, neither directive has been consistently implemented.

189 Cf. *Republic Act 11188* (aka 'Special Protection of Children in Situations of Armed Conflict Act'), 10 January 2019.

190 Cf. *Special Protection of Children in Situations of Armed Conflict Act*, Senate Bill No. 1697, introduced 15 February 2018 by Senator Grace Poe. Seventeenth Congress of the Republic of the Philippines, Chapter IV, Section 24(c) and Section 9(d)(5).

191 Directive no. VPM/MDNAC/CAB/0909/2013 on the implementation of the Action Plan.

192 Directive 05/00/CAG/ANR/194/2013 on the detention of minors for suspected association with an armed group and/or negative force.

6.3 Rehabilitation and Reintegration Programs

In a range of countries, Government agencies, UNICEF, and/or non-governmental organisations provide rehabilitation and reintegration assistance to children who have been associated with armed groups. In **Mali**, for example, UNICEF supported 107 children (including 5 girls) in 2018 who had been associated with armed groups, providing them with various services including health, nutrition, psychosocial support, security, and education while in transit centres, and helping many of the children reunite with their families and communities.[193]

An academic literature review on the psychosocial adjustment of former child soldiers found that schooling and training programs are critical in helping war-affected youth increase their future employment opportunities and achieve a sense of safety and normalcy in their everyday lives. Children who are able to return to school demonstrate more prosocial behaviours and higher levels of confidence, and former child soldiers who are able to enter the labour force are better able to 'redefine themselves and to shift their identity from soldier to civilian.[194]

Research conducted in the **Democratic Republic of Congo** on the obstacles to the reintegration of girls formerly associated with armed groups found that community acceptance is the single most critical factor in the successful reintegration of children formerly associated with armed groups and should be the focus of reintegration programming. The Study recommended that children formerly associated with armed groups be fully involved in their psychosocial adjustment and reintegration process, and that programs should also consult and involve their families and communities, as they are key to the successful reintegration of the child. The research also indicated that programs should support other vulnerable children in the community along with children formerly associated with armed groups, in order to avoid their stigmatisation and encourage the recovery of the entire community.[195]

193 Information provided by UNICEF, March 2019.

194 Theresa S. Betancourt (*et al.*), 'Research Review: Psychosocial adjustment and mental health in former child soldiers – a systematic review of the literature and recommendations for future research', *Journal of Child Psychology and Psychiatry.* January 2013, Vol. 54(1), pp. 17–36.

195 Presentation given by Child Soldiers International to a Sub-regional workshop on the treatment of children associated with extremist groups, organised by UNODC in Dakar on 1-3 June 2016. Available at: https://www.child-soldiers.org/Handlers/Download.ashx?IDMF=ba7cb3b8-6d2d-4269-acfc-786e5a443708 (accessed 17 May 2019).

6.4 Community-based Reintegration

In some cases, children who have been associated with armed groups may face stigma or potential reprisals in their home communities, leading to prolonged deprivation of liberty in camps. In **Iraq**, for example, many women and children with relatives suspected of being Islamic State (ISIS) members have been rounded up and forced into de facto prison camps. However, the town of al-Shura in northern Iraq, forty kilometers south of Mosul, has accepted back women and children with relatives who joined ISIS, and Juburi elders there are assisting in the reintegration of children of ISIS members into local schools.

When ISIS took control of the al-Shura area, approximately half of the 2,200 families in the town had members who joined ISIS. When the Iraqi Government retook the area in November 2016, the residents fled to displacement camps and Mosul. Later that month, the Iraqi Federal Police allowed residents to return to al-Shura if they had no immediate relatives linked to ISIS. However, women and children with immediate relatives suspected of being ISIS members were not allowed to return.

Sheikh Jamhour, a leader in the Jaburi tribe, approached the Federal Police asking them to allow families with immediate relatives who joined ISIS to return, making two promises: he and fellow residents who had returned would not harm the families, and they would take responsibility for the families' peaceful reintegration into the community. He said: 'IS formed itself in US-run prisons like Camp Bucca, these camps now housing relatives of IS members will become the same if we are not careful. In the camps their children would get no decent education. We refused to abandon them. If we brought them back, I knew we could bring back their minds.'[196]

Security forces agreed to let the families return in June of 2017. ISIS fighters had killed at least 250 people from the community, so before the families' return, Sheikh Jamhour and other local leaders worked with residents who were victims of ISIS abuses. These leaders held three group meetings with the families who lost loved ones to ISIS to explain the planned returns of the families and ensure that they would buy in. Initially, the families who had lost members to ISIS demanded blood money from the returning families, but Jamhour insisted that the women and children had no part in the killings, and any compensation should come from the Government.

When it was time for the families to return, Jamhour and other local leaders identified extended families in the community who could host them and coached the host families

196 Cited in Belkis Wille, 'How Reconciliation in Iraq Could Stop Collective Punishment,' *Just Security*, 22 March 2018.

on the messages they should convey to returning family members to convince them that life was not better under ISIS. For example, he highlighted the importance of voting in Iraq's upcoming elections. 'I want to show them that if they are unsatisfied with the Government, they can push for change from within the system,' he said.

Jamhour visits the local school almost daily to speak to the children about the perils of life under ISIS, and the imam in the local mosque uses religious language to combat ISIS ideology. The teachers initially dealt with traumatised children without any specialized training, but more recently, UNICEF has begun offering assistance with reintegration and rehabilitation.

The town of al-Shura is special in some ways. Nearly all residents are from the Juburi tribe, so the leaders' decision appears to have been broadly accepted. The women with immediate relatives who were ISIS members all had extended family in al-Shura who are willing to take them in and vouch that they would not become a security risk. Almost half of the town's population had an immediate relative who was an ISIS member, so welcoming them back was critical for the survival of the local population.

However, Sheikh Jamhour thought their experiment in al-Shura could be replicated elsewhere. 'If tribes decide to forgive these families and take responsibility to reintegrate them into society, those rejecting the policy will fall silent for the greater good of the community. After all, ISIS was a transnational movement, not a tribe, and the tribal structure will always be stronger here.'[197]

197 Cited in Belkis Wille, 'How Reconciliation in Iraq Could Stop Collective Punishment,' *Just Security*, 22 March 2018.

7. Conclusions

In situations of armed conflict, children are at heightened risk of detention. At any given time, thousands of children are deprived of their liberty in the context of armed conflict, and are often held for weeks, months, or even years without charge. Available data suggests an alarming five-fold increase in detention rates between 2012 and 2017, largely due to counter-terrorism measures. This trend continued in 2018 and 2019, due to a large number of children deprived of liberty in Syria and Iraq for alleged association with ISIS. This disturbing trend runs counter to international law, which treats children recruited in the context of armed conflict primarily as victims who are entitled to rehabilitation and reintegration. Particularly in conflicts with so-called 'terrorist' or violent extremist groups, governments are more likely to detain – and often prosecute – children than to provide them with rehabilitation.

Children are detained for a range of reasons. In countries where children have been recruited as child soldiers, State security forces frequently detain them on suspicion of involvement with armed opposition groups. Security forces apprehend children during military operations or on the battlefield, and round up children during mass security sweeps, at checkpoints, or during house raids.

Many other children are detained not because of actual association with armed groups, but simply because they appear of fighting age, come from communities perceived to be sympathetic to opposition forces, or because their family members are suspected of involvement with opposing forces. Younger children are detained with their mothers (who may be children themselves) when the mothers are suspected of supporting or being members of armed groups. Children may be detained to coerce incriminating evidence or to convince family members to turn themselves in.

Children have also been detained as punishment for refusing to join armed forces, for use in intelligence gathering, for extortion or ransom, and for prisoner swaps. At the end of conflict, children may be detained in camps for screening of suspected combatants or to be 'de-radicalised.'

Most children detained in the context of armed conflict are held by government forces, but armed groups also detain children, often as punishment for perceived support for the Government or refusing to join the armed group, for indoctrination, as a form of recruitment, to extract ransom, or as bargaining chips for prisoner swaps. Girls are detained by both Government and opposition forces for domestic and sexual exploitation.

Children are often subject to torture and ill-treatment, most often to extract confessions of involvement with armed groups. In many cases, children sign confessions simply to end the torture. Conditions are also extremely poor, with severe overcrowding, and grossly inadequate sanitation, food, and health care. Children are frequently detained with adults,

and have no access to education, recreation, or rehabilitation programs. In several countries, children have died in custody due to poor conditions or ill-treatment.

The majority of children detained in the context of armed conflict are detained without charge or trial. While some may be released within a few days to child protection authorities, others are detained for weeks, months, or even years, sometimes in violation of explicit protocols mandating the handover of children associated with armed forces or groups to civilian authorities for rehabilitation. Some are held incommunicado, with no access to lawyers or family. Some families only get access to their children by paying bribes.

Treatment of children associated with armed groups is often arbitrary and excessively harsh. Children may be prosecuted in adult or military courts that fail to meet international standards for child justice, and convicted of terrorism and sentenced to long prison terms simply for brief periods of association with armed groups. Some are charged solely for membership in a proscribed armed group, rather than any other criminal offense. Few have access to legal assistance, and some have been sentenced to excessive prison terms of up to 20 years, or even life.

While some conflict countries have rehabilitation programs for children associated with armed groups, others do not. Even when programs exist, the UN sometimes obtains the release of detained children only after sustained advocacy and after considerable lengths of time. In other cases, countries operate 'rehabilitation' or 'reintegration' facilities that may, in practice, function as detention centres. When children are charged with national security offenses, few countries have systems providing diversion from the criminal justice system or alternatives to detention.

The negative consequences for children deprived of their liberty can be profound, including mental and physical trauma, family separation, deprivation of education, long-term stigma, and in some cases, nearly insurmountable challenges to societal reintegration. Many children feel doubly-victimised; first, by the armed group which recruited them – often through force, coercion, or deception – and secondly, by the government forces which detain and punish them.

Rather than enhance national security, the detention of children for alleged association with armed groups may only heighten risks and perpetuate conflict. Children who are ill-treated in detention may easily become alienated and join armed groups. The UN Secretary-General has said that depriving children of their liberty because of their association with armed groups 'is contrary not only to the best interests of the child, but also to the interests of society as a whole,' and notes that such detention can lead to the creation of community grievances.[198]

198 United Nations, *Report of the Secretary-General on Children and Armed Conflict*, S/2016/360, 20 April 2016, para. 16.

8. Recommendations

1. In line with UN Security Council Resolution 2427 (2018), States should recognise that children who were detained for association with armed groups are **first and foremost victims of grave abuses of human rights** and international humanitarian law, and prioritise their recovery and reintegration.

2. In line with the *Paris Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, States should **not detain, prosecute**, or **punish children** who have been associated with armed forces or armed groups solely for their membership in such forces or groups.

3. In line with UN Security Council Resolution 2427, States should adopt and implement standard operating procedures for the **immediate and direct handover of children** from military custody to appropriate child protection agencies.

4. States should ensure that children formerly associated with armed forces and armed groups are provided with **appropriate rehabilitation** and **reintegration assistance**, and where possible and in the best interests of the child, **family reunification**. Such assistance should take into account the specific situation and needs of girls associated with armed forces and armed groups in order to guarantee equal access to rehabilitation and reintegration assistance, as well as tailored measures.

5. States and other parties to armed conflict must **not detain children illegally** or **arbitrarily**, including for preventive purposes; alleged offenses by family members; intelligence-gathering; purposes of ransom, prisoner swaps, as leverage in negotiations; or for sexual exploitation.

6. States should ensure that any arrest or detention of a child should be based on specific and credible evidence of criminal activity and **prioritise diversion from the criminal justice system**.

7. States should treat children above the minimum age of criminal responsibility who are charged with criminal offenses under national or international law in **accordance with international human rights** and **child justice standards**. In particular, States should ensure they enjoy full due process guarantees, including access to counsel, the right to challenge their confinement, protection of privacy, and contact with their families.

8. States should ensure that any sentence for criminal offenses is **appropriate to the child's** age and aimed at their rehabilitation and reintegration into society. States should **consider all non-custodial solutions**, and only use detention as a **measure of last resort** and **for the shortest appropriate period of time**, **in line with the best interests of the child**.

CHAPTER 14

CHILDREN DEPRIVED OF LIBERTY ON NATIONAL SECURITY GROUNDS

© Armend Nimani/AFP via Getty Images, Child repatriated with its mother, who had joined ISIS, is now held in a foreign detention center in Vranidoll, Kosovo

Aser's Story

Egypt

'It seems that you want to go back to the electric shocks again', the prosecutor told Aser the moment he denied the charge of 'membership in a terrorist group'.

In Egypt, it is a crime to belong to the banned Muslim Brotherhood. Aser's charge however went beyond mere membership. It also included actively participating in an apparent attack on a hotel in Cairo involving the use of force, possession of firearms and assaulting police officers.

Aser's ordeal, however, began three years earlier when armed police and members of the National Security Agency raided his family home in Cairo on January 2016. Despite failing to produce an arrest or search warrant, the officers insisted that they will only take **14-year old Aser** for a brief period of questioning. All his family could do was to look on helplessly as the their child was led away.

The officers ended up **holding Aser incommunicado for 34 days**. A family member recalls how they frantically tried to locate him at several police stations. 'They all denied that Aser was in their custody.' Little did the family know that while they were searching, Aser was suspended in a room by his limbs and tortured with electric shocks. In the end, he gave in and confessed to participating in the attack. Despite this confession though, Aser was later deliberately warned by the prosecutor that if he tried to retract the confession, he would be sent back to the NSA for further torture.

By August 2019, Aser had been detained without trial for more than three years. If convicted, he could face 15 years imprisonment.

For data protection and confidentiality reasons, the names were altered.

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1. Introduction

Since 2001, the number of terrorist attacks worldwide has increased significantly, driven largely by violent extremist groups such the Islamic State (ISIS), Boko Haram, the Taliban, Al-Shabab, and the Communist Party of India – Maoist. According to the Global Terrorism Database, terrorist attacks reached a peak of 17,000 in 2014, with countries such as Afghanistan, Iraq, India, Pakistan, and Nigeria hit the hardest. In recent years, attacks have also taken place in European cities including Paris, Nice, Brussels, and Berlin.[1]

Worldwide Terrorism Incidents (2008-2017)

Source: National Consortium for the Study of Terrorism and Responses to Terrorism (START) (2018), Global Terrorism Database [Data file]. Retrieved from https://www.start.umd.edu/gtd

1 Cf. *Global Terrorism Database*, Available at https://www.start.umd.edu/gtd/ (accessed 23 May 2019). See also, Gary LaFree, 'Will Terrorism Continue to Decline in 2019?', *The Conversation*, 27 February 2019, Available at https://theconversation.com/will-terrorism-continue-to-decline-in-2019-104466 (accessed 23 May 2019).

Armed groups designated as terrorist or armed groups termed violent extremist have recruited thousands of children, in some cases across borders, to carry out suicide and other attacks, and for various support roles both within and outside the theatre of hostilities. Some are recruited through force, coercion or deception, while others are influenced by family and peer networks, poverty, physical insecurity, social exclusion, financial incentives, or a search for identity or status. The growth of the internet has provided such groups with new avenues to recruit children, who are often particularly susceptible to propaganda and online exploitation due to their age and relative immaturity.

In response to heightened concerns about threats to their national security and counter-terrorism resolutions adopted by the United Nations Security Council, the vast majority of the world's countries have adopted new counter-terrorism legislation or amended existing national laws since 2001. These laws often fail to distinguish between adults and children, include overly broad definitions of terrorism, provide fewer procedural guarantees, and impose harsher penalties.[2] Some States, for example, have criminalised mere association with non-State armed groups designated as terrorist or armed groups termed violent extremist, have extended the period of time that individuals can be detained without charge or before trial in the context of counter-terrorism, lowered the age of detention for certain offenses, and required children charged with national security offenses to be tried in adult courts or before military tribunals.[3]

The combination of increased activity by non-State armed groups designated as terrorist or armed groups termed violent extremist, the extensive exploitation of children by these groups, and increasingly expansive counter-terrorism measures and laws has increased the number of children detained in the context of national security. As explored in this chapter, the number of children detained for national security offenses not only continues to grow, but States increasingly invoke national security in order to ignore or abandon established child rights standards, including the use of detention only as a measure of last resort, and the obligation to provide rehabilitation and reintegration assistance for children illegally recruited by armed groups designated as terrorist or termed violent extremist.

2 UN Security Council, *S/RES/2427*, 9 July 2018, paras. 19 & 20, which specifically 'stresses the need to pay particular attention to the treatment of children associated or allegedly associated with all non-state armed groups, including those who commit acts of terrorism.'

3 Raya Jalabi, 'Special Report: Forgotten victims – the children of Islamic State', Reuters, Available at https://www.reuters.com/article/us-iraq-islamic-state-children-special-r/special-report-forgotten-victims-the-children-of-islamic-state-idUSKCN1R2134 (accessed 3 September 2019).

The previous chapter focused on deprivation of liberty in the context of armed conflict (i.e. where a conflict was taking place on the State territory). It concerned itself with children who are detained on national security-related charges primarily for their association with armed groups in conflict situations, including children associated with Boko Haram in **Nigeria**, Al-Shabab in **Somalia**, the Islamic State in **Iraq** and **Syria**, etc. This chapter however, deals primarily with children detained in the context of national security in countries without an armed conflict on their territories.

1.1 Terminology

The terminology around national security offenses is problematic, as the terms in use (e.g. 'terrorism,' 'violent extremism,' 'jihadism') are often politicised and lack internationally agreed-upon definitions.[4] The terms are often used simplistically and inaccurately, and frequently applied disproportionately to groups associated with Islam. As noted in the Secretary-General's *Plan of Action to Prevent Violent Extremism*, definitions of 'terrorism' and 'violent extremism' are the prerogative of Member States and must be consistent with their obligations under international law, in particular international human rights law.[5] The Global Study, basing itself on the language used in the UN Security Council Resolution 2427 (2018) on Children in Armed Conflict, therefore prefers to use the term 'non-State armed groups designated as terrorist' or 'armed groups termed violent extremist'.[6]

However, as seen in this chapter, counter-terrorism laws are sometimes used to criminalise peaceful activities that fall outside of common conceptions of terrorism. Such activities often relate to freedom of expression and assembly, as well as association with groups such as gangs.

4 In this regard, it is important to note as well that the adoption of the precise definition of terrorist acts in national legislation is frequently recommended by UN treaty bodies

5 UN General Assembly, *Plan of Action to Prevent Violent Extremism: Report of the Secretary General*, A/70/674, 24 December 2015.

6 See also: the 2018 Report of the Secretary-General on Women, Peace and Security, para. 71, Available at https://reliefweb.int/sites/reliefweb.int/files/resources/N1831325.pdf (accessed 4 September 2019).

2. Legal Framework

The international legal framework for children who are alleged to have committed offenses in the context of national security includes international human rights law, international humanitarian law, the international legal framework related to counter-terrorism, and international law regarding trafficking in persons.

2.1 Human Rights Law

As noted in previous chapters, human rights law applies to all children, regardless of the type or seriousness of the offense. These standards recognise that children 'differ from adults in their physical and psychological development, and their emotional and educational needs. Such differences constitute the basis for the lesser culpability of children in conflict with the law.'[7] These principles hold true regardless of the offense and hold true for children charged with or convicted of violent extremist offenses as much as they do to children charged with or convicted of minor theft.

Although some international human rights treaties allow derogation during times of public emergency, the CRC does not contain an explicit derogation clause and allows only very narrow limitations to its provisions.[8] Thus, the key provisions of the CRC that are applicable to the right to personal liberty (Article 37) and the administration of justice (Article 40) also apply to any child who may have committed national security or terrorism-related offenses. Most importantly, deprivation of liberty shall be used only as a measure of last resort and for the shortest appropriate period of time.[9]

States also have a duty to take measures to prevent the deprivation of liberty by third parties. According to the Human Rights Committee, States parties to the ICCPR must protect individuals against abduction or detention by individual criminals or irregular groups, including armed or non-State armed groups designated as terrorist, operating within their territory.[10]

7 CRC-Committee, *General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, CRC/C/GC/10, 25 April 2007.

8 See: Article 10 on family reunification, Article 13 on freedom of expression, Article 14 on freedom of religion, and Article 15 on freedom of association and assembly.

9 Cf. Article 37(b) CRC.

10 UN Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and Security of Person)*, CCPR/C/GC/35, 16 December 2014, para. 7.

All treatment of children in the context of national security must respect the dignity of the child, ensure that the best interests of the child are a primary consideration, and take 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.[11] In cases where a child has committed an alleged offense, the Convention calls for the use of measures without resorting to judicial proceedings, whenever appropriate and desirable,[12] and the consideration of a range of alternatives to detention, including care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes.[13]

Other relevant provisions include the right to prompt legal counsel, to be informed of the charges, to have the matter decided without delay, and the right to challenge the legality of the detention.[14] States must also set a minimum age of criminal responsibility, below which children cannot be held liable for criminal offenses.[15] The CRC-Committee has stated that States should not create exceptions to the minimum age based on the type or severity of offense.[16] It has also made clear that any detention of a child before trial should be limited to cases where the child is an immediate danger to himself or herself or others, or where it is considered necessary to ensure the child's appearance at court proceedings.[17]

The Optional Protocol to the CRC on the involvement of Children in Armed Conflict (OPAC) states that armed groups distinct from the armed forces of a State shall not, under any circumstances, recruit or use in hostilities children under the age of 18.[18] Importantly, the prohibition on recruitment of children by non-State armed groups is not limited to parties to armed conflict and applies in all contexts. It also prohibits all recruitment, regardless of whether it is by force or allegedly 'voluntary.'

Article 6 of the OPAC requires States parties to take all feasible measures to ensure that children in their jurisdiction who are recruited in violation of the OPAC are demobilised or released from service, and 'when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration.'[19] It

11 Article 40.1 CRC. see also: chapter 9 on Children Deprived of Liberty in the Administration of Justice.

12 *Ibid*., Article 40.3.

13 *Ibid*., Article 40.4.

14 *Ibid*., Articles 37 & 40.

15 *Ibid*., Article 40, paragraph 3(a).

16 Cf. CRC-Committee, CRC/C/GC/10, *op. cit*., para. 34

17 *Ibid*., para. 80.

18 UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, A/RES/54/283, 25 May 2000.

19 *Ibid*., Article 6.

also calls on States parties to cooperate in the rehabilitation and reintegration of children recruited in violation of the OPAC, including through technical cooperation and financial assistance.[20]

2.2 International Humanitarian Law

As outlined in the previous chapter, international humanitarian law governs the conduct of parties engaged in armed conflict, including the actions of both government forces and non-State armed groups. In some cases, certain non-State armed groups are designated as 'terrorist' organisations by States and/or international and regional organisations.

International humanitarian law prohibits the recruitment and use in hostilities of children under the age of 15.[21] It also prohibits deliberate attacks against civilians unless they are taking a direct part in hostilities, acts of terror against the civilian population,[22] acts or threats of violence where the primary purpose it to spread terror among the civilian population,[23] and killing, torture, or other outrages against human dignity of persons who are not or no longer taking part in hostilities.[24]

In international armed conflict, combatants enjoy immunity from prosecution for lawful acts of war, but can be prosecuted for war crimes, crimes against humanity, acts of genocide, and other serious crimes. In non-international armed conflicts, participation in hostilities is subject to domestic law, including national security laws and counter-terrorism legislation, but authorities are encouraged to grant amnesty (except for crimes under international law) to those who have been involved in the conflict at the end of hostilities.[25] In either case, all protections of human rights law apply, including the use of detention of children only as a measure of last resort and for the shortest appropriate period of time.

20 UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict,* A/RES/54/283, 25 May 2000, Article 7.

21 International Committee of the Red Cross (ICRC), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 8 June 1977, 1125 UNTS 3, Article 77(2); See also: ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II),* 8 June 1977, 1125 UNTS 609, Article 4(3)(c).

22 *Ibid*., 1125 UNTS 609, Article 4, para. 2(d) & Article 13, para. 2.

23 *Ibid*., 1125 UNTS 3, Article 51, para. 2.

24 ICRC, *Geneva Conventions I-IV,* 12 August 1949, Common Article 3.

25 Cf. *Protocol II to the Geneva Conventions*, Article 6, para. 5.

2.3 The Paris Principles

The Paris Principles and Guidelines on children associated with armed forces or armed groups ('Paris Principles'), while not binding law, also provide guidance, stating that children who have been associated with armed groups should not be prosecuted or punished, or threatened with prosecution or punishment solely for their membership in such groups.[26] A child who is accused of illegal acts as part of an armed group should be considered primarily a victim of violations of international law, not only as a perpetrator.[27] Alternatives to judicial proceedings should be sought wherever possible,[28] and any criminal prosecution should be in accordance with international child justice standards.[29] If a child is prosecuted, the Paris Principles state 'the purpose of any sanction imposed on a child should be to promote rehabilitation and reintegration into the community and not to punish.'[30]

2.4 International Standards related to Counter-Terrorism

The international legal framework for countering terrorism is contained primarily in nineteen international conventions and protocols and a series of UN Security Council resolutions,[31] complemented by the UN Global Counter-Terrorism Strategy, other UN General Assembly resolutions, and customary law.[32] International conventions and protocols related to counter-terrorism set out specific acts which States are expected to criminalise and prosecute. These include terrorist bombings, hostage-taking, crimes against internationally protected persons, offenses linked to dangerous materials (including nuclear materials), and the financing of terrorism.[33]

The Security Council has adopted several resolutions regarding terrorism, calling on all States to take the necessary steps to prevent the commission of terrorist acts and ensure that any persons who participate in the financing, planning, preparation or perpetration of terrorist

26 UNICEF, *The Paris Principles. Principles and Guidelines on Children Associated with Armed Forces or Armed Groups*, February 2007, para. 8.7, Available at http://www.unicef.org/protection/files/ParisPrinciples310107English.pdf (accessed 25 May 2019).

27 *Ibid*., para. 3.6.

28 *Ibid*., para. 3.7.

29 *Ibid*., para. 8.8.

30 *Ibid*., para. 3.6.

31 Including United Nations Security Council resolutions 1267 (1999), 1373 (2001), 1540 (2004), 1566 (2004), 1624 (2005), 1735, 2178 (2014), & 2396 (2017).

32 See: UN Office of Counter-Terrorism, 'International Legal Instruments', Available at https://www.un.org/counterterrorism/international-legal-instruments (accessed 25 May 2019). See also: Manfred Nowak & Anne Charbord (eds.), *Using Human Rights to Counter Terrorism, Elgar Studies in Human Rights*, Cheltenham/Northampton MA, Edward Elgar Publishing, 2018.

33 Cf. UN Office of Counter-Terrorism, 'International Legal Instruments', *op. cit.*

acts or in support of terrorist acts are brought to justice, and that such acts are established as serious criminal offenses in domestic law.[34] It has also stated that all States should criminalise cross-border travel for the purpose of the perpetration, planning or preparation of or participation in terrorist acts, or the providing or receiving of terrorist training.[35] Although States are required to criminalise participation in terrorist acts, no international counter-terrorism instrument specifically calls for the criminalisation of individuals solely for their association with or membership in a non-State armed group designated as terrorist.[36]

The UN General Assembly, in its resolution on the UN Global Counter-Terrorism Strategy Review, strongly condemned the systematic recruitment and use of children to perpetrate terrorist attacks and acknowledged that children alleged or accused of committing terrorist acts may themselves be victims of terrorism. It stressed that they should be 'treated in a manner consistent with their rights, dignity and needs, in accordance with applicable international law, in particular, obligations under the Convention on the Rights of the Child.'[37] Both the General Assembly and the Human Rights Council have specifically stated that efforts to reintegrate children formerly associated with armed groups should include children associated with non-State armed groups designated as terrorist.[38] The General Assembly has also specifically addressed the situation of child 'returnees,' calling on Member States to develop 'effective strategies to deal with returnees, including through repatriation, in accordance with relevant international obligations and national law.'[39]

The Security Council has also specifically addressed the situation of children associated with 'foreign terrorist fighters,' 'recognizing the particular importance of providing timely and appropriate reintegration and rehabilitation assistance to children associated with foreign terrorist fighters returning or relocating from conflict zones, including through access to health care, psychosocial support and education programs that contribute to the well-being of children and to sustainable peace and security.'[40]

34 Cf. UN Security Council, *Resolution 1373*, S/RES/1373, 28 September 2001.

35 Cf. UN Security Council, *Resolution 2178*, S/RES/2178, 24 September 2014.

36 UN Office of Drugs and Crime (UNODC), *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups*, 2017, pp. 72-73. The *Additional Protocol to the 2005 Council of Europe Convention for the Prevention of Terrorism* requires Member States to criminalise 'participating in an association or group for the purpose of terrorism'.

37 UN General Assembly, *The United Nations Gobal Counter-Terrorism Strategy Review*, A/RES/70/291, 1 July 2016.

38 Human Rights Council, *Protection of human rights and fundamental freedoms while countering terrorism*, A/HRC/RES/35/34, 13 July 2017, para. 19; See also: A/RES/70/291, *op. cit.*, para. 18.

39 UN General Assembly, *The United Nations Gobal Counter-Terrorism Strategy Review*, A/RES/72/284, 2 July 2018, para. 39.

40 UN Security Council, *Resolution 2396*, S/Res/2396, 21 December 2017, para. 36. See also UN Security Council, *Resolution 2427 (2018)*, S/RES/2427, 9 July 2018, OP20: '[...]emphasizes that children who have been recruited in violation of applicable international law by armed forces and armed groups and are accused of having committed crimes during armed conflicts should be treated primarily as victims of violations of international law.'

The Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context[41] provides specific guidance to Governments regarding the treatment of children involved in terrorism activities. It calls for children involved in terrorism-related activities to be treated in accordance with international law and international child justice standards, and from a child rights and child development perspective. It urges States to consider and design diversion mechanisms for children charged with terrorism-related offenses, to avoid criminal proceedings. If prosecuting children for terrorism-related activities, States should primarily use the child justice system, and apply, where appropriate, alternatives to detention and imprisonment, including during the pre-trial stage, giving preference to the least-restrictive means to achieve the judicial process. States are also urged to develop rehabilitation and reintegration processes to aid the child's successful reintegration into society.[42]

In 2018, the UN Counter-Terrorism Implementation Task Force issued Guidance to States on human rights-compliant responses to the threat posed by foreign fighters. It states that 'Children should be regarded primarily as victims and treated as such, although this does not exclude prosecution of children above the minimum age of criminal responsibility in appropriate cases.'[43] It states that children under age 18 who are alleged to be foreign fighters should be dealt with in accordance with child justice standards, and that States should consider alternatives to prosecution, including during the pre-trial stage. It reiterates the principle that detention should only be a measure of last resort and for the shortest period necessary.

2.5 International Law regarding Trafficking in Persons

Children who are recruited and used by non-State armed groups designated as terrorist or armed groups termed violent extremist may be considered victims of trafficking. The Trafficking in Persons Protocol (Palermo Protocol) defines 'trafficking in persons' as the 'recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of

41 The memorandum was developed through a series of expert consultations, led by the Government of Switzerland, under the auspices of the Global Counterterrorism Forum.

42 Global Counterterrorism Forum, *Neuchâtel Memorandum on Good Practices for Juvenile Justice in a Counterterrorism Context*, 2016, Available at http://strproject.oijj.org/document/39 (accessed 26 May 2019).

43 UN Counter-Terrorism Implementation Task Force, *Guidance to States on human rights-compliant responses to the threat posed by foreign fighters*, OHCHR, 2018.

exploitation'.[44] It further states that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if this does not involve any of the means outlined above.[45]

The Palermo Protocol defines exploitation as sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.[46] Many States have recognised forms of trafficking-related exploitation that include the use of children in armed conflict and exploitation in criminal activities.[47]

The UN Security Council has recognised the connection between trafficking in persons and terrorism and other transnational organised criminal activities, and has specifically noted that the recruitment and use of children in violation of applicable international law by parties to armed conflict can be associated with trafficking in persons.[48] The Security Council has affirmed that victims of trafficking in persons in all its forms committed by non-State armed groups designated as terrorist should be classified as victims of terrorism, and that these victims should be eligible for official support, recognition and redress available to victims of terrorism, and have access to national relief and reparations programmes.[49]

44 UN General Assembly, *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime*, 15 November 2000, Article 3(a).

45 Cf. Article 3(c) Trafficking in Persons Protocol.

46 *Ibid*., Article 3(a).

47 See: UNODC, *Issue Paper: The Concept of 'Exploitation' in the Trafficking in Persons Protocol*, Vienna, 2015, Available at https://www.unodc.org/documents/congress/background-information/Human_Trafficking/UNODC_2015_Issue_Paper_Exploitation.pdf (accessed 26 May 2019).

48 UN Security Council *Resolution S/RES/2331*, 20 December 2016.

49 *Ibid*., para. 10.

3. Pathways to Deprivation of Liberty

Children are detained as national security threats for a broad range of activities, including association with non-State armed groups, posting political opinions online, participating in peaceful protests, involvement in banned political groups, or for alleged gang membership.

3.1 Membership or Association with Non-State Armed Group Designated as Terrorist

Under international law, the recruitment of children by non-State armed groups is always illegal. Yet some countries have criminalised mere association or membership with organisations designated as terrorist, including in cases involving children, even if no other crime has been committed. In **Afghanistan**, for example, any person who becomes a member of a terrorist organisation is liable to 'medium-term imprisonment.'[50] In the **UK**, it is an offense to belong to a proscribed organisation.[51] In **Turkey**, a 'terrorist offender' includes

50 Islamic Republic of Afghanistan, *Law on Combat against Terrorist Offenses of 2008*, Section 91/(10 & 3(2)).

51 United Kingdom, *Terrorism Act 2000*, 2000, Section 11.

anyone belonging to a group with the aim of 'changing the attributes of the Republic as specified in the Constitution' or 'damaging the indivisible unity of the State.'[52]

A survey of national counter-terrorism legislation by the Child Rights International Network (CRIN) found that several countries surveyed had criminalised membership in non-State armed groups designated as terrorist, and that none made exceptions for children.[53] Some countries proscribe fairly light penalties for such membership – for example, **Bangladesh**, which allows a maximum of 6 months imprisonment[54] – while others carry much heavier sentences, such as **New Zealand**, which imposes sentences of up to 14 years.[55]

As described in the previous chapter, governments have detained many children for alleged involvement with non-State armed groups designated as terrorist or armed groups termed violent extremist in the context of armed conflict,[56] in particular in **Afghanistan**, **Iraq**, **Nigeria**, **Somalia**, and **Syria**. In **Iraq**, for example, over 1,000 children were detained for alleged association with ISIS in 2017,[57] and several hundred, including at least 185 foreign children, had been convicted for such association.[58]

Governments in non-conflict situations also detain children for association with proscribed organisations, including political parties. In **Egypt**, for example, authorities arrested and imprisoned nearly 3,200 children after Mohamed Morsi was ousted from power in July 2013, primarily for participating in illegal or violent protests, or for membership in or support for the Muslim Brotherhood.[59]

In **Turkey**, at least 197 children were detained in prison on terrorism-related offenses as of August 2017, including as alleged members of the Kurdistan Worker's Party (PKK).[60] In complaints to the Human Rights Association, some boys said they were coerced to identify others allegedly involved in the PKK youth movement or anyone involved in resistance

52 Law on the Fight Against Terrorism, *Law No. 3713, Adopted in 1991 and amended in 1995, 1999, 2003, 2006, and 2010., Article 1.* Available at https://www.ecoi.net/en/file/local/1130809/1226_1335519341_turkey-anti-terr-1991-am2010-en.pdf (accessed 26 May 2019).

53 Children's Rights Information Network, *Caught in the Crossfire? An international survey of anti-terrorism legislation and its impact on children,* 2018, p 25. Available at: https://archive.crin.org/sites/default/files/caughtinthecrossfire.pdf (accessed 26 May 2019).

54 Bangladesh, *Anti-Terrorism Act 2009*, 2009, Section 8.

55 New Zealand, *Terrorism Suppression Act 2002*, 2002, Section 13(3).

56 This tendency is expressly contra the UN Security Council resolution on this issue. Cf. S/RES/2427, *op. cit.*, OP20.

57 United Nations, *Report of the Secretary-General on Children and Armed Conflict,* S/2018/465, 16 May 2019.

58 Supreme Judicial Council, *The Judiciary Reveals the Number of Foreigners Accused of Terrorism during the Current Year,* Republic of Iraq, 31 December 2018.

59 Human Rights *Watch, Egypt: 7,400 Civilians Tried in Military Courts,* 13 April 2016, Available at https://www.hrw.org/news/2016/04/13/egypt-7400-civilians-tried-military-courts (accessed 29 May 2019); See also: Human Rights Watch, *World Report 2018: Egypt,* January 2018.

60 Data from the *Turkish General Directorate of Prisons and Detention Houses,* cited in Rifat Başaran, '197 children in prison on terror charges in Turkey', *Hurriyet Daily News*, 7 November 2017, Available at http://www.hurriyetdailynews.com/197-children-in-prison-on-terror-charges-in-turkey-122057 (accessed 25 May 2091).

against State authorities. Other boys were then detained based on the names provided under duress.[61]

3.2 Online Activity

Children's emotional and cognitive immaturity puts them at risk of online recruitment by violent extremist groups. Some violent extremist groups, such as ISIS, have increasingly used the internet and online propaganda to recruit supporters, including children. In 2015 for instance, 25,000 Twitter accounts believed to be associated with ISIS generated more than 17 million tweets related to the group.[62] Recruiters for violent extremist groups use online platforms such as Twitter and Facebook to identify potential recruits, then cultivate them through targeted messages.[63] They may track the online behaviour of internet users to identify those vulnerable to its propaganda and then tailor their narrative. Children who engage in internet searches to learn more about Islam, for example, can end up being 'groomed' by ISIS recruiters who seek to build a relationship of trust.[64] Groups such as ISIS have also directed propaganda messages directly at women and girls, whom they address as 'sisters of the Islamic State.'[65]

The internet has also made it easier for children to commit national security offenses online, sometimes unknowingly. Children may innocently exercise their curiosity about issues related to terrorism, unaware that they are accessing proscribed content, or exercise their freedom of expression without being aware that their posts could be considered criminal offenses.

In **Australia**, a 17-year old became a supporter of ISIS after encountering ISIS propaganda online.[66] He began chatting on Facebook with an older ISIS recruiter in the **UK** who encouraged him to launch a terror attack in Melbourne and sent him links to articles giving detailed

61 Human Rights Watch, *Submission for the UN Committee against Torture Review of Turkey: 57th Session of the Committee against Torture,* 22 April 2016, Available at https://www.hrw.org/news/2016/04/22/un-committee-against-torture-review-turkey (accessed 25 May 2019).

62 Majid Alfifi, Prisa Kaghazgaran & James Caverlee, *Measuring the Impact of ISIS Social Media Strategy,* California, Fred Morstatter, 2018. Available at http://snap.stanford.edu/mis2/files/MIS2_paper_23.pdf (accessed 25 May 2019).

63 J.M. Berger, 'How Terrorists Recruit Online,' *Brookings*, 9 November 2015. Available at https://www.brookings.edu/blog/markaz/2015/11/09/how-terrorists-recruit-online-and-how-to-stop-it/ (accessed 25 May 2019).

64 UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violence Extremist Groups: The Role of the Justice System,* 2017, p. 13.

65 *Ibid*., p. 14.

66 The Court of Appeal, *DPP (Cth) v MHK [2017] VSCA 157,* 2017. Cited in *Law Council of Australia, Review of the prosecution and sentencing of children for Commonwealth terrorist offences,* 27 June 2018, Available at https://www.inslm.gov.au/sites/default/files/submissions/law_council_of_australia.pdf (accessed 25 May 2019).

instructions on how to make improvised explosive devices. The teenager, sentenced to 11 years in prison, reportedly had emotional and anxiety issues and testified that he was 'very embarrassed' and 'ashamed' of his plans to build bombs for an attack.[67] In **Germany**, a 16-year old Syrian refugee was convicted in April 2017 of planning to carry out a terrorist attack and sentenced to two years in a youth prison. An ISIS supporter in **Israel** had engaged the boy in an internet chat and sent him instructions on how to make a bomb. The judge in the case stated that plans for an attack were at a very early stage and there was no threat to the public.[68]

In March 2017, the United Nations University interviewed four children (three Jordanians and one Syrian, ages 16 and 17) detained by **Jordanian** authorities on terrorism-related charges for activity with the Islamic State. Only one of the four first made contact with the Islamic State through a real-life acquaintance. A second initially communicated with an ISIS recruiter over the internet, which allegedly led to contact with an ISIS operative on the ground in Jordan. The remaining two were accused of engaging with ISIS only over social media and claim never to have met any of its members or engaged in any terrorist activity offline.[69]

In a case from the **UK**, a 17-year old autistic boy posted content on Instagram promoting 'jihad' and supporting al-Qaeda, and allegedly planned an attack on a Justin Bieber concert in Cardiff in June 2017. He claimed he had spoken to a man on Instagram who 'told him he needed to commit a terrorist act if he wanted to go to paradise.'[70] The boy was given a life sentence in March 2018 and will serve at least 11 years imprisonment before being considered for parole.[71]

In the **United States**, several children have been detained and prosecuted for terrorism-related offenses. Most became involved with extremist groups online. For example, a high school student from Virginia began studying Islam online, where he began communicating with ISIS supporters. He helped a friend travel to Syria to join ISIS and became very active on Twitter, including providing instructions on how to use Bitcoin to support ISIS. In 2016, he

67 Nick McKenzie, Richard Baker & Jane Lee, 'Teen jailed for seven years over Mother's Day terror plot,' *The Age*, 7 December 2016.

68 Cf. 'German court convicts 16-year old Syrian refugee for planning bomb attack', *Deutsche Welle*, 10 April 2017, Available at https://www.dw.com/en/german-court-convicts-16-year-old-syrian-refugee-for-planning-bomb-attack/a-38374202 (accessed 3 August 2019).

69 Interviews with detainees at a facility in Jordan, 2 March 2017; Mara Revkin, 'I am Nothing Without a Weapon', Siobhan O'Neil & Kato van Broeckhoven (eds.), *Cradled by Conflict,* UN University, 2018, p 128.

70 Lizzie Dearden, 'Autistic teenager who planned Isis-inspired terror attack in Cardiff jailed for life,' *The Independent*, 2 March 2018.

71 Steven Morris, 'Teenager given life sentence for planned Justin Bieber gig attack,' *The Guardian*, 2 March, 2018.

pled guilty to providing material support for a foreign non-State armed group designated as terrorist and was sentenced to 11 years in prison with lifetime supervision following release.[72]

As illustrated by some of the cases above, once violent extremist groups engage children online, the children are more likely to engage in online activity that may lead to their arrest and detention. In some cases, online activity is their only 'offense'. For example, in August of 2016 a teenage boy in **Tajikistan** was convicted of incitement to join the Islamic State and sentenced to a prison term of ten years and six months. According to a local report, the boy, a tenth-grade student, distributed Islamic State photos and video content on social media, and called on citizens of Tajikistan to participate in 'extremist activity.' He was convicted of 'urging compatriots to join the ranks of militants.' This was reportedly the first time a child has been convicted of inciting terrorism in Tajikistan.[73] In **Jordan**, authorities arrested a 16-year old boy on charges of spreading ISIS propaganda. The boy said an ISIS supporter who claimed to be living in the 'caliphate' approached him on Facebook. The boy had few friends and said he saw the recruiter as a sympathetic listener and gateway to a virtual community. He told United Nations University interviewers that 'I was only a supporter in my heart and online; I never planned to take any action.'

3.3 Protests and Ill-defined Acts of 'Terrorism'

As States have adopted and amended counter-terrorism legislation, many have utilised vague or overbroad definitions that can result in charges against children for peaceful activity, including exercising their right to freedom of expression and assembly. In 2014, **Algeria** amended its penal code to add definitions of terrorism that include 'any act' which aims to affect the 'normal functioning of institutions or attacks the symbols of the nation.'[74] In **Malaysia**, terrorism is defined to include acts intended to 'influence or compel' the Government to 'do or refrain from doing any act.'[75] **Jordan** includes acts intended to 'affect the policy of the state or the government' in its definition of terrorism.[76]

72 Yasmine Abutaleb and Kristina Cooke, 'Extremists Among Us: A teen's turn to radicalism and the US safety net that failed to stop it,' *Reuters*, 6 June 2016.

73 Cf. 'В Таджикистаневпервыеосудилишкольниказапропагандуэкстремизма,' *Regnum*, 4 August 2016, Available at https://regnum.ru/news/accidents/2163156.html(accessed 26 May 2019).

74 Cf. Resource Equity, *Algeria Code Pénal*, promulgated by Order No. 66-156 of 18 Safar 1386 corresponding to 8 June 1966, as amended by Law No. 14-01 of 4 February 2014, Article 87 *bis*, Available at https://landwise.resourceequity.org/record/2720(French language version, accessed 26 May 2019).

75 Cf. *Penal Code of Malaysia*, Act No. 574. 7 August 1997. Chapter VIA, Article 130B, Paragraph 2 (c)(ii).

76 'Anti-Terrorism Law No. 55 of Year 2006', *Official Gazette No. 4790*, 1 November 2006, Article 2, p. 4264, Available at https://cyrilla.org/api/documents/download?_id=5a32658a6666c81c5c1c3f4a (accessed 3 August 2019).

Both the Human Rights Committee and the Committee against Torture have criticised countries for such overbroad definitions, finding that they have been used to charge and prosecute political opponents and religious minorities.[77]

As a consequence of these broad definitions, children may be arrested and detained on national security grounds simply for participating in protests against the Government. In **Ethiopia**, for example, since late 2015, security forces have detained tens of thousands of Ethiopians, including children, during widespread protests against Government policies. After Abiy Ahmed Ali was elected in April 2018, the Government undertook significant reforms, releasing thousands of detainees, lifting the ban on opposition groups, and initiating a process to revise repressive laws that had been used to silence dissent, including the Anti-Terrorism Proclamation.[78] In **Egypt**, children have also been arrested and detained for participating in anti-Government protests. In some cases, according to the Egyptian Coalition on Children's Rights, children have been arrested for simply walking near areas where protestors were marching.[79]

77 See e.g. Uzbekistan, Morocco, Russia, Turkmenistan, and Saudi Arabia.

78 Human Rights Watch, *Ethiopia: World Report 2019*, 17 January 2019, Available at https://www.hrw.org/world-report/2019/country-chapters/ethiopia (accessed 26 May 2019).

79 *Ibid*.

States that were recommended to establish or revise the legal definition of terrorism by recommendation of UN mechanisms (2007-2018)

	COUNTRY	UN MECHANISM
2007	ALGERIA	HUMAN RIGHTS COMMITTEE
	CHILE	HUMAN RIGHTS COMMITTEE
	ISRAEL/PALESTINE	SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM
	TURKEY	WORKING GROUP ON ARBITRARY DETENTION
	UNITED STATES OF AMERICA	SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM
2008	ALGERIA	COMMITTEE AGAINST TORTURE
	MONACO	HUMAN RIGHTS COMMITTEE
	SPAIN	SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM
	ETHIOPIA	HUMAN RIGHTS COMMITTEE
2009	AUSTRALIA	HUMAN RIGHTS COMMITTEE
	NEW ZEALAND	UNIVERSAL PERIODIC REVIEW
	RUSSIAN FEDERATION	HUMAN RIGHTS COMMITTEE
	TANZANIA	HUMAN RIGHTS COMMITTEE
	TURKEY	OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT
2010	ETHIOPIA	UNIVERSAL PERIODIC REVIEW
	ISRAEL	HUMAN RIGHTS COMMITTEE
	ISRAEL	OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON THE INVOLVEMENT OF CHILDREN IN ARMED CONFLICT
	TUNISIA	SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM
2011	MONACO	COMMITTEE AGAINST TORTURE
	MOROCCO	COMMITTEE AGAINST TORTURE
2012	ECUADOR	UNIVERSAL PERIODIC REVIEW
	TURKEY	HUMAN RIGHTS COMMITTEE
2014	AUSTRALIA	COMMITTEE AGAINST TORTURE
	CHILE	HUMAN RIGHTS COMMITTEE
	CHILE	SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS WHILE COUNTERING TERRORISM
	CHILE	UNIVERSAL PERIODIC REVIEW
	IRELAND	HUMAN RIGHTS COMMITTEE
	SYRIA	COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN
2015	IRAQ	HUMAN RIGHTS COMMITTEE
	REPUBLIC OF KOREA	HUMAN RIGHTS COMMITTEE
	UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND	HUMAN RIGHTS COMMITTEE
	UZBEKISTAN	HUMAN RIGHTS COMMITTEE
2016	CHINA	COMMITTEE AGAINST TORTURE
	JORDAN	COMMITTEE AGAINST TORTURE
	POLAND	HUMAN RIGHTS COMMITTEE
	TUNISIA	WORKING GROUP ON THE USE OF MERCENARIES AS A MEANS OF IMPENDING THE EXERCICE OF THE RIGHT OF PEOPLES TO SELF-DETERMINATION
2017	JORDAN	HUMAN RIGHTS COMMITTEE
	PAKISTAN	HUMAN RIGHTS COMMITTEE
	PAKISTAN	UNIVERSAL PERIODIC REVIEW
	SRI LANKA	COMMITTEE AGAINST TORTURE
	TUNISIA	UNIVERSAL PERIODIC REVIEW
2018	CAMEROON	UNIVERSAL PERIODIC REVIEW
	SAUDI ARABIA	UNIVERSAL PERIODIC REVIEW
	EL SALVADOR	COMMITTEE ON THE RIGHTS OF THE CHILD

Source: Recommendations retrieved from the Universal Human Rights Index

3.4 Apology for Terrorism

Some governments, including **France**, **Germany**, **Morocco**, **Spain**, and the **UK**, have criminalised expression perceived to support the aims of violent extremist groups as 'apology for terrorism' or 'glorification of terrorism.'[80] In **Italy**, for example, a top court has ruled that a 'like' on Facebook can constitute evidence of apology for terrorism.[81]

In May 2018, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism expressed concern at evidence that French laws criminalising 'apology for terrorism' had been used extensively against children.[82] For example, in January of 2015, **French** police detained and questioned an 8-year old boy after he allegedly expressed support for those who carried out the attack on the satirical weekly Charlie Hebdo. The child reportedly triggered concern when he refused to participate in a minute of silence at his school in commemoration of the victims.[83] In another instance, French authorities arrested and charged a 16-year old boy with apology for terrorism after he posted to his Facebook page a cartoon deemed to satirise the murder of Charlie Hebdo cartoonists.[84]

In a report to the General Assembly, UN Secretary-General Ban Ki-Moon stated that 'laws should only allow for the criminal prosecution of direct incitement to terrorism, that is, speech that directly encourages the commission of a crime, is intended to result in criminal action and is likely to result in criminal action.'[85] UN experts on freedom of expression have also stated that '...[c]riminal responsibility for expressions relating to terrorism should be limited to those who incite others to terrorism; vague concepts such as "glorifying", "justifying" or "encouraging" terrorism should not be used.'[86]

80 Amnesty International, *Dangerously Disproportionate: The Ever-Expanding National Security State in Europe,* 2017, Available at https://www.amnesty.org/download/Documents/EUR0153422017ENGLISH.PDF (accessed 26 May 2019) See also: *Morocco Penal Code*, Article 218-2.

81 The Local, 'A Facebook 'like' can constitute apology for terrorism, rules Italy's top court,' 13 December 2017, https://www.thelocal.it/20171213/a-facebook-like-can-constitute-apology-for-terrorism-rules-italys-top-court (accessed 26 May 2019).

82 UN Office of the High Commissioner for Human Rights, *Preliminary findings of the visit: UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism concludes visit to France*, 23 May 2018.

83 Cf. 'French police question eight-year-old over terrorism comments,' *The Guardian,* 28 January 2015.

84 Christophe Turgis, 'Charlie Hebdo: a Nantes, un adolescent de 16 anspoursuivi pour "apologie due terrorisme" sur Facebook,' *France Info,* 17 January 2015.

85 Report of the Secretary-General, *The protection of human rights and fundamental freedoms while countering terrorism*, A/63/337, 28 August 2008, para. 62.

86 Cf. 'Special Rapporteurs warn against restrictions on freedom of speech in conflicts', *Article 19*, 4 May 2015, Available at https://www.article19.org/resources/special-rapporteurs-warn-restrictions-freedom-speech-conflicts/ (accessed 22 August 2019).

3.5 Gang Activity

In recent years, anti-terrorism laws have been used in some countries to prosecute criminal offences committed by gangs and to prosecute members of gangs, including children. The use of these measures can have the effect of bypassing specialised protections for children within the criminal justice system, including by permitting more severe sentences and administrative detention.

Beginning in 2015, **El Salvador** began using its 2006 Special Law against Acts of Terrorism to prosecute suspected gang members, including children. The law defines a terrorist act as 'evidence of intent to provoke states of alarm, fear or terror in the population, place in imminent danger or affect the life or physical or mental integrity of people.' The Government reported that in 2017, 206 children (182 boys, 24 girls) were held in administrative/security detention on national security grounds, a marked increase from 2016, during which 7 boys were reportedly held.[87] As of 26 June 2018, 94 children (86 boys, 8 girls) were being held in administrative/security detention on national security grounds, including 28 children aged 14 or 15.[88]

Following a 2018 visit to **El Salvador**, the Special Rapporteur on Extrajudicial Executions raised concerns regarding the use of the law against gang members and that charges under the law were used for the purpose of arbitrary detention.[89] In 2018, the CRC-Committee also recommended that **El Salvador** review the Special Law against Acts of Terrorism 'with a view to removing the classification of members of *maras* [gangs] as terrorists.'[90]

87 UN Global Study Questionnaire, El Salvador (State Reply).

88 *Ibid.*

89 Human Rights Council, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions on her mission to El Salvador*, A/HRC/38/44/Add.2.,18 June 2018.

90 CRC-Committee, *Concluding observations on the combined fifth and sixth periodic reports of El Salvador*, CRC/C/SLV/CO/5-6, 29 November 2018, Available at https://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRC/C/SLV/CO/5-6&Lang=En (accessed 26 May 2019).

3.6 Foreign Children Associated with Non-State Armed Groups Designated as Terrorist or Armed Groups Termed Violent Extremist

As discussed in the previous chapter, thousands of children from more than 80 countries travelled to **Iraq** or **Syria**—either alone or with their families—to join ISIS both before and after the declaration of the 'caliphate' in June 2014.[91] Many of the children originated from either **Western** or **Eastern Europe**. Over 1,000 children associated with ISIS are believed to have returned to their home countries, while others were killed in **Iraq** or **Syria**,[92] or have been detained—and in some cases prosecuted—in Iraq, Libya, and Syria.

Under international law, both the child's country of origin (where recruitment by non-State armed groups designated as terrorist or armed groups termed violent extremist often takes place) and the host country (where the child may have been associated with such groups) have obligations to provide the child with assistance.[93] The UN Security Council has also recognised 'the importance of timely and appropriate reintegration assistance to children associated with foreign terrorist fighters returning or relocating from conflict zones.'[94] However, thousands of children associated with foreign fighters have been deprived of liberty in camps and other facilities across **Iraq** and **Syria**, as their or their parents' countries of origin have been reluctant to accept them back.

A small number of children have been detained and prosecuted after their return home. In **France**, for example, a youth was convicted in October 2018 and sentenced to 4 years in prison for traveling to **Syria** with his father and brother to join ISIS when he was 15 years old.[95] In June 2016, two children ages 15 and 16, were sentenced to a 6 months' suspended sentence for having spent three weeks in **Syria** to 'make jihad.' Upon arriving in **Syria**, the two children joined the Mourad Fares brigade, which was linked to al-Qaeda, and admitted to having guarded towers while armed with Kalashnikovs. The children's parents quickly brought them back to **France** and according to their legal counsel, the children said they did not know that they had joined a non-State armed group designated as terrorist. They were convicted of 'criminal conspiracy in relation to a terrorist enterprise.'[96]

91 Joana Cook & Gina Vale, *From Daesh to Diaspora: Tracing the Women and Minors of Islamic State*, International Centre for the Study of Radicalisation, 2018, p. 3.

92 *Ibid*.

93 UN General Assembly, *Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict*, 25 May 2000, Articles 6 & 7.

94 UN Security Council, *Resolution 2396*, S/RES/2396, 21 December 2017, para. 36.

95 Cécile De Sèze, 'Terrorisme: unjihadistemineurrevenu de Syriecondamné à quatreans de prison,' *RTL*, 19 October 2018, Available at https://www.rtl.fr/actu/justice-faits-divers/terrorisme-un-jihadiste-mineur-revenu-de-syrie-condamne-a-quatre-ans-de-prison-7795252257 (accessed 26 May 2019).

96 Child Rights International Network, *France: Six Months Suspended for Two Teenagers who went to Syria*, 7 July 2016.

The Australian Government estimates that around 220 Australians travelled to join the conflict in **Syria** and **Iraq** since 2012, and that approximately 40 had returned to **Australia** by 2018. Government authorities state that returning foreign fighters are considered by law enforcement and security agencies on a 'case-by-case basis' and that child returnees who are not subject to criminal charges are 'assessed for their level of risk to the community and considered for intervention programs.'[97] **Belgium's** National Security Council announced new measures for child returnees in March 2018, focused on case-by-case threat assessments. In cases where a child is considered a security threat, child detention may be considered; in other cases, social care mechanisms are activated.[98] A review by the European Parliamentary Research Service concluded that most **EU Member States'** policies for child returnees were generally accommodated into existing frameworks of child detention and child care.[99]

4. Deprivation of Liberty in Practice

4.1 Data: The Number of Children Detained for National Security

Research conducted for this study identified at least 31 conflict and non-conflict countries where children have been detained in the context of national security. As reflected in the previous chapter, children associated with non-State armed groups in conflict countries have been increasingly detained as national security threats, rather than provided with rehabilitation and reintegration assistance. The Study estimates that at least 35,000 children were deprived of liberty in the context of armed conflict in 2019, including children associated with foreign fighters held in camps or other facilities in Iraq and **north-eastern Syria**.[100]

97 Joint submission of the Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation to questions from the INSLM: Independent National Security Legislation Monitor (INSLM), *Review of the prosecution and sentencing of children for Common wealth terrorist offences*, 27 June 2018, p. 5, Available at https://www.inslm.gov.au/sites/default/files/submissions/law_council_of_australia.pdf (accessed 26 May 2019).

98 European Parliamentary Research Service, *The return of foreign fighters to EU soil: Ex-post evaluation*, May 2018, p. 48, Available at http://www.europarl.europa.eu/RegData/etudes/STUD/2018/621811/EPRS_STU(2018)621811_EN.pdf (accessed 26 May 2019).

99 *Ibid*.

100 See Chapter 13: The UN Monitoring and Reporting Mechanism documented 4,471 children detained in the context of armed conflict in 2017. UNICEF reported in 2019 that an additional 30,000 children associated with foreign fighters were deprived of liberty in camps and other facilities in Iraq and north-eastern Syria. See also: UNICEF, 'Protect the Rights of Children of Foreign Fighters Stranded in Syria and Iraq', *Statement of the UNICEF Executive Director, Henrietta Fore*, 21 May 2019, Available at https://www.unicef.org/press-releases/protect-rights-children-foreign-fighters-stranded-syria-and-iraq (accessed 8 June 2019).

Research on the countries examined in this chapter suggests that in 2017 **at least 1,500 children were detained in the context of national security in countries without an armed conflict on their territories**. This is a conservative estimate based on available data, including the examples provided below. The actual number is unknown, as many States do not provide data on the number of children detained for alleged national security offenses.

Countries known to detain children on grounds of national security[101]

AUSTRALIA, EGYPT, EL SALVADOR, ETHIOPIA, FRANCE, GERMANY, JORDAN, MALAYSIA, TAJIKISTAN, THAILAND, TURKEY, UNITED KINGDOM, UNITED STATES

Source: Literature review conducted for the Global Study. Please see further information in the info box entitled "Examples of children detained in the context of national security".

101 Note that a 'non-conflict country' is a country where children from a conflict country are detained outside of the State engaged in active conflict on the ground.

Examples of children detained in the context of national security:

- In **Turkey**, at least 197 children were detained in prison on terrorism-related offenses as of August 2017, including as alleged members of the Kurdistan Worker's Party (PKK).[102]
- In **El Salvador**, 206 children were held in administrative/security detention on national security grounds in 2017, primarily for alleged gang activity.[103]
- In **Ethiopia**, hundreds of children have been detained for participating in protests against Government policies.[104]
- In **France**, 275 children were placed in administrative detention in 2017 for a range of suspected offenses, including terrorism.[105]
- In October 2017, the **Malaysian** Government confirmed that 17 children were being detained under the 2012 Security Offences (Special Measures) Act (SOSMA), which provides for 'special measures relating to security offenses' and grants police the power to arrest and detain without a warrant 'any person whom he has reason to believe to be involved in security offences.'[106]
- In **Australia**, 8 children have been charged with terrorism-related offenses since 2014. In 2018, three children of these were serving sentences for terrorism offenses, including an individual who was 14 at the time of arrest.[107]
- In **Jordan**, at least nine children were held in special 'high-security' child care centers for terrorism-related offenses in 2018.[108]

102 Data from the Turkish General Directorate of Prisons and Detention Houses, cited in: Rifat Başaran, *op. cit.*

103 UN Global Study Questionnaire, El Salvador (State Reply).

104 Human Rights Watch, *'We Are Like the Dead': Torture and other Human Rights Abuses in Jail Ogaden, Somali Regional State, Ethiopia*, 4 July 2018, Available at https://www.hrw.org/sites/default/files/report_pdf/ethiopia0718_web.pdf (accessed 26 May 2019).

105 European Council for Refugees and Exiles, 'France: A sharp rise in rates of child detention is a cause for concern,' *Relief Web*, 16 March 2018, Available at https://reliefweb.int/report/france/france-sharp-rise-rates-child-detention-cause-concern (accessed 16 May 2019); Esther Benbasse to the Minister of the Interior, 'Retention of children in administrative detention center,' *France's OJ Senate*, 8 July 2016.

106 Malaysia, *Security Offences (Special Measures) Act* 747, 22 June 2012, preamble and Part II, Article 4(1).

107 Joint submission of the Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation to questions from the INSLM: Independent National Security Legislation Monitor (INSLM), *Review of the prosecution and sentencing of children for Commonwealth terrorist offences*, 27 June 2018.

108 Information from Penal Reform International, 27 August 2018.

4.2 Administrative Detention/Detention without Charge

Administrative detention typically refers to the detention of individuals by the State without trial, usually for security reasons. Administrative detention can be used to avoid sending suspects for prosecution and trial under the regular criminal justice system and can violate a detainee's right to judicial review of pre-trial detention, fair trial, and a presumption of innocence.

In **France**, 275 children were placed in administrative detention in 2017 for a range of suspected offenses, including terrorism, representing a significant increase compared to 2014, when 170 children were held.[109] Le Defenseur des Droits, an independent State institution, attributed the rise to legislative changes, particularly a 2016 amendment to the Code of Entry and Residence of Foreigners and the Right of Asylum, which allows the detention of children if their behaviour constitutes a threat to public order or national security.[110]

In **Ethiopia**, where children were detained in Jail Ogaden for alleged involvement with the opposition group ONLF, detainees often spent years in the jail, but very few said they had ever appeared in court or were aware of the charges against them.[111]

In the context of national security, many States have lengthened the period of time they detain suspects without charge. Among the countries with the longest periods of detention without charge is **Sri Lanka**, which allows detention for as long as 18 months.[112] Other countries allow the time period to be renewed up to a set period of time. **Ethiopia**, for example, allows detention to be extended by 28-day increments for up to 4 months.[113]

Of particular concern is that some countries allow unlimited extensions that can result in indefinite detention without charge. Among these are **Afghanistan**, which allows Afghan authorities the power to detain anyone suspected of 'crimes against internal or external security' or anyone believed 'likely to commit such a crime' for a period of one year,

109 European Council for Refugees and Exiles, 'France: A sharp rise in rates of child detention is a cause for concern,' *Relief Web*, 16 March 2018, Available at https://reliefweb.int/report/france/france-sharp-rise-rates-child-detention-cause-concern (accessed 16 May 2019); Esther Benbasse to the Minister of the Interior, 'Retention of children in administrative detention center,' published on France's OJ Senate, 8 July 2016.

110 Republic of France, *Code of Entry and Residence of Foreigners and the Right to Asylum*, Article L511-1, as amended by Article 27 of Law No. 2016-274 of 7 March 2016. Cf. European Council for Refugees and Exiles (2018), *op. cit.*

111 Cf. HRW, '*We Are Like the Dead*' (2018), *op. cit.*

112 Sri Lanka, *Prevention of Terrorism Act No. 48 of 1979*, Section 28, Available at http://www.commonlii.org/lk/legis/num_act/potpa48o1979608/s28.html (accessed 26 May 2019); Human Rights Watch, *'Locked Up Without Evidence': Abuses under Sri Lanka's Prevention of Terrorism Act*, 29 January 2018, Available at https://www.hrw.org/report/2018/01/29/locked-without-evidence/abuses-under-sri-lankas-prevention-terrorism-act (accessed 26 May 2019).

113 National Legislative Bodies, *Ethiopia: Proclamation No. 652/2009 of 2009, Anti-Terrorism Proclamation*, 7 July 2009, Part Three, Article 20, para 3, Available at http://www.refworld.org/docid/4ba799d32.html (accessed 26 May 2019).

which can be renewed indefinitely.[114] In **Pakistan**, under the 2011 Actions in Aid of Civil Power Regulation, the army has the capacity to detain indefinitely individuals suspected of terrorist acts in military 'internment centers' without a warrant and without charge or judicial supervision.[115]

Others include **Cameroon**, which sets an initial detention period of 15 days, but allows unlimited renewals;[116] and **Thailand**, which sets an initial period of 7 days, but then allows unlimited 30-day renewals.[117]

Some States allow longer periods of detention without charge for terrorism suspects than for suspects involved in other offenses. For example, in May 2018, **Indonesia** amended its counter-terrorism law to increase the period that police can detain terrorism suspects without charge from three days in the 2003 law to a maximum of 21 days.[118] For non-terrorism-related crimes, police are only allowed to detain suspects for a 24-hour period before charge.

Some States have lowered the age at which a person can be detained without charge for national security offenses. For example, **Australia's** criminal code does not allow children under age of 16 to be subject to preventive detention.[119] However, new counter-terrorism legislation approved by the Commonwealth's State and Territory Governments in October 2017 allows for investigative detention of children as young as 14 for suspected terrorism.[120] The premier of **New South Wales** also announced in February 2018 that he was considering a policy to keep youth charged with terrorism-related offences in detention beyond the end of their sentences.[121]

114 Islamic Republic of Afghanistan, Presidential Decree 76, 'Annex Number One (1) to the Criminal Procedure Code on Terrorist Crimes and Crimes against Internal and External Security', Article 10, endorsed on 25 September 2015 and published in the Official Gazette (number 1190) on 19 October 2015, Available at https://www.afghanistan-analysts.org/wp-content/uploads/2016/01/2015-09-Pres.-Legis.-Decree-76-Annex-1-to-CPC-English-2016-Jan.-11-v.4-from-UNAMA-RoL-Hartmann-2.pdf (accessed 18 July 2019).

115 UN Committee against Torture, *Concluding observations on the initial report of Pakistan*, CAT/C/PAK/CO/1, 1 June 2017, p. 4, para. 12.

116 Republic of Cameroon, *Law on the Suppression of Acts of Terrorism in Cameroon,* Law No. 2014/028, 23 December 2014, Chapter 3, Article 11, Available at http://www.assnat.cm/gestionLoisLegislatures/libraries/files_upload/uploads/Lois/2014-028fr.pdf (accessed 26 May 2019).

117 *Emergency Decree on Public Administration in a State of Emergency,* B.E. 2548, 16 July 2005, Section 12, Available at http://www.nsc.go.th/Law/unofficial%20translation%20EMERGENCY%20DECREE%20ON%20PUBLIC%20ADMINISTRATION%20IN%20EMERGENCY%20SITUATIONS.pdf (accessed 18 July 2019).

118 Republic of Indonesia, *Eradication of Criminal Acts of Terrorism Law*, Article 28, 25 May 2018.

119 Commonwealth of Australia, *Criminal Code Act 1995,* Compilation No. 113, Subdivision B. Section 105.5(1).

120 Commonwealth of Australia, *Terrorism (Police Powers) Act of 2002,* Act No. 115, New South Wales, Part 2AA, Section 25F(1). Note: In October 2017, the Commonwealth, state and territory Governments of Australia agreed that all Australian states would adopt the 2002 New South Wales law.

121 Sarah Gerathy, 'Terror teens in NSW juvenile system have greater security and de-radicalisation programs," *ABC News*, 7 February 2018.

4.3 Prolonged Detention before Trial

The CRC states that a child accused of an offense should have the matter determined 'without delay.'[122] Some States' national laws, however, allow for lengthy periods of detention before trial. **France** for example, allows children age of 16 to be detained for up to three years before trial.[123] In 2018, **Indonesia** amended its counter-terrorism law to extend the maximum period of pre-trial detention from 180 days to 240 days, or up to 290 days with approval of the chief magistrate of the district court.[124] **Malaysia** allows pre-trial detention for 2 years, with no limit to the number of times a detention order can be extended, creating de facto indefinite detention before trial.[125]

In **Egypt**, where at least 150 children have been tried by military courts, an independent newspaper followed 35 cases of children who were sentenced by the courts, and found that most had been held in pre-trial detention for 900 to 1,500 days before receiving a sentence.[126] In **Pakistan**, 15 children were detained for more than five years in Balochistan before a special anti-terrorism court acquitted them in July 2018 of charges that they had carried out more than 20 bombings in the provincial capital, Quetta.[127]

4.4 Trial before Military and Adult Courts

International standards on child justice encourage States to develop specialised child justice systems to protect the rights of children and meet their specific needs. In contrast, military courts rarely have specialised child justice expertise and often fail to meet basic standards of due process. The Human Rights Committee has expressed concern regarding the jurisdiction of military courts over children, noting violations of fair trial guarantees and fundamental safeguards, such as interrogation in the absence of a lawyer, torture and forced confessions, arbitrary sentences, and the limited right of appeal against military

122 Article 40 CRC, para. 2(iii).

123 Republic of France, *Law No. 2016-987 of 21 July 2016, on prolonging the application of the Law No. 55-385 of 3 April 1955 relating to the state of emergency and carrying measures of reinforcement of the anti-terrorist fight*, Article 12, Available at https://www.legifrance.gouv.fr/eli/loi/2016/7/21/INTX1620056L/jo/texte (accessed 26 May 2019).

124 Republic of Indonesia, *Eradication of Criminal Acts of Terrorism Law*, 25 May 2018, Article 25.

125 Malaysia, *Prevention of Terrorism Act, Act No. 769., 4 June 2015*, Part IV, Article (13)(1)(b) & Article 17(5), Available at http://www.federalgazette.agc.gov.my/outputaktap/aktaBI_20150604_Act769(BI).pdf, (accessed 26 May 2019).

126 Cf. Mahmoud Wakea (2017), *op. cit.*

127 Syed Ali Shah, 'Quetta court acquits 15 juvenile suspects arrested in 2013 over charges of multiple bombings,' *Dawn*, 5 July 2018, Available at https://www.dawn.com/news/1418154 (accessed 2 August 2019).

court decisions.[128] The CRC-Committee has also said explicitly that the use of military courts for children should be avoided.[129]

Nevertheless, some national counter-terrorism laws stipulate that cases are to be prosecuted before criminal [adult] or military courts. In **Cameroon**, for example, all terrorism-related offenses fall exclusively under the jurisdiction of military tribunals.[130] Similarly, in **Thailand**, any case related to national security or public order may be tried by a military court.[131] In **Israel**, security offenses are tried by military courts under military law, which affords children fewer protections than civilian law. For example, **Israeli** military law allows longer periods of detention before children must be seen by a judge (up to 72 hours vs. 24 hours in civilian law), before access to a lawyer (96 hours vs. 48 hours), before being charged (15 days vs. 10 days), and prior to the conclusion of trial (9 months vs. 6 months).[132]

In other cases, counter-terrorism laws are silent on the issue of where children are to be tried, creating confusion regarding whether their cases should fall under the child justice system or other adult or military courts. For example, **Tunisia's** Child Protection Code states that children should be exclusively judged by a specialised child court, but a 2015 counter-terrorism law states that exclusive jurisdiction over terrorist offenses lies with the Counterterrorism Division of the Court of First Instance of Tunis.[133]

In **Egypt**, at least 150 children were tried by military courts between October 2014 and September 2017, primarily for participating in illegal or violent protests, or for membership in or support for the Muslim Brotherhood.[134] Some received sentences of up to 10 years in prison.[135] In one case, following a mass trial of 27 defendants, a military court sentenced a boy who was 15 when arrested to three years in a child detention facility for allegedly participating in an illegal protest, despite defence lawyers' arguments that he was too young to face military trial and had not actually been a participant.[136]

128 Human Rights Committee, *Concluding observations on the third periodic report of Lebanon,* CCPR/C/LBN/CO/3, 9 May 2018, paras. 31 & 43.

129 CRC-Committee, *Consideration of Reports Submitted by States Parties Under Article 8 of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Concluding Observations, United States of America*, CRC/C/OPAC/USA/CO/1, 25 June 2008.

130 Republic of Cameroon, *Law on the Suppression of Acts of Terrorism in Cameroon, Law No. 2014/028,* 23 December 2014, Chapter 1, Article 1(3), Available at http://www.assnat.cm/gestionLoisLegislatures/libraries/files_upload/uploads/Lois/2014-028fr.pdf (accessed 26 May 2019)

131 Kingdom of Thailand, *Martial Law Act, B.E. 2457 (1914),* Section 7, Available at http://library.siam-legal.com/thai-law/martial-law-general-sections-1-5/ (accessed 16 May 2019).

132 Military Court Watch, *Monitoring the Treatment of Children Held In Israeli Military Detention: Annual Report,* 14 June 2018, p. 20.

133 Republic of Tunisia, *Organic Law No. 2015-16, related to the fight against terrorism and suppression of money laundering,* 7 August 2015, Article 49.

134 HRW, *Egypt: 7,400 Civilians Tried in Military Courts* (2016), *op. cit.* See also: HRW, *World Report 2018: Egypt,* January 2018.

135 Cf. Mahmoud Wakea (2017), *op. cit.*

136 Cf. HRW, *Egypt: 7,400 Civilians Tried in Military Courts* (2016).

In **Lebanon**, an estimated 355 children were tried before military courts in 2016.[137] Children arrested in relation to terrorism or national security offenses, and those arrested in the course of counter-offensives conducted by military and security forces, were commonly held for up to one month in military detention facilities, before transfer to a prison detaining adults awaiting trial on terrorism charges.[138]

Military Intelligence officers arrested 'Khaled' [not his real name], then 16, at his home in north **Lebanon** in 2014. According to his lawyer, military intelligence officers interrogated and tortured him for several days. In a military court, prosecutors charged Khaled with membership in a non-State armed group designated as terrorist and involvement in terrorist activities, which carry a sentence of 5-15 years imprisonment. Despite Khaled's statements that he confessed under torture, the military court found him guilty. However, the court stated that they did not have the authority to sentence a child. After spending nearly a year detained alongside adults in Roumieh prison, Lebanon's largest and 'most notorious,' Khaled was released on bail, only to face another trial on terrorism charges before a child court.

Source: Human Rights Watch, 'It's Not the Right Place for Us': The Trial of Civilians by Military Courts in Lebanon, 26 January 2017, pp. 26-27.

4.5 Torture and Ill-treatment

In some countries, children detained for national security offenses have been subjected to ill-treatment and torture. As described in the previous chapter, where countries are in conflict, authorities have been known to torture children accused of national security offenses. Outside of conflict situations, however, the torture of children by governmental authorities is also a known phenomenon, especially during interrogations. For example, moments of heightened anti-government protests have led to the detention of children in overcrowded, unhygienic facilities where torture is widespread. Methods of torture include beatings, stripping, extinguishing cigarettes on a child's skin, and applying electric shocks to genitals and other body parts. Some children have been repeatedly raped by using wooden sticks. These methods serve the purpose to extract confessions from children who are seen as a threat to national security.

137 Cf. HRW, *Egypt: 7,400 Civilians Tried in Military Courts* (2016).

138 UNICEF Lebanon Country Office, *Written contribution on Child Rights for UPR documentation of Lebanon – March 2015*, p. 2, para. 11.

4.6 Sentencing

Many countries have increased penalties for terrorism or national security offenses. In some cases, penalties for children specifically have been increased, while in others, expanded penalties may apply to cases involving children. For example, **Morocco's** 2003 Law to Combat Terror doubled custodial sentences for terrorist acts and included the death penalty as a possible sentence.[139] In **Algeria**, sentences for criminal acts committed for terrorism are double those typically applied and an offense that would incur life imprisonment will induce the death penalty if the offense was linked to terrorism.[140] **Iran**, **Malaysia**, **Pakistan**, **Saudi Arabia**, and **Yemen** specifically apply the death penalty for children convicted of terrorism.[141]

Many countries try children as adults for terrorism-related offenses, which can significantly increase possible penalties. In **Canada**, for example, terrorism offenses carry a possible life sentence, which would otherwise not be applicable to children.[142] Some countries also strip individuals of citizenship if convicted of a terrorist offense. For example, under section 35 of the **Australian** Citizenship Act 2007, the Australian citizenship of a dual national aged 14 or older automatically ceases if they fight for, or are in the service of, a declared non-State armed group designated as terrorist overseas.[143] The **UK**, **Germany**, **Norway**, **Switzerland**, **Belgium**, **Canada**, **Denmark**, and the **Netherlands** have also passed legislation to revoke citizenship for individuals who travelled abroad to join a non-State armed group designated as terrorist. In some of these cases, citizenship can only be stripped from naturalised or dual citizens.[144]

139 UN Security Council, *Third report of the Kingdom of Morocco to the Counter-Terrorism Committee established pursuant to Security Council resolution1373 (2001),* S/2003/1173, 15 December 2003, Available at http://www.refworld.org/pdfid/46dbc9a8d.pdf (accessed 26 May 2019).

140 People's Democratic Republic of Algeria, *Code Pénal, promulgated by Order No. 66-156 of 18 Safar 1386 corresponding to 8 June 1966, as amended by Law No. 14-01 of 4 February 2014,* Article 87 bis 1, para. 2, Available at https://landwise.resourceequity.org/record/2720 (French language version, accessed 26 May 2019).

141 Child Rights International Network, *Death Penalty,* n.d., Available at https://www.crin.org/en/home/campaigns/inhuman-sentencing/problem/death-penalty (accessed 26 May 2019). In Yemen it is formally illegal to sentence anyone to death for an offence committed while under the age of 18, but the lack of birth documentation for much of the population and unreliable age assessment measures have resulted in children being eligible for the death penalty in practice.

142 Canada, *Combating Terrorism Act, 2013, S.C. 2013*, Available at https://laws-lois.justice.gc.ca/eng/annualstatutes/2013_9/page-1.html (accessed 26 May 2019).

143 Joint submission of the Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation to questions from the INSLM: Independent National Security Legislation Monitor (INSLM), *Review of the prosecution and sentencing of children for Commonwealth terrorist offences*, 27 June 2018.

144 Cf. Joana Cook & Gina Vale (2018), *op. cit.*

5. Preventing Deprivation of Liberty

5.1 Legislative Protections

Many countries' counter-terrorism laws are silent on the issue of children, creating confusion regarding whether children accused of terrorism are to be treated under counter-terrorism or child justice laws. **Afghanistan's** Law on Combat against Terrorist Offense, however, explicitly states that when children are accused of or charged with a terrorist offense, proceedings must be carried out in accordance with the country's child justice law.[145] The law precludes life imprisonment or the death penalty, and specifies that confinement is 'considered to be the last resort for rehabilitation and re-education' and may only be used for the 'minimum possible duration.'[146] In practice, however, the law has not been consistently applied.

Like Afghanistan, **Indonesia's** child justice law is clear that children who are charged with a terrorist act under the 2002 Anti-Terrorism law are to be brought before a specialised child court.[147] The 2002 Anti-Terrorism Law also explicitly states that the law's minimum sentences to be imposed for terrorism-related offences do not apply to children under the age of 18.[148] Nor can children be sentenced to life imprisonment or the death penalty for the commission of a terrorist act.[149] The **Swiss** system has also established that there is no exception to the competency of the child justice system in cases of terrorism involving children.[150]

5.2 Case Work Approach

International law requires States to treat the best interests of the child as a primary consideration in all actions or decisions concerning the child. This requires an individual assessment of each child's special circumstances, including the social and cultural context and family situation. For children suspected of association with violent extremist groups or other national security offenses, a case-by-case assessment of their best interests is essential.

145 Islamic Republic of Afghanistan, *Law on Combat against Terrorist Offences (2008)*, Article 5.

146 Islamic Republic of Afghanistan, *Juvenile Law of 2005 (Juvenile Code), Official Gazette No. 846*, (1384/01/03 A.P.), 23 March 23 2005.

147 Republic of Indonesia, *Law No. 11 of 2012 on Juvenile Justice System, 'Juvenile Justice Law'*, Article 81(2).

148 Republic of Indonesia, *Law No. 15 of 2003, 'Anti-Terrorism Law'*, Article 19.

149 *Ibid.*

150 UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups*, 2017, p. 80.

In **Tunisia**, for example, a probation system established under the 1995 Child Protection Code has been used for reintegration of children charged with terrorism-related offenses. Under the system, children are allowed 'guarded freedom' for a duration of one to three years. Judges appoint social workers as probationary officers to facilitate the social reintegration process, which include education, sports activities, and vocational training. Civil society organisations help to implement the programme.[151]

5.3 Repatriation of Foreign Children Associated with Violent Extremist Groups

Many countries have been reluctant to bring home child nationals from Iraq, Libya, and Syria after their parents joined ISIS. Several countries, however, have repatriated foreign children of parents detained in **Syria** or **Iraq** for alleged association with ISIS. For example, in late 2018 and early 2019, **Russia** repatriated 57 children who had previously been detained with their mothers in **Iraq**.[152] In January 2019, **Kazakhstan** evacuated 30 children of suspected ISIS fighters from **Syria**, where they were being held by the Syrian Democratic Forces.[153] Other countries, including **Indonesia** and **Egypt**, have also taken back small numbers of children.[154]

In the **Netherlands**, child protection boards create a return plan for children returning from conflict-affected areas. The plan covers who will take care of the child, what kind of professional care the child should receive, which school is best positioned to take the child, and what safety measures, if necessary, should be taken to ensure both the safety of the child and his or her environment. An individual officer maintains regular contact with family members of the child, and the local municipality is responsible for ensuring that the conditions of the return plan are met.[155]

In **Switzerland**, children returning from Syria or another conflict area who may have been associated with a non-State armed group designated as terrorist are handled by the prosecutor's office of the Swiss canton in which the young person resides. Whether a

151 Information from the United Nations Office of Counter-Terrorism, April 2019.

152 France 24, 'Russia "repatriates" 27 IS children from Iraq', 10 February 2019. Available at https://www.france24.com/en/20190210-russia-repatriates-27-children-iraq (accessed 26 May 2019).

153 The Defence Post, 'Kazakhstan evacuates 30 children of ISIS fighters from Syria', 9 January 2019. Available at https://thedefensepost.com/2019/01/09/kazakhstan-evacuates-30-children-of-isis-fighters-from-syria/ (accessed 26 May 2019).

154 ICRC, *Libya-Egypt: two years on, twelve children reunited with their families*, 20 December 2018, Available at https://www.icrc.org/en/document/libya-egypt-two-years-twelve-children-reunited-their-families(accessed 26 May 2019); Ben Hubbard, 'Wives and Children of ISIS: Warehoused in Syria, Unwanted Back Home', *New York Times*, 4 July 2018, Available at https://www.nytimes.com/2018/07/04/world/middleeast/islamic-state-families-syria.html (accessed 26 May 2019).

155 Information from the United Nations Office of Counter-Terrorism, April 2019.

child requires special educational care or therapeutic treatment is determined on a case-by-case basis. Irrespective of whether the child is responsible for the commission of a crime, various protective measures can be selected according to the child's needs, such as supervision, personal care, outpatient care or accommodation. If the culpability of the child is ascertained, penalties can take the form of an admonition, a personal work order, a fine, or deprivation of liberty.[156]

The return of children associated with foreign fighters to their (or their parents') country of origin may restore the child's liberty. In some cases, however, their mothers remain detained in **Iraq** or **Syria**, creating situations of family separation that run counter to the best interests of the child.

6. Conclusions

Dozens of countries have detained children for alleged national security offenses. In some countries, hundreds of children may be detained at any given time, as countries have adopted increasingly severe counter-terrorism measures. The recruitment of children into non-State armed groups designated as terrorist or armed groups termed violent extremist is unlawful – and sometimes constitutes trafficking – yet the **children are often treated as perpetrators rather than victims**.

Since 2001, the vast majority of countries have adopted counter-terrorism legislation that often fails to distinguish between adults and children, includes overly broad definitions of terrorism, provides fewer procedural guarantees, and imposes harsher penalties. Some States criminalise mere association with non-State armed groups designated as terrorist or armed groups termed violent extremist increasing the number of children detained and prosecuted for association with such groups. Counter-terrorism laws are also used to detain children for posting political opinions online, participating in peaceful protests, involvement in banned political groups, or for alleged gang activity. In many cases, these practices violate children's rights to freedom of expression, association, and assembly.

Violent extremist groups such as ISIS have increasingly used the internet and propaganda to recruit children online. As a result, some children have been detained and tried for terrorism-related offenses, despite being far from the theatre of large-scale hostilities,

156 UNODC, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups*, 2017, p. 80.

often acting on the instructions of individuals they have never met. Children also have been detained or even convicted, not for violent activity, but simply for posting content on Facebook, Twitter, or other online platforms that is perceived as supporting a certain groups or ideology.

Many States invoke national security in order to ignore or abandon established child rights standards, including the use of detention only as a measure of last resort, and the obligation to provide rehabilitation and reintegration assistance for children affected by armed conflict. While in so-called 'traditional' armed conflicts, former child soldiers may be recognised as victims that need rehabilitation and help reintegrating into society, in conflicts with non-State armed groups designated as terrorist, children with similar experiences are prosecuted as criminals and sentenced to prison as terrorists.

Thousands of children are deprived of liberty because of association with foreign terrorist fighters. Many of these children travelled to **Iraq** and **Syria** with their families, while others travelled alone and became associated with ISIS. Thousands of children have also been born to international parents inside the so-called 'caliphate' and remain in de facto prison camps, as their parents' countries of origin refuse to accept them back.

Compared to children charged with other criminal offenses, children charged with national security offenses may be more likely to be detained without charge or trial for long periods and prosecuted in adult or military courts that have no child justice safeguards. Authorities often ignore international standards calling for detention only as a measure of last resort and for the shortest appropriate period of time. Children have been detained without charge or trial for years, and when convicted, have sometimes received harsh sentences, including life imprisonment. Diversion programs or alternatives to detention are often unavailable.

The Secretary-General has noted that in member States responses to violent extremism, 'children are often systematically treated as security threats rather than as victims.'[157] He stressed that the **effective reintegration of children formerly associated with groups perpetrating violent extremism should be a priority, and that depriving such children of their liberty was contrary both to their best interests, and to the best interests of society as a whole**.[158] Both the UN General Assembly and the Human Rights Council have specifically stated that efforts to reintegrate children formerly associated with armed groups should include children associated with non-State armed groups designated as terrorist.[159]

157 UN Secretary-General, *Children and Armed Conflict: report of the Secretary General,* A/2016/36020, April 2016, para. 16.

158 *Ibid*.

159 Cf. A/HRC/RES/35/34, *op. cit.*, para. 19; A/RES/70/291, *op. cit.*, para. 18.

7. Recommendations

1. In line with UN Security Council Resolution 2427 (2018), States should recognise that children recruited by non-State armed groups designated as terrorist or armed groups termed violent extremist are **first and foremost victims of grave abuses of human rights**. As a priority, States should facilitate their **recovery** and **reintegration** and hold those who recruit and use them to account.
2. In line with the Paris Principles and Guidelines on children associated with armed forces or armed groups, States should **not detain** or **prosecute** a child solely for membership or association with a prohibited group.
3. States should explicitly exclude children from national counter-terrorism and security legislation, and ensure that children suspected of national security offenses are treated **exclusively within child justice systems**, with full child justice guarantees, including access to counsel, the right to challenge their confinement, protection of privacy, and contact with their families.
4. States should ensure that counter-terrorism legislation with **penal sanctions is never used against children peacefully exercising their rights to freedom of expression, freedom of religion or belief, or freedom of association and assembly**.
5. States should **end all administrative** or **preventive detention of children** and extended pre-charge detention for the purposes of counter-terrorism.
6. States should **never** use the gravity of the offence, even when it is linked to national security, as a justification to **lower the minimum age of criminal responsibility**.
7. States should develop and implement **diversion programmes** for children alleged to have committed national security offenses to avoid the use of the criminal justice system.
8. States should develop **alternatives to deprivation of liberty** at all stages of the criminal justice system for children accused or convicted of national security offenses, including care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes, and other non-custodial measures.
9. States should ensure that any sentence for national security offenses is **appropriate to the child's age** and aimed at their rehabilitation and reintegration into society.
10. States should always give preference to the least restrictive means to achieve the aims of the judicial process, and **reserve deprivation of liberty solely for exceptional cases** where children are a credible threat to others. In such cases, detention must only be used as a measure of last resort and for the shortest appropriate period of time, in line with the best interests of the child.

11. States should develop and **apply a tailored and individual case management approach** to children associated with non-State armed groups designated as terrorist or armed groups termed violent extremist, including specialised services for health-related assistance, educational and vocational measures and economic and social support. Priority must be given to the best interests of the child.

12. States should take all necessary measures to ensure that **rehabilitation programmes are neither punitive nor discriminatory**, do not amount to arbitrary detention, and are not used as a means to stifle children's right to freedom of expression or to access information.

13. States should **take responsibility for children abroad who are their citizens who may be detained on security related offenses** or for association to armed groups, including children born to their nationals; based on the child's best interests, they should facilitate the child's return to their country of origin for rehabilitation, reintegration, and/or prosecution, as appropriate, in full compliance with international law. This requires compliance, specifically, with the rules governing family separation as well as the principle of non-refoulement.

14. States should **not use counter-terrorism powers to prosecute foreign children for unlawful presence or illegal entry into a State** particularly when they have travelled to the country with their families or have been born in the country.

15. To uphold the rights of children, **States should recognise children** recruited by non-State armed groups designated as terrorist or armed groups termed violent extremist primarily **as victims**, end the detention of children solely for membership in such groups, and prioritise their rehabilitation and reintegration. States should also ensure that children are never detained for exercising their rights to freedom of expression, association, or assembly. In cases where children are prosecuted for violent offenses, they should be treated in accordance with international child justice standards, including the **use of detention as a measure of last resort and for the shortest appropriate period of time**.

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CHAPTER 15

OVERARCHING CONCLUSIONS AND RECOMMENDATIONS

© Terre des Hommes, Child having experienced poverty and ethnic-based conflict, now living with a foster family as an alternative to institutional care, Vietnam

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As I share in the introduction, my decision to accept the invitation by Marta Santos Pais, former SRSG on Violence against Children, to lead the Global Study on Children Deprived of Liberty was very much motivated by my own experiences of having visited children in detention in some of the worst situations imaginable. The data, primary research as well as the numerous consultations with children contained in this Study indeed confirm that deprivation of liberty is not only one of the most harmful situations children can find themselves in, but it sadly remains one of the most overlooked violations of the Convention on the Rights of the Child. As such, the findings and recommendations summarised below seek to give clarity and some urgency to the reasons why States, as well as the international community, must strengthen all efforts to drastically reduce the number of children in detention worldwide, since depriving children of their liberty leaves a lasting mark on their lives and on society as a whole.

1. More than 7 Million Children are Deprived of Liberty in the World

Data collected for the Global Study and well-grounded scientific approximations indicate that, altogether, **roughly 1.5 million children** are currently deprived of liberty per year on the basis of a judicial or administrative decision. The table below illustrates, most children are deprived of liberty in institutions **(670,000)**, followed by those in the administration of justice **(410,000)**, in immigration detention **(330,000)**, in armed conflict situations **(35,000)** and for national security reasons **(1,500)**. An additional **19,000** children are living with their primary caregivers (usually mothers) in prisons. I wish to stress, however, that those figures, although arrived at on the basis of scientifically sound methodologies, remain highly conservative owing to the scarcity of official and reliable disaggregated data.

Situations of Deprivation of Liberty	Number of children deprived of liberty
Institutions	670,000
Administration of Justice	410,000
Immigration Detention	330,000
Armed Conflict	35,000
National Security	1,500
In Detention with their Primary Caregivers	19,000
Total	**1,465,500**

The real number of children deprived of liberty seems to be much higher in all situations of detention covered by the Global Study. In particular, roughly 5.4 million children are currently living in institutions worldwide.[1] As the Human Rights Committee has stressed, children placed in institutions are *de facto* deprived of liberty, as they are not allowed to leave these institutions at their own free will.[2] While at least **670,000 children (12.4%)** are *de jure* deprived of liberty in institutions on the basis of a judicial or administrative decision[3], the number of children *de facto* deprived of liberty in public and private institutions (including children with disabilities, infants and other young children), therefore amounts to **5.4 million children**. If we add only an estimated number of around 1 million children detained in police custody per year,[4] **the real number of children deprived of liberty worldwide exceeds 7 million per year**.

Similarly, the number of children in migration-related detention is arguably significantly higher, as States detain child migrants as well as children in refugee-like situation in a diverse range of facilities, which makes it difficult to acquire exhaustive data. Only in the responses to the Global Study questionnaire and State reports submitted to the CMW-Committee, we managed to identify at least 40 different settings, including among others, border posts, transit zones in the airports, immigration centres, prisons, shelters, police stations and courthouses. In some countries, places of detention bear such euphemistic/misleading names as guesthouses for foreigners or accommodation.[5]

1 Chris Desmond, Kathryn Watt, Anamika Saha, Jialin Huang & Chunling Lu, Prevalence and number of children living in institutional care: global, regional, and country estimates, 'The Lancet Child & Adolescent Health', Vol. 4, Issue 5, pp. 370-377.

2 Human Rights Committee, *General Comment 35 of 2014*, CCPR/C/GC/35, para.62, according to which any 'placement of a child in institutional care amounts to deprivation of liberty within the meaning of article 9'.

3 For a detailed description of the methodology used in order to estimate the share of children *de jure* deprived of liberty in institutions see: Chapter 3 on Data Collection and Analysis.

4 Estimates based on the responses to the Global Study questionnaire. See on Data Collection and Analysis.

5 Chapter 11 on Children Deprived of Liberty for Migration Related Reasons.

Global Number of Children in All Situations of Deprivation of Liberty

ALL SITUATIONS OF DEPRIVATION OF LIBERTY

7,195,500	IN ALL SITUATIONS
5,400,000	DE FACTO DEPRIVED OF LIBERTY IN INSTITUTIONS
670,000	DE JURE DEPRIVED OF LIBERTY IN INSTITUTIONS
1,410,000	IN THE ADMINISTRATION OF JUSTICE
410,000	IN PRE- TRIAL DETENTION AND PRISONS
330,000	IN MIGRATION RELATED DETENTION
35,000	IN THE CONTEXT OF ARMED CONFLICT
19,000	LIVING IN PRISONS WITH THEIR CAREGIVERS
1,500	DETAINED ON GROUNDS OF NATIONAL SECURITY

Source: responses to the Global Study questionnaire, UN Secretary-General, UNICEF, UNODC, Chris Desmond, Chunling Lu et al. (2020), World Prison Brief, literature review.

The majority of States which responded to the questionnaire had difficulties in providing comprehensive, up-to-date and disaggregated data on the number of children in the six situations of detention covered by the Global Study. Administrative records are particularly limited in the context of migration, institutions, national security and armed conflicts. For this reason, it is difficult to arrive at scientifically sound overall data per region.

Data collected and research conducted for the Global Study also reveal significant gender disparities in most situations of detention. In the administration of justice as well as in the context of armed conflicts and national security, **94% of all children deprived of liberty are boys**, and **only 6% are girls**. Since the detention rate of boys is much higher than the crime rate of boys, one may conclude that girls benefit at a much higher rate than boys from diversion and non-custodial solutions. Boys also constitute roughly two thirds of all children in migration related detention and clearly more than **50%** of all children who are placed in institutions on the basis of a judicial or administrative decision, as is illustrated in Table 3. Overall, roughly **three in four children deprived of liberty are boys**. When considering detained primary caregivers, who are allowed to keep their infants and young children with them in prison, data collected for the Global Study show that **almost 100% are mothers**. Even in those eight States which allow also fathers to live with their dependent children in prison, there are almost no suitable 'father-child units' in male prisons.

Percentage of	In the Administration of Justice	In Armed Conflict and National Security	In Immigration Detention	In Institutions
Boys	94	ca. /approx. 94	67	56
Girls	6	ca. /approx. 6	33	44

Source: responses to the Global Study questionnaire, TransMonEE/UNICEF database, official statistics, literature review.

2. Deprivation of Liberty of Children shall only be an Exception

Article 37(b) of the Convention on the Rights of the Child provides that 'no child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a **measure of last resort** and for the **shortest appropriate period of time'**. This establishes a high standard, applicable to all situations in which children are deprived of liberty. Together with the guiding principles of the Convention on the Rights of the Child (especially the best interests of the child, the prohibition of discrimination and the right of children to development and participation), this high standard requires States to **reduce the detention of children to an absolute minimum by developing and applying appropriate non-custodial solutions.** The precise extent to which the principle of measure of last resort allows deprivation of liberty depends on the type of detention.

States are required to **develop specific child justice systems with the aim of diversion**. If diversion measures are not possible, the principle of the shortest appropriate period of time needs to be applied. As such, life imprisonment without possibility of release and other excessively long prison sentences should not be applicable. The CRC General Comment No. 24 on children's rights in the child justice system states that in the case of police custody, every child arrested should be brought before a competent authority to examine the legality of the deprivation of liberty or its continuation within 24 hours. In the case of pre-trial detention, it states that no child should be held longer than 30 days without formal charges being laid, and a final decision on the charges should be made within six months from the initial date of detention, failing which the child should be released.[6]

In most States, **primary caregivers**, usually the mothers, who are sentenced to a prison term, are **permitted to keep their young children with them in prison**, if no other solution can be found, which satisfies the principle of the best interests of the child. In most States, children can stay with their mothers until the age of three, but regulations differ considerably. It was found in the Global Study that rigid State regulations are not effective, because they jeopardise a careful balancing of different interests on a case-by-case basis, and that the problem of children growing up in prisons can most easily be avoided if mothers with young children are not sentenced to a prison term.

6 CRC-Committee, *General comment No. 24 (2019) on children's rights in the child justice system*, CRC/C/GC/24, 18 September 2019, para. 90.

Detention for purely **migration-related reasons is never in conformity with the Convention on the Rights of the Child**. Whether children are on the move unaccompanied, separated or with their families, migration-related detention never meets the high standards of a measure of last resort in Article 37(b) CRC or of the best interests of the child in Article 3 CRC. There are always non-custodial solutions available, which need to be applied.

Similar considerations apply to children deprived of liberty **in institutions**. In principle, the United Nations, in its Guidelines for the Alternative Care of Children,[7] envisages that **States should refrain from institutionalising children who are in need of care, protection, education, rehabilitation or treatment.** Where the immediate family is unable to care for a child with disabilities, Article 23(5) of the Convention on the Rights of Persons with Disabilities requires States to 'undertake every effort to provide alternative care within the wider family, and, failing that, within the community in a family setting'. This rule should also be applied to other children.

States arrest and detain children associated with armed groups – be it because they have allegedly participated in hostilities during armed conflicts or are perceived as a threat to national security. Many children are detained not because of actual association with non-State armed groups designated as terrorist, but on the assumption that they are sympathetic to those groups or on the suspicion of their family members being involved with such groups. In such cases, children are often tried before military courts without the presence of their parents or caregivers, without a clear understanding of the charges brought against them and without legal assistance or any respect for their procedural rights. Such situations violate the Convention on the Rights of the Child, as well as the protocols mandating the handover of children associated with armed forces or groups to civilian authorities for rehabilitation.

7 UN General Assembly, *Guidelines for the Alternative Care of Children*, A/RES/64/142, 18 December 2009.

3. Over-Criminalisation and Lack of Family Support

The most important reason for the large number of children in detention is the lack of adequate support for families, caregivers and communities to provide appropriate care to children and encourage their development. Such support and effective cooperation between parents, child welfare, social protection, education, health, law enforcement and the justice system would prevent children from being placed in institutions and coming into conflict with the law.

'Tough-on-crime' policies, including the criminalisation of status offences, drug offences, petty crimes and low minimum ages of criminal responsibility, as well as widespread discrimination and corruption, contribute to a large number of children being deprived of liberty. Similar reasons are behind restrictive migration and asylum policies and extensive counter-terrorism practices.

4. Detention of Children is a Form of Structural Violence

Research conducted for the Global Study, the views of children interviewed and my own experiences from many fact-finding missions show that, in most States, conditions of detention, in all contexts, are deplorable and do not meet international standards. Children are often not separated from adults. Many detention facilities are characterised by overcrowding and high degrees of abuse, neglect and violence as well as a lack of hygiene standards, air and sunlight, privacy, adequate health care, recreational and educational opportunities and gender-sensitive facilities.

The absence of independent monitoring bodies with the mandate of carrying out unannounced visits to all places of detention contributes to the continuation of such conditions, which can amount to inhuman and degrading treatment.

5. Progress Achieved

There are a considerable number of positive practices, which are documented in detail in the various chapters of the Global Study. They reveal some general trends that have led to an improvement in the rights of children deprived of liberty or at risk thereof.

In the administration of justice, most States have introduced **child justice legislation and established corresponding specialised procedures**, including courts for children, which have led to the **effective diversion of children** from the criminal justice system. These developments seem to have contributed to a decrease in the number of children detained in remand centres and prisons. While UNICEF in 2007 estimated that over 1 million children were detained in the context of the administration of justice,[8] data collected for the Global Study indicate that the number is currently less than half that.

With respect to children living in prisons with their primary caregivers, questionnaire responses reveal that **many Governments accord much more attention to the issue than before**. They apply an individualised, informed and qualitative approach, which aims at striking a fair balance between the interests of the primary caregivers, usually mothers, to keep their young children with them in prison, and the best interests of the affected children. Research for the Study also indicates a trend in both State practice and high court jurisprudence to ensure, as far as possible, that mothers with small children are not sentenced to prison terms and that non-custodial solutions are prioritised.

With respect to migration-related detention of children, research for the Global Study and questionnaire responses reveal that **at least 24 States** (out of which 22 are UN Member States) **do not, or claim not to, deprive children of their liberty for migration-related purposes**.

The **Guidelines for the Alternative Care of Children** of 2009 seem to have **had an impact on the deinstitutionalisation practices of States**. In the *Global Study on Violence against Children* of 2006, the total number of children in institutions was given as 8 million.[9] Research conducted for the current Study however estimate the number to be roughly 5.4

8 UNICEF, *Juvenile Justice in CEE/CIS: An Overview of problems and progress*, 2007, Available at https://www.unicef.org/publications/files/Progress_for_Children-No.8_EN_081309.pdf (accessed 20 November 2019). See also: Geert Cappelaere & Alexis Grandjean, 'Enfants prives de liberte: Droits et realites', *Jeunesse et Droit*, Liege, Belgium, 2000.

9 Paulo Sergio Pinheiro, *World Report on Violence Against Children*, United Nations Secretary-General's Study on Violence against Children, Geneva, Switzerland, 2006.

million.[10] Deinstitutionalisation measures have been adopted, for example, in Central and Eastern Europe, as well as in Central Asia.[11] Many of those children, including those with disabilities, have now been reunited with their families or placed in family-type settings in the community.

In the context of armed conflict, the Security Council in 2018 called on all parties to such conflicts to cease unlawful or arbitrary detention. The Council encouraged States to establish 'standard operating procedures for the **rapid handover of the children concerned to relevant civilian child protection actors**'.[12] This has already had a **positive impact on State practice**, as some African States have signed such handover protocols with the United Nations, transferring children associated with armed forces and armed groups to child welfare centres, with the aim of ensuring their rehabilitation and reintegration into society.

With respect to national security, several States have opted for children associated with non-State armed groups designated as terrorist to be **tried in special courts for children**. While many States have been reluctant to bring home child nationals associated with such groups from conflict-affected areas, some States have adopted return plans with clear responsibilities for State authorities concerning the necessary steps for the safety, reintegration and rehabilitation of such children.

10 Chris Desmond, Kathryn Watt, Anamika Saha, Jialin Huang & Chunling Lu, Prevalence and number of children living in institutional care: global, regional, and country estimates, 'The Lancet Child & Adolescent Health', Vol. 4, Issue 5, pp. 370-377.

11 UNICEF, *15 years of De-Institutionalization Reforms in Europe and Central Asia. Key results achieved for children and remaining challenges*, 2018.

12 UN Security Council, S/RES/2427 of 2018, para. 19.

6. Overarching Recommendations

Despite the improvements that have occurred, States and the international community still have to do a great deal more in order to ensure the full protection of children deprived of liberty. As I have stated in my introduction to the Study, **depriving a child of liberty, is to deprive that child of his/her childhood**. This should never be acceptable and we should do everything in our power to prevent it from happening. The following section is therefore dedicated to presenting a series of overarching recommendations based on the facts uncovered and the insights gained from the Study research. These recommendations are only the beginning of a long process, which ultimately seeks to ensure that **no child is left behind bars**.

1. To start with, I strongly recommend that States make all efforts to significantly **reduce the number of children held in places of detention and prevent deprivation of liberty before it occurs**, including addressing the root causes and pathways leading to deprivation of liberty in a systemic and holistic manner.

2. In order to achieve this goal, States are urged to **develop national action plans** with clear targets and benchmarks indicating how to reduce progressively and significantly the number of children in the various situations of deprivation of liberty and how to replace detention of children by non-custodial solutions.

3. To address the root causes of deprivation of liberty of children, States should **invest significant resources to reduce inequalities and support families** to empower them to foster the physical, mental, spiritual, moral and social development of their children, including children with disabilities.

4. States should also **invest significant resources in the child welfare system**. They should ensure a close **inter-agency cooperation** between the child welfare, social protection, education, health and justice systems, the law enforcement as well as the administration of migration and refugee policies. In this way, States are urged to build comprehensive child protection systems and implement detention prevention and early intervention policies.

5. In all decisions that may lead to the detention of children, I call upon States to most rigorously **apply the requirement of Article 37(b) of the Convention on the Rights of the Child** that deprivation of liberty shall be applied only as a measure of last resort. This means that children may only be detained in truly exceptional cases.

6. I further call upon States to **repeal all laws and policies that permit the deprivation of liberty** of children on the basis of an **actual, or perceived, impairment** or on the basis of their **sexual orientation and/or gender identity**.

7. As migration-related detention of children can never be considered as a measure of last resort, I strongly urge States to **stop all forms of immigration detention of children**, whether unaccompanied or migrating with their families, and replace it by appropriate non-custodial solutions.

8. I further call upon States to **adopt a comprehensive deinstitutionalisation policy** by developing appropriate family-type settings, since children should not grow up in institutions, which are characterised by strict discipline, neglect, abuse and lack of love.

9. Children recruited by armed forces or groups designated as terrorist or violent extremist shall be **treated primarily as victims rather than perpetrators** with the aim of their rehabilitation and reintegration into society. I recommend that States shall take responsibility for their child nationals detained abroad in facilitating their return to their country of origin.

10. I also call upon States to **establish effective child justice systems**, **apply diversion** at every stage of the criminal procedure, increase the **minimum age of criminal responsibility to at least 14 years**, **shorten the length of detention** and **decriminalise** perceived 'immoral' or 'disruptive' **behaviour of children**, consensual sexual activities between teenagers as well as behaviour typical of children (status offences). **Diversion measures should equally be applied to boys and girls** and be appropriate to the child's age, level of maturity, as well as the situation in the community. The **detention of mothers** and other primary caregivers with very young children **should be avoided as much as possible**.

11. If detention is unavoidable under the particular circumstances of a case, it shall be **applied only for the shortest appropriate period of time**. States have an obligation to apply **child-friendly and gender-sensitive conditions**, without any discrimination. **Children shall not be exposed to neglect, violence, sexual abuse or exploitation, ill-treatment, torture and inhuman conditions of detention**. States should ensure that children have access to essential services aimed at their rehabilitation and reintegration into society, including education, vocational training, family contacts, sports and recreation, adequate nutrition, housing and health care. **Health services** in detention shall be of a standard equivalent to that available in the community at large.

12. Since children have the right under Article 12 of the Convention on the Rights of the Child **to be heard** and **actively participate in all matters directly affecting their lives**, they shall be empowered to influence decisions relating to their treatment and enjoyment of such essential services and have the right to effective remedies, as well as to lodge complaints to an independent and impartial authority on any grievances and human rights violations during detention. Furthermore, States are strongly encouraged to ratify the third Optional Protocol to the **Convention on the Rights of the Child on a communications procedure (OPIC),** enabling children to further seek redress for violations of their rights.

13. States are strongly encouraged to **ratify the Optional Protocol to the Convention against Torture (OPCAT)** and to establish independent and effective National Preventive Mechanisms with a particular expertise to conduct visits to places where children are, or may be, deprived of liberty.

14. States should **enhance the capacity**, by means of investing in human resources, awareness-raising and systematic education and training, **of all professionals who work with and for children** in decisions leading to their deprivation of liberty, and those who are responsible for their well-being while in detention. This applies to the police, judges, prosecutors, prison guards, psychiatrists, medical personnel, psychologists, educators, probation officers, social workers, child protection and welfare officers, asylum and migration personnel and any other individuals in contact with children at risk of deprivation, or deprived, of liberty.

15. States are strongly encouraged to **establish an appropriate system of data collection** at the national level, involving all relevant ministries and other State agencies, coordinated by a focal point. Whenever possible, data on children should be obtained directly from them in accordance with the principle of informed consent and self-identification. When necessary, such information should be supplemented by data concerning their parents or primary caregivers. States should regularly collect data, disaggregated by age, gender and nationality, on the number of children deprived of liberty in all situations covered by the Global Study per year and **on a 'snapshot' date**.

16. I also call upon the UN General Assembly to **ensure the development and maintenance of an international database containing all relevant data on children's deprivation of liberty**. In developing such a database, a common methodology, based on the Global Study, needs to be applied in order to enhance comparative research.

17. As deprivation of liberty constitutes a form of structural violence against children, I further recommend that the **detention rate** of children in all situations covered by the Global Study be **considered in the implementation of target 16.2 of the Sustainable Development Goals.**

18. Considering the magnitude of the problem and the fact that deprivation of liberty of children constitutes one of the most neglected problems of the Convention on the Rights of the Child, I strongly recommend that **this phenomenon shall remain on the agenda of the UN General Assembly, the Security Council and the Human Rights Council.** All United Nations agencies, mandates and special mechanisms should play an active role in the implementation of the recommendations provided by this Global Study. I call upon the General Assembly to consider **appropriate and effective follow-up mechanisms** aimed at disseminating the Study findings and promoting its recommendations at the international, regional and national levels.

19. To end with, I wish to tell **all children** who are or may be deprived of liberty that **this Global Study is a study for you**. Speak up and demand your right to be free, your right to grow up in a family or family-type setting, your right to be cared for with love and your right to actively participate in all decisions that directly affect your lives - especially decisions about your freedom. Challenge your politicians to change laws that treat you like a criminal just because you may have a disability, or may be a refugee or migrant, may belong to the LGBTI community, may have run away from home or may have been forced to live on the streets. Remind your Government that it is against the law to detain children without trying to place them in a family-like environment first. Your Government should know that **depriving children of their liberty is depriving them of their childhood!**

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Annex I. Data Collection and Analysis

1. The Global Study Model Analysing the Magnitude of Deprivation of Liberty of Children

For the purpose of estimating the global number of children deprived of liberty, statistical models have been designed for the Global Study covering the following situations of deprivation of liberty:

1. administration of justice,
2. children in migration-related detention,
3. children living in prison with their primary caregivers,
4. children in institutions.

Due to the limited data submitted under the Global Study questionnaire, the number of children detained in the context of armed conflict and on the grounds of national security was estimated based on the latest reports from international organisations and a thorough literature review.[1]

1 The number for children detained in the context of armed conflict is based on the figures reported under the UN Monitoring and Reporting Mechanism on grave violations committed against children in situations of armed conflict as well as estimates from UNICEF. For more on armed conflict see: Chapter 13 on Children Deprived of Liberty in the Context of Armed Conflict (4.1. Data: The Number of Children Deprived of Liberty). For more on national security see: Chapter 14 on Children Deprived of Liberty on National Security Grounds (4.1. Data: The Number of Children detained for National Security).

1.1. Common Variables used for Research across all Situations of Deprivation of Liberty[2]

Variable	Description	Source
Region	Based on the regional classification by UNICEF[3]	For the purpose of Global Study, Pacific has been treated as a separate region whilst Central Asia and South Asia has been treated as one region.
Total population	In absolute numbers (used *inter alia* to calculate imprisonment rate per 100,000 citizens)	Extracted from World Bank Open Data Portal (ID: SP.POP.TOTL). Sources: United Nations Population Division, *World Population Prospects: 2019 Revision*; Census reports and other statistical publications from national statistical offices; Eurostat: Demographic Statistics; United Nations Statistical Division, *Population and Vital Statistics Report* (various years); U.S. Census Bureau: International Database; and Secretariat of the Pacific Community: Statistics and Demography Programme.
Children population	In absolute numbers and as % of total population (data extracted for age groups 0-14 and 0-19; the latter served as a basis for estimating population 0-18)	Extracted from World Bank Open Data Portal (population 0-14: SP.POP.0014.TO; population 15-19: ID: SP.POP.1519.MA.5Y and ID: SP.POP.1519.FE.5Y). World Bank estimates are based on age/sex distributions of United Nations Population Division's World Population Prospects (2017).
GDP per capita	In current USD	Extracted from World Bank Open Data Portal (NY.GDP.PCAP.CD). World Bank national accounts data, and OECD National Accounts data files.
Gini index (World Bank estimate)	Gini index measures the income inequality	World Bank, Development Research Group. Data are based on primary household survey data obtained from government statistical agencies and World Bank country departments. For more information and methodology, please see Povcal Net.

2 Data extracted from World Bank Open Data Portal in line with the license CC-BY 4.0. The column 'Sources' reflects the description of variables on World Bank. Any changes to the extracted variables have been reflected in the tables below.

3 For UNICEF regional classification see: https://data.unicef.org/regionalclassification (accessed 19 October 2019).

1.2 Specific Variables used for Research in particular Situations of Deprivation of Liberty

a. Children Deprived of Liberty in Administration of Justice

Common variables	Area-specific variables	Estimates
1) region 2) total population 3) children population 4) GDP per capita 5) Gini index	1) prison population below 18 years old 2) number of children in pre-trial detention in 2017 3) minimum age of criminal responsibility 4) maximum sentence for children 5) prison population rate 6) youth unemployment 7) Rule of Law Indicator	Between 160,000 and 250,000 children detained on any given day in 2018 Approx. 410,000 children detained throughout the year (sample: 124 countries).

Variable	Description	Source
Prison population below 18 years old	In absolute numbers (for the snapshot date and the latest year available; mostly 2017) As % of total prison population	Responses to the Global Study questionnaire (Q4 for the snapshot date and Q7 for the annual data), World Prison Brief (official sources only).
Number of children in pre-trial detention in 2017	In absolute numbers (for the snapshot date and the latest year available)	Responses to the Global Study questionnaire (Q4 for the snapshot date and Q6 for the annual data).
Minimum age of criminal responsibility	In years	Responses to the Global Study questionnaire (Q1), information submitted by CRIN (as a member of the Research Group).
Maximum sentence for children	In years	Responses to the Global Study questionnaire, information submitted by CRIN (as a member of the Research Group).
Prison population rate	Prisoners (including individuals who are sentenced and held in pre-trial detention) per 100,000 citizens	World Prison Brief (official sources only)
Youth unemployment	As % of the labour force aged 15-24 without work but available for and seeking employment	Extracted from World Bank Data Portal (ID: SL.UEM.1524.NE.ZS). Source: International Labour Organization, ILOSTAT database (data retrieved in September 2018)
Rule of Law Indicator	Rule of Law is one of the Worldwide Governance Indicators. It measures *inter alia* the quality of the police and the courts, as well as the likelihood of crime and violence.	Extracted from World Bank Open Data Portal (RL.EST)

b. Children Living in Prison with their Caregivers

Common variables	Area-specific variables	Estimates
1) region 2) total population 3) children population 4) GDP per capita 5) Gini index	1) population of children residing with their caregivers in prisons 2) legislation - children allowed to stay with caregivers 3) legislation – children allowed to reside in prison with mother/father 4) legislation - age limit for children to be allowed to stay with detained caregivers 5) legislation – children allowed to enter prison with parents 6) fertility rate 7) mortality rate of infants 8) prison population rate 9) female prison population 10) unemployment rate	Approx. 9,000 children deprived of liberty at any given day. Approx. 19,000 children deprived of liberty throughout the year (sample: 69 countries).

Variable	Description	Source
Population of children residing with their caregivers in prisons	In absolute numbers (for snapshot date and latest year available; mostly 2017)	Responses to the Global Study questionnaire (Q36 for snapshot date and Q37 for annual data), literature review.
Legislation - children allowed to stay with caregivers (mother/father)	Yes/no	Responses to the Global Study questionnaire (Q29), literature review.
Legislation - age limit for children to be allowed to stay with detained caregivers	In years	Responses to the Global Study questionnaire (Q29), literature review.
Legislation – children allowed to enter prison with parents	Yes/no	Responses to the Global Study questionnaire (Q29).
Fertility rate	In absolute numbers (total births per woman) – number of children that would be born to a woman if she were to live to the end of her childbearing years	Extracted from World Bank Open Data Portal (ID: SP.DYN.TFRT.IN). Sources: 1. United Nations Population Division, *World Population Prospects: 2017 Revision*; 2. Census reports and other statistical publications from national statistical offices; 3. Eurostat: Demographic Statistics; 4. United Nations Statistical Division, *Population and Vital Statistics Report* (various years); 5. U.S. Census Bureau: International Database, and 6. Secretariat of the Pacific Community, *Statistics and Demography Programme*.
Mortality rate of infants	Per 1,000 live births - number of infants dying before reaching one year of age, per 1,000 live births in a given year	Extracted from World Bank Open Data Portal (ID: SP.DYN.IMRT.IN). Source: estimates developed by the UN Inter-agency Group for Child Mortality Estimation (UNICEF, WHO, World Bank, UN DESA Population Division).
Prison population rate	Prisoners (including individuals that are sentenced and held in pre-trial detention) per 100,000 citizens	World Prison Brief (official sources only)
Female prison population	As % of total prison population	World Prison Brief (official sources only)
Unemployment rate	As % of total labour force – share of the labour force that is without work but available for and seeking employment	Extracted from World Bank Open Data Portal (ID: SL.UEM.TOTL.ZS). Source: (ILOSTAT database, retrieved in April 2019).

c. Children Deprived of Liberty for Migration Related Reasons

Common variables	Area-specific variables	Estimates
1) region 2) total population 3) children population 4) GDP per capita 5) Gini index	1) children deprived of liberty for migration-related reasons 2) refugee population 3) net migration 4) unemployment rate 5) Human Development Index 6) Political Stability and Absence of Violence 7) Global Peace Index	Approx. 330,000 children detained throughout the year (sample: 74 countries).

Variable	Description	Source
Children deprived of liberty for migration-related reasons	Absolute numbers	Responses to the UN Global Study questionnaire and additional sources (official data provided by States as well as international organisations).
Refugee population	Absolute numbers (individuals who are recognised as refugees; by country or territory of asylum)	Extracted from World Bank Open Data Portal (ID: SM.POP.REFG). Sources: UNHCR, complemented by statistics on Palestinian refugees under the mandate of the UNRWA, 2017).
Net migration	The total number of immigrants minus the annual number of emigrants, including both citizens and non-citizens	Extracted from World Bank Open Data Portal (ID: SM.POP.NETM). Source: United Nations Population Division, 2017.
Unemployment rate	As % of the total labour force – share of the labour force that is without work, but available for and seeking employment	Extracted from World Bank Open Data Portal (ID: SL.UEM.TOTL.ZS). Source: (ILOSTAT database, retrieved in April 2019).
HDI	HDI is a composite index measuring average achievement in three basic dimensions of human development: 1. a long and healthy life; 2. knowledge and; 3. a decent standard of living	Extracted from UN Development Programme (2018).
PSAV	PSAV is one of the Worldwide Governance Indicators that measures perceptions of the likelihood of political instability and/or politically-motivated violence, including terrorism	Extracted from World Bank Open Data Portal (PV.EST).
GPI	GPI comprises 23 indicators in order to measure peacefulness	Vision of Humanity

2. Methodologies and Models Used for the Situations of Deprivation of Liberty not Analysed through the Global Study Model

2.1. Children Deprived of Liberty in Institutions

Children *de facto* deprived of liberty	Children *de jure* deprived of liberty	Estimates
Based on the data extracted from: - responses to the Global Study questionnaire - peer-reviewed literature - grey literature - Integrated Public Use Microdata Series **In total: 137 countries**	Comparative analysis: - responses to the Global Study questionnaire (13 countries identified) - review of legislation (aiming at identification of 'closed' institutions) and extraction of statistics on the population of these institutions (10 countries identified) **In total: 23 countries**	**FIRST STAGE** Number of children **de facto** deprived of liberty: ca. 5.4 mln **SECOND STAGE** Number of children **de jure** deprived of liberty: 12,4% out of 5.4 million (ca. 670,000)

Estimating the number of children *de facto* and *de jure* deprived of liberty was a two-stage process. At the first stage, data extracted from the responses to the Global Study questionnaire (25 States provided relevant statistics) has been utilised for informing dedicated research aiming at estimating the global number of children living in institutions.[4] Global Study data was integrated into the dataset encompassing information extracted from peer-reviewed literature, grey literature and the Integrated Public Use Microdata Series (sample: 137 countries).[5] Using various statistical methods (e.g. regression with generalised linear model), the global number of children living in institutions was estimated at ca. 5.4 million.

The second stage focused on estimating the rate of children *de jure* deprived of liberty in institutions (by a formal State decision) and has been conducted by the Global Study team. This part of the research was driven by the comparative analysis of replies submitted under the Global Study questionnaire with available data extracted from the external sources (e.g. official statistics). By comparing numbers reported under the questionnaire with the total population of children in institutions, we managed to identify 13 countries that indeed

4 Chris Desmond, Kathryn Watt, Anamika Saha, Jialin Huang & Chunling Lu, Prevalence and number of children living in institutional care: global, regional, and country estimates, 'The Lancet Child & Adolescent Health', Vol. 4, Issue 5, pp. 370-377.

5 Ibid., p. 4.

distinguished between the children placed in institutions and children deprived of liberty in these facilities. The sample has been enlarged with an additional 10 countries in which the number of children deprived of liberty in institutions was assessed based on the review of legislation (aiming at the identification of types of 'closed' institutions) and the extraction of statistics on the population of these institutions. By comparing the number of children living in institutions (estimated at the first stage) with the figures identified at the second stage of the research, the number of children *de jure* deprived of liberty is estimated at 12.4% (ca. 670,000).

2.2. Children Deprived of Liberty in the Context of Armed Conflict and National Security

Due to the transient character of armed conflicts as well as the limited data available, the global number of children deprived of liberty was estimated based on the most recent UN reports from 2017 and early 2019. Thus, our estimates should be always interpreted in the context of armed conflicts ongoing in this period of time. According to UN data:

- at least 4,471 children were detained in the context of armed conflict in 2017 (source: United Nations, *Report of the Secretary-General on Children and Armed Conflict*, S/2018/465, 16 May 2018);
- in Iraq and Syria in early 2019 there were an estimated 30,000 children in various detention facilities (source: UNICEF, 'Protect the Rights of Children of Foreign Fighters Stranded in Syria and Iraq', *Statement of the UNICEF Executive Director, Henrietta Fore*, 21 May 2019).

In total, the Global Study estimates a minimum of 35,000 children deprived of liberty in countries that are experiencing armed conflict. Further research conducted for the Global Study suggested that in 2017 at least 1,500 children were detained in the context of national security in non-conflict countries.

Annex II. The Impact on Health of Children Deprived of Liberty

1. Search Strategies on the Health of Children Deprived of Liberty in the Administration of Justice

The process of identifying the relevant literature was divided into 3 stages as indicated on the infographic below. At the first stage, we used various variants and combinations of search terms relating to both deprivation of liberty and health conditions. Publications that included one of the terms listed in steps 1-4 have been classified to the second stage of the search. At this stage, the number of eligible publications was reduced to these containing combinations of terms enumerated in the steps 1, 2 and 4. At the last stage, articles that had been published earlier than 1980 were excluded from the review.

1.1 PubMed Search Strategy

1. adolescent* or young or juvenile* or youth*
2. "justice system" or detention or "correctional facility" or "correctional facilities"
3. "juvenile offender" or "juvenile offenders" or "juvenile justice" or "juvenile detainee" or "juvenile detainees" or "juveniles detained" or "juvenile detention" or "juveniles arrested" or "juvenile arrestee" or "juveniles arrested" or "juvenile arrestees" or "incarcerated youth" or "incarcerated youths" or "youth incarcerated" or "detained youth" or "detained youths" or "young detainee" or "young detainees" or "young arrestee" or "young arrestees" or "juvenile court" or "juvenile courts" or "young offender" or "young offenders" or "juvenile delinquency" or "juvenile delinquent" or "juvenile delinquents" or "young delinquent" or "young delinquents" or "youth detained" or "incarcerated adolescent" or "incarcerated adolescents" or "young detained" or "young arrested" or "young incarcerated"
4. illness or illnesses or disease or diseases or disorder or disorders or infection or infections or mortality or mortalities or asthma or suicide or suicides or suicidal or "self harm" or "self destructive" or "self mutilation" or "self inflicted" or "self injury" or "self injuries" or "self-harm" or "self-destructive" or "self-mutilation" or "self-inflicted" or "self-injury" or "self-injuries" or nssi or "mental health problem" or "mental health problems" or psychiatric or ptsd or adhd or "oppositional defiant" or depression or anxiety or schizophrenia or bipolar or psychopathy or psychopathological or hiv or aids or std or "stds" or "sexually transmitted" or hepatitis or hepatic or "blood-borne" or "blood borne" or tb or tuberculosis or herpes or "genital wart" or "genital warts" or pregnancy or "tobacco use" or smoking or "substance use" or "alcohol use" or "drug use" or "substance abuse" or "alcohol abuse" or "drug abuse" or "substance misuse" or "alcohol misuse" or "drug misuse" or addiction or "risky sex" or "risky sexual" or "risky behaviour" or "risky behavior" or "risk behavior" or "risk behaviour" or "risky behaviours" or "risky behaviors" or "risk behaviors" or "risk behaviours" or "unsafe sex" or "unsafe sexual"

5. 1 and 2 and 4
6. 2 and 4
7. 5 or 6

Limit 7 to yr = "1980 – Current"

1.2 PRISMA flow chart of study selection

2. Search Strategies on Health of Children in Other Situations of Deprivation of Liberty

2.1 MEDLINE Search Strategy

Single terms common for all research areas
Publications that included at least one keyword indicated in steps 1-5

Area-specific combination of terms
Publication that included several keywords as indicated:
- steps 6-10: migration
- steps 11-15: armed conflict
- steps 16-23: institutions
- steps 24-32: caregivers

Timeframe
Articles published since 1980

Terms Common for all Research Areas

1. (newborn* or baby or babies or neonat* or infan* or toddler* or pre-schooler* or preschooler* or kindergarten or boy*1 or girl*1 or child or children or childhood or adolescen* or pediatric* or paediatric* or youth* or young or juvenile*1 or teen*1 or teenage*).tw,kf[6]
2. (Detention or Detain* or Imprison* or Custod* or Incarcerat* or Confine or Confinement or internment or supervis* or (secure adj facility) or (secure adj facilities) or (children* adj home*) or (care adj home*)).tw,kf
3. (health or disease* or illness* or injur* or morbidity or comorbid or co-morbid or virus or disorder or disorders or multimorbidity or multi-morbidity or chlamydia or gonorrhea or (sexually adj transmit*) or syphilis or (human adj papillomavirus) or herpes or trichomoniasis or (unprotect* adj sex) or (unprotect* adj intercourse) or pregnan* or gestation or child-birth or reproductive or parity or gravid or Mental or depress* or borderline or psychos* or psychot* or psycholog*or psychiatri* or schizophren* or manic or anti-social or antisocial or anxi* or (attention adj difficulty adj hyperactivity) or (attention adj deficit) or posttraumatic or post-traumatic or personalit* or obsessive-compulsive or oppositional or undernourish* or undernutrit* or malnutrit* or malnourish* or underweight or infect* or communicable

6 The following abbreviations have been used throughout this section:
tw = title or abstract
kw = author-provided keyword exact
kf = word in author provided keyword
Source: University of Toronto Libraries, *Searching the Literature: A Guide to Comprehensive Searching in the Health Sciences*, Available at https://guides.library.utoronto.ca/c.php?g=577919&p=4305874 (accessed: 20 October 2019).

or tuberculosis or dengue or (human adj immunodeficiency) or (acquired adj immune adj deficiency adj syndrome) or hepatitis or influenza or flu or malaria or pneumonia or tetanus or cholera or violen* or trauma* or assault or abuse* or maltreat* or tortur* or bully* or (adverse adj childhood adj experience*) or victim* or maltreat* or chronic or non-communicable or noncommunicable or asthma or diabet* or cancer or epilepsy or cardiovascular or leukemia or stroke or kidney or dental or dentition or (oral adj hygiene) or gum or caries or teeth or tooth or plaque or mort* or death or fatal* or dying or die* or suicid* or parasuicide or ideation or ((self or deliberate or intentional or non-fatal or non-suicidal or self-direct*) adj3 (injur* or mutilat* or harm* or wound* or inflict* or poison* or violen* or strangl* or strangu* or cut or cutting or hanging or overdose)) or disabilit* or disable* or cognitive or intellectual* or brain injury or (Foetal adj Alcohol adj Spectrum) or autis* or aspergers or dyslexi* or (cerebral adj palsy) or (down adj syndrome) or (auditory adj processing) or tobacco or cigarette or smok* or nicotine or alcohol or substance*1 or drug or illicit or prescrib* or prescription or overdose or poison* or addict* or marijuana or cannabis or heroin or cocaine or opioid* or inhalant or chroming or methamphetamine or amphetamine or benzodiazepine*).tw,kf

4. minority health/ or Disease/ or exp Morbidity/ or Unsafe sex/ or Sexual Health/ or Sexually Transmitted Diseases/ or Reproductive Medicine/ or mental disorders/ or mental health/ or exp Malnutrition/ or exp Communicable Diseases/ or exp violence/ or exp chronic disease/ or Oral health/ or Oral hygiene/ or Fatal outcome/ or Mortality, Premature/ or Exp death/ or exp self-injurious behavior/ or suicidal ideation/ or suicide, attempted/ or Intellectual Disability/ or Exp substance-related disorders/ or Exp smoking/ or prescription drugs/ or street drugs/ or exp "Wounds and Injuries"/
5. child health/ or Child Nutrition Disorders/ or Dental care for children/ or Child mortality/ or Disabled children/

Children Deprived of Liberty for Migration Related Reasons

6. (Refugee* or migrant* or immigrant* or emigrant* or (border adj facility) or (border adj facilities) or (third adj country adj national*) or asylum).tw,kf
7. refugees/ or "Emigration and Immigration"/ or "Transients and Migrants"/
8. 1 and 2 and (3 or 4) and (6 or 7)
9. 2 and 5 and (6 or 7)
10. **8 or 9**

Children Deprived of Liberty in the Context of Armed Conflict

11. ((armed adj conflict) or war or wars or warfare* or non-combatant* or noncombatant* or combatant* or soldier* or army or armies or insurgen* or militia* or militar* or war-affected or nonstate* or non-state* or (national adjsecurit*) or terror*). tw,kf
12. "Warfare and Armed Conflicts"/ or exp Terrorism/

13. 1 and 2 and (3 or 4) and (11 or 12)
14. 2 and 5 and (11 or 12)
15. **13 or 14**

Children Deprived of Liberty in Institutions

16. (Detention or Detain* or Imprison*Institution* or Incarcerat* or Confine or Confinement or (secure adj facility) or (secure adj facilities) or (children* adj home*) or (care adj home*)).tw,kf
17. (foster or abandon* or poverty or homeless* or run-away* or runaway* or orphan* or (out-of-home adj care) or (residential adj treatment) or involuntary).tw,kf
18. poverty/ or runaway behavior/ or Residential Treatment/ or involuntary treatment/ or involuntary treatment, psychiatric/
19. child, abandoned/ or child, unwanted/ or child, orphaned/ or child, foster/ or Homeless Youth/
20. 1 and (3 or 4) and 16 and (17 or 18)
21. 16 and 5 and (17 or 18)
22. (3 or 4) and 16 and 19
23. 20 or 21 or 23

Children Living in Prisons with their Primary Caregivers

24. ((newborn* or baby or babies or neonat* or infan* or toddler* or pre-schooler* or preschooler* or kindergarten or boy*1 or girl*1 or child or children or childhood or adolescen* or pediatric* or paediatric* or youth*) adj4 (father* or mother* or dad*1 or mum*1 or mom*1 or parent*)).tw,kf
25. (prison or prisons or jail or codetain* or co-detain* or Detention or Detain* or Imprison* or Incarcerat* or Confine or Confinement or internment).tw,kf
26. Prisons/
27. ((mother adj1 baby adj unit*) or (mother-baby adj unit*) or (mother adj1 infant adj unit*) or (mother-infant adj unit*) or nursery or day-care or daycare or kindergarten* or preschool* or creche or childcare or child-care or playschool or play-school).tw,kf
28. (3 or 4) and (25 or 26) and 27
29. 5 and (25 or 26) and 27
30. (3 or 4) and 24 and (25 or 26)
31. 5 and 24 and (25 or 26)
32. **28 or 29 or 30 or 31**
33. **10 or 15 or 23 or 32**

Limit 33 to yr = "1980 – Current"

2.2 Embase Search Strategy for Publications on Other Settings

Single terms common for all research areas
Publications that included at least one keyword indicated in steps 1-6

Area-specific combination of terms
Publication that included several keywords as indicated:

- steps 7-11: migration
- steps 12-16: armed conflict
- steps 17-24: institutions
- steps 28-33: caregivers

Timeframe
Articles published since 1980

Terms Common for all Research Areas

1. (newborn* or baby or babies or neonat* or infan* or toddler* or pre-schooler* or preschooler* or kindergarten or boy*1 or girl*1 or child or children or childhood or adolescen* or pediatric* or paediatric* or youth* or young or juvenile*1 or teen*1 or teenage*).tw,kw
2. (Detention or Detain* or Imprison* or Custod* or Incarcerat* or Confine or Confinement or internment or supervis* or (secure adj facility) or (secure adj facilities) or (children* adj home*) or (care adj home*)).tw,kw
3. Detention/ or Detention camp/
4. (health or disease* or illness* or injur* or morbidity or comorbid or co-morbid or virus or disorder or disorders or multimorbidity or multi-morbidity or chlamydia or gonorrhea or (sexually adj transmit*) or syphilis or (human adj papillomavirus) or herpes or trichomoniasis or (unprotect* adj sex) or (unprotect* adj intercourse) or pregnan* or gestation or child-birth or reproductive or parity or gravid or Mental or depress* or borderline or psychos* or psychot* or psycholog*or psychiatri* or schizophren* or manic or anti-social or antisocial or anxi* or (attention adj difficulty adj hyperactivity) or (attention adj deficit) or posttraumatic or post-traumatic or personalit* or obsessive-compulsive or oppositional or undernourish* or undernutrit* or malnutrit* or malnourish* or underweight or infect* or communicable or tuberculosis or dengue or (human adj immunodeficiency) or (acquired adj immune adj deficiency adj syndrome) or hepatitis or influenza or flu or malaria or pneumonia or tetanus or cholera or violen* or trauma* or assault or abuse* or maltreat* or tortur* or bully* or (adverse adj childhood adj experience*) or victim* or maltreat* or chronic or non-communicable or noncommunicable or asthma or diabet* or cancer or epilepsy or cardiovascular or leukemia or stroke or kidney or dental or dentition or (oral adj hygiene) or gum or caries or teeth or tooth or plaque or mort* or death or fatal* or dying or die* or suicid* or parasuicide or ideation or ((self or deliberate

or intentional or non-fatal or non-suicidal or self-direct*) adj3 (injur* or mutilat* or harm* or wound* or inflict* or poison* or violen* or strangl* or strangu* or cut or cutting or hanging or overdose)) or disabilit* or disable* or cognitive or intellectual* or brain injury or (Foetal adj Alcohol adj Spectrum) or autis* or aspergers or dyslexi* or (cerebral adj palsy) or (down adj syndrome) or (auditory adj processing) or tobacco or cigarette or smok* or nicotine or alcohol or substance*1 or drug or illicit or prescrib* or prescription or overdose or poison* or addict* or marijuana or cannabis or heroin or cocaine or opioid* or inhalant or chroming or methamphetamine or amphetamine or benzodiazepine*).tw,kw

5. health/ or minority health/ or Diseases/ or Morbidity/ or exp Unprotected sex/ or exp sex trafficking/ or Sexual Health/or exp sexually Transmitted Disease/ or exp mental health/ or exp malnutrition/ or Underweight/ or exp Communicable Disease/ or Emotional abuse/ or Physical abuse/ or Sexual abuse/ or exp violence/ or exp chronic disease/ or Exp non communicable Disease/ or dental health/ or Fatality/ or Exp mortality/ or Exp death/ or Exp suicide/ or Suicide attempt/ or expautomutilation/ or suicidal ideation/ or Exp disability/ or Intellectual impairment/ or exp mental deficiency/ or Exp Drug abuse/ or Exp Substance abuse/ or Exp smoking/ or Drug overdose/ or Illicit drug/ or Street drug/ or prescription drug/ or Drug misuse/ or Exp alcohol abuse/ or Exp alcohol intoxication/ or exp Injury/
6. exp child health/ or adolescent pregnancy/ or Child abuse/ or exp Childhood mortality/ or Exp handicapped child/

Children Deprived of Liberty for Migration Related Reasons

7. (Refugee* or migrant* or immigrant* or emigrant* or (border adj facility) or (border adj facilities) or (third adj country adj national*) or asylum).tw,kw
8. exp migration/ or exp migrant/ or immigration/ or exp undocumented immigrant/ or exp refugee/ or exp refugee camp/ or asylum seeker/
9. 1 and (2 or 3) and (4 or 5) and (7 or 8)
10. (2 or 3) and 6 and (7 or 8)
11. 9 or 10

Children Deprived of Liberty in the Context of Armed Conflict

12. ((armed adj conflict) or war or wars or warfare* or non-combatant* or noncombatant* or combatant* or soldier* or army or armies or insurgen* or militia* or militar* or war-affected or nonstate* or non-state* or (national adjsecurit*) or terror*).tw,kw
13. War/ or War exposure/ or Terrorism/
14. 1 and (2 or 3) and (4 or 5) and (12 or 13)
15. (2 or 3) and 6 and (12 or 13)
16. **14 or 15**

Children Deprived of Liberty in Institutions

17. (Detention or Detain* or Imprison* or Incarcerat* or Institution* orConfine or Confinement or (secure adj facility) or (secure adj facilities) or (children* adj home*) or (care adj home*)).tw,kw
18. (foster or abandon* or poverty or homeless* or run-away* or runaway* or orphan* or (out-of-home adj care) or (residential adj treatment) or involuntary).tw,kw
19. poverty/ or runaway behavior/ or foster care/ or Orphanage/
20. child, abandoned/ or child, unwanted/ or orphaned child/ or foster child/ or Homeless Youth/
21. 1 and (3 or 17) and (4 or 5) and (18 or 19)
22. (3 or 17) and 6 and (18 or 19)
23. (3 or 17) and (4 or 5) and 20
24. 21 or 22 or 23

Children Living in Prisons with their Primary Caregivers

25. ((mother adj1 baby adj unit*) or (mother-baby adj unit*) or (mother adj1 infant adj unit*) or (mother-infant adj unit*) or nursery or day-care or daycare or kindergarten* or preschool* or creche or childcare or child-care or playschool or play-school). tw,kw
26. (prison or prisons or jail or codetain* or co-detain* or Detention or Detain* or Imprison* or Incarcerat* or Confine or Confinement or internment).tw,kw
27. Detention/ or Detention camp/ or Prisons/
28. ((newborn* or baby or babies or neonat* or infan* or toddler* or pre-schooler* or preschooler* or kindergarten or boy*1 or girl*1 or child or children or childhood or adolescen* or pediatric* or paediatric* or youth*) adj4 (father* or mother* or dad*1 or mum*1 or mom*1 or parent*)).tw,kw
29. (4 or 5) and 25 and (26 or 27)
30. 6 and 25 and (26 or 27)
31. (4 or 5) and (26 or 27) and 28
32. 6 and (26 or 27) and 28
33. **29 or 30 or 31 or 32**
34. **11 or 16 or 24 or 33**

Limit 34 to yr = "1980 – Current"

2.3 PRISMA flow chart of study selection

Annex III. Composition of the NGO Panel for the Global Study on Children Deprived of Liberty

Co-Conveners of the NGO Panel

1. Defence for Children International (DCI)
2. Human Rights Watch (HRW)

Members of the Core Group of the NGO Panel

3. Child Rights International Network (CRIN)
4. International Catholic Child Bureau (ICCB/BICE)
5. International Detention Coalition (IDC)
6. International Juvenile Justice Observatory (IJJO)
7. Penal Reform International (PRI)
8. Terre des Hommes International Federation (TDH)
9. World Organization Against Torture (OMCT)

Members of the NGO Panel

10. Abraham's Children Foundation (ACF), *Nigeria*
11. Advocacy Forum Nepal, *Nepal*
12. African Child Policy Forum (ACPF), *Ethiopia*
13. Alliance for Children, *Mauritius*
14. Alliance for Peace Democracy & Human Rights (APHRO), *Iraq*
15. American Civil Liberties Union (ACLU), *USA*
16. Amnesty International
17. Appui au Développement Communautaire (ADC), TAGAZAW, *Niger*
18. Arc en ciel, *Gabon*
19. Arche d'Alliance ONG de promotion de la paix et de défense des droits de la personne humaine, *Democratic Republic of the Congo*
20. Article 39, *United Kingdom*
21. Asociación Argentina de Magistrados Funcionarios y Profesionales de la Justicia de Niñez, Adolescencia y Familia (AJUNAF), *Argentina*
22. Association Antigone, *Italy*
23. Association de Défense des Droits de la Femme en Mauritanie, *Mauritania*
24. Association for Childhood Education International (ACEI), *USA*
25. Association for the Prevention of Torture (APT), *Switzerland*

26. Association Internationale des Magistrats de la Jeunesse et de la Famille (AIMJF), *Switzerland*
27. Association Nationale des Communautés Éducatives et Sociales (ANCES), *Luxembourg*
28. Association Nationale pour le Developpement Humain, *Burkina Faso*
29. Australian Lawyers Alliance, *Australia*
30. Awareness Against Human Trafficking, *Kenya*
31. Baha'i International Community, *USA*
32. Bulgarian Helsinki Committee, *Bulgaria*
33. Bureau National Catholique de l'Enfance au Mali, *Mali*
34. Bureau National Catholique de l'Enfance au Togo, *Togo*
35. Bureau National Catholique de l'Enfance en RD Congo, *Democratic Republic of the Congo*
36. Burundi Child Rights Coalition (BCRC), *Burundi*
37. Campaign for Youth Justice, *USA*
38. Casa Alianza
39. Centre for Human Rights and Peace Advocacy (CHRAPA), *Cameroon*
40. Centre of Excellence in Alternative Care of Children, *India*
41. Centre of Innovation in Governance and Public Administration, *India*
42. Centro de Derechos Humanos Fray Matías de Córdova, *Mexico*
43. CHANGE Trust, *Kenya*
44. Child Fund Alliance, *USA*
45. Child Fund Sierra Leone, *Sierra Leone*
46. Child Helpline International (CHI), *The Netherlands*
47. Child Rights Coalition Asia, *The Philippines*
48. Child Rights Centre, *Serbia*
49. Child Rights Connect, *Switzerland*
50. Child Rights Movement, *Pakistan*
51. Child Rights Network of Southern Africa (CRNSA), *Botswana*
52. Child Soldiers International, *United Kingdom*
53. Children and Young People Living for Peace, *Nigeria*
54. Children of Prisoners Europe (COPE)
55. Children's Human Rights Centre of Albania (CRCA), *Albania*

56. Children's Rights Alliance for England (CRAE), *United Kingdom*
57. Children's Legal Rights and Development Center (CLRDC), *The Philippines*
58. Church World Service, *USA*
59. CLEAR, *Kenya*
60. Clear Path Clear Vision, *India*
61. Colectivo de Derechos de Infancia y Adolescencia, *Argentina*
62. Combite Pour la Paix et le Développement, *Haiti*
63. Congregation of Our Lady of Charity of the Good Shepherd, *Italy*
64. Consortium for Street Children, *United Kingdom*
65. Coram Children's Legal Centre, *United Kingdom*
66. Corporacion Opcion, *Chile*
67. Dignitéen Détention (DiDé), *Switzerland*
68. Dignité et Droits pour les Enfantsen Côte d'Ivoire (DDE-CI), *Ivory Coast*
69. Dogodogo Centre Street Children Trust, *Tanzania*
70. Dreikönigsaktion (DKA), *Austria*
71. Dynamo International – Street Workers Network, *Germany*
72. ECPAT International, *Thailand*
73. Edmund Rice International (ERI), *Switzerland*
74. Eurochild, *Belgium*
75. European Network of Ombudspersons for Children (ENOC), *France*
76. Exalt Youth, *United States*
77. Fair Trials, *United Kingdom and Belgium*
78. FEMU Sinaloa, *Mexico*
79. Fondation Noura, *Mauritania*
80. For Our Children Foundation, *Bulgaria*
81. Forum for Human Rights, *Czech Republic*
82. Franciscans International (FIOP), *Switzerland*
83. Freedom Gate Greece, *Greece*
84. Fundación DiagramaIntervención Psicosocial, *Spain*
85. Fundación Proyecto B, *Chile*

86. Future for Marginalized Community (FUMACO)
87. Geneva Infant Feeding Association – International Baby Food Action Network, *Switzerland*
88. Global Campaign to End Immigration Detention of Children
89. Global Detention Project (GDP), *Switzerland*
90. Global Initiative to End All Corporal Punishment of Children, *United Kingdom*
91. Graduate Women International (GWI), *Switzerland*
92. Grandir Dignement, *France/Madagascar*
93. Helsinki Foundation for Human Rights, *Finland*
94. Hope and Homes for Children UK, *United Kingdom*
95. Howard League for Penal Reform, *United Kingdom*
96. Human Rights and Gender Justice Clinic, *USA*
97. Human Rights Defence Club, *Cameroon*
98. Imbokodo Support for Restorative Justice and reintegration, *South Africa*
99. Inclusion International, *United Kingdom*
100. InCRC, *South Korea*
101. Inquest, *United Kingdom*
102. Institut international des Droits de l'Enfant (IDE), *Switzerland*
103. Institute for Social Justice (ISJ), *Pakistan*
104. International Association for Hospice and Palliative Care (IAHPC), *USA*
105. International Bureau for Children's Rights (IBCR), *Canada*
106. International Coalition for Children with Incarcerated Parents (INCCIP), *USA*
107. International Commission of Jurists (ICJ), *Switzerland*
108. International Council of Jewish Women (ICJW), *Australia*
109. International Day of African Childhood and his Youth (IDAY), *Belgium*
110. International Institute for Child Protection (IICP), *The Gambia*
111. International Justice Consulting (IJC)
112. International Social Service (ISS), *Australia*
113. International Society for the Prevention of Child Abuse and Neglect (ISPCAN), *USA*
114. International Women's Human Rights Clinic (IWHRC), *USA*
115. Istituto Internazionale Maria Ausiliatrice (IIMA; Human Rights Office), *Switzerland*

116. Juvenile Justice Advocates International (JJA-JJI), *USA/Mexico*
117. Juvenile Justice Initiative, *USA*
118. Kaana Charity, *United Kingdom/Uganda*
119. Kids Smile Foundation, *Sri Lanka*
120. Kigoma Women's Development Group (KIWODE), *Tanzania*
121. L'Unione Nazionale Camere Minorili, *Italy*
122. Legal Aid of Cambodia (LAC), *Cambodia*
123. Legal Awareness Watch, *Pakistan*
124. Lumos, *United Kingdom*
125. Mental Disability Advocacy Center (MDAC), *Hungary*
126. Minori Stranieri Non Accompagnati (MSNA), *Italy*
127. Morogoro Saving the Poor Organization (MOSAPORG), *Tanzania*
128. Nagari Foundation, *Nigeria*
129. National Juvenile Justice Network, *USA*
130. Network for Peace and Child Development, *Niger*
131. Nisida European Study Centre, *Italy*
132. Nyankonton Aid Foundation, *Ghana*
133. Organisation Mondiale Pour L'Éducation Préscolaire (OMEP), *Canada*
134. PakTurk International Schools & Colleges (PakTurk ICEF), *Pakistan*
135. Partnership for Human Rights, *Georgia*
136. Partnership Network for Preventing Violence against Children, *Turkey*
137. Peace One Day, *Mali*
138. Plan International, *United Kingdom*
139. Platform for International Cooperation on Undocumented Migrants (PICUM), *Belgium*
140. Prisoners' Rehabilitation and Welfare Action (PRAWA), *Nigeria*
141. Quaker United Nations Office (QUNO), *Switzerland*
142. Red Latinoamericana y caribeñapor la defensa de los derechos de losniños, niñas y adolescentes (REDLAMYC), *Mexico*
143. REFORMAR, *Mozambique*
144. Reinserta, *Mexico*
145. RELAF- Red Latinoamericana de Acogimiento Familiar, *Uruguay*

146. Religiosos Terciarios Capuchinos, *Colombia*
147. Religiosos Terciarios Capuchinos, *Ecuador*
148. Rescue for Vulnerable Persons, RVP asbl, *Democratic Republic of the Congo*
149. Retrak, *United Kingdom*
150. Right to Education Initiative, *United Kingdom*
151. Rights International, *United Kingdom*
152. Salesian Sisters of Don Bosco Daughters of Mary Help of Christians (FMA), *Italy*
153. Save the Children, *United Kingdom*
154. Save the Children Romania, *Romania*
155. So They Can
156. SOS Children's Villages International, *Austria*
157. Stahili Foundation, *The Netherlands*
158. Sustainable Development Organization (SDO), *Pakistan*
159. The Commissioner for Fundamental Rights (UN NHRI), *Hungary*
160. Thinking Indigenous, *USA*
161. Undugu Society of Kenya, *Kenya*
162. Uno de Siete Migrando A.C, *Mexico*
163. Vides Internazionale, *Italy*
164. Vivere, *Switzerland*
165. War Child Holland, *The Netherlands*
166. War Child UK, *United Kingdom*
167. Watchlist on Children and Armed Conflict, *USA*
168. Young in Prison, *The Netherlands*
169. Youth Association for Development (YAD), *Pakistan*
170. Youth First Initiative, *USA*

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More than 7 million children are suffering in various types of child-specific institutions, immigration detention centres, police custody, prisons and other places of detention.

It is a reality that stands in direct contrast to the requirement of the Convention on the Rights of the Child, which clearly states that the detention of children must only be used as a measure of last resort. This means that children should in principle not be detained and States should always look first for non-custodial solutions. While some progress has indeed been made in recent years, the Study highlights a dire need to do much more in terms of deinstitutionalisation, diversion, ending migration-related detention and other measures in order to comply with the Convention.

It is evident from the views expressed by children in the Study that for them deprivation of liberty essentially means deprivation of their childhood. From this perspective, the Global Study argues that depriving children of their liberty is a form of structural violence, which States actually committed to eliminate under SDG 16.2. Since every child has the right to grow up in a family environment surrounded by love and care, it is the responsibility of States to invest more resources to support families and child welfare systems.

Ultimately, children deprived of liberty are invisible to the large majority of society and their fate constitutes the most overlooked violation of the Convention. As an initial step, this Global Study thus aims to help ensure that no child is left behind, and in particular, that no child is left behind bars.

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