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Access to Justice for Children Deprived of Their Liberty

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Citation

Liefaard, T. (2017). Access to Justice for Children Deprived of Their Liberty. In *Protecting Children Against Torture in Detention: Global Solutions for a Global Problem* (pp. 57-80). Washington D.C.: American University. Washington College of Law. doi:10.17606/n523-sd33

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Note: To cite this publication please use the final published version (if applicable).

Protecting Children against Torture in Detention:

Global Solutions for a Global Problem



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Access to Justice for Children Deprived of Their Liberty

DR. TON LIEFAARD*

Abstract

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

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1. Introduction

A child deprived of his¹ liberty finds himself in a highly vulnerable situation. Deprivation of liberty means that the child is placed in a detention centre, prison or other institution from which he cannot leave at will and which has generally been designed to prevent him from running away. Consequently, the child finds himself in a regime that lacks transparency, which makes oversight by family members and society as a whole challenging if not impossible and which makes the child particularly dependent and vulnerable. The specific vulnerability of children deprived of their liberty has been recognized under international human rights law. Article 37 of the UN Convention on the Rights of the Child (CRC) stipulates that a child may only be deprived of his liberty as a measure of last resort and for the shortest appropriate period of time (sub b). This core provision of international human rights law furthermore provides that if it is nevertheless regarded necessary to deprive a child of his fundamental right to liberty², he must be treated with humanity and respect for the inherent dignity of the human person, and in a manner that takes into account the needs of person of his or her age. States parties³ therefore are under the obligation to guarantee children deprived of liberty a legal status, which acknowledges:

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

In practice, there are great concerns about the millions of children deprived of their liberty worldwide.⁶ Various reports on the position of children in police cells, detention centers, prisons, jails, immigration centres, welfare institutions, psychiatric hospitals, military courts and other institutions show that the rights of many children are grossly violated and that this is happening in all parts of the world. Children are placed in institutions where there is overcrowding, no protection of privacy, no separation from adults,⁷ lack of hygiene, lack of access to day light and fresh air, lack of access to (mental) health care services, no education and no family contact⁸; parents or other family members may not even know that their child is detained and where. Children in institutions across the globe are confronted with various forms of violence, including peer-to-peer violence and self-inflicted violence, without staff or the institution administration responding to it

¹ Unless stated otherwise, this chapter refers to the child in the masculine form.

² See e.g. art. 9 (1) ICCPR.

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

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

⁵ Liefwaard 2015.

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

⁷ Cf. art. 37 (c) CRC.

⁸ Cf. art. 37 (c) CRC.

adequately. Staff may very well subject children to violence themselves, either through means that are unlawful or through legally sanctioned forms of violence, such as the use of force or restraint, screening methods and solitary confinement. As indicated by the UN Special Representative on Violence against Children, among others, there is a very thin line between illegal and legally sanctioned forms of violence,⁹ but even the use of the latter can be problematic in light of the rights of children, which include the right to be protected against all forms of violence¹⁰ and freedom from torture or other forms of cruel, inhuman or degrading treatment or punishment.¹¹ The widespread use of solitary confinement and weapons in institutions, even in institutions specifically designed for children, is particularly worrisome.¹² It is clear that the rights of children are seriously neglected and deliberately violated in institutions throughout the world, which jeopardizes the short- and long-term interests of the children and also of society.¹³ Of course, there are also examples of good or promising practices, but these exceptions confirm the rule that there are too many children in institutions and that they are at serious risk. The great and on-going concerns about deprivation of liberty of children have resulted in the UN General Assembly calling upon the UN Secretary General to conduct 'an in-depth global study on children deprived of liberty'.¹⁴

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

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

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

⁹ Joint report 2012, para. 36.

¹⁰ Art. 19 CRC. See also CRC Committee 2011;

¹¹ Art. 37 (a) CRC. Joint Report 2012;

¹² UN Rapporteur on Torture 2015; Liefwaard, Reef & Hazelzet 2014.

¹³ See e.g. CRC Committee 2007, paras. 13 and 14.

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

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

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

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

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

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

2.1 Access to Justice

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

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

¹⁸ See also DCI Belgium 2016, p. 23ff.

¹⁹ See e.g. art. 9 (1) ICCPR.

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

²¹ UN High Commissioner 2013, para. 4.

²² UN High Commissioner 2013, para. 4.

²³ UNICEF 2015, p. 18.

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

2.2 The Right to an Effective Remedy

a. International human rights law

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

²⁴ UNICEF 2015, p. 18.

²⁵ UNICEF 2015, p. 13. Cf. UNICEF 2008.

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

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

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

²⁹ Human Rights Committee 2004, para. 15.

³⁰ Human Rights Committee 2004, para. 15. See also art. 24 ICCPR.

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

It is clear that remedies can have different forms and are not limited to judicial remedies. Consequently, individuals cannot always claim such remedies, at least not in first instance. The wording of article 2 (3)(c) ICCPR indicates that the possibility of a judicial remedy must be developed as a form of appeal. Article 25 of the American Convention on Human Rights (ACHR) provides the right to an effective judicial remedy, under the ACHR and the national constitution.³² Under the European Convention on Human Rights (ECHR), however, the right to an effective remedy does not require access to a judicial remedy, 'since other remedies may present the required effectiveness'.³³ The type of remedy required is dependent upon the nature and gravity of the allegation³⁴ and is as will be further elaborated in paragraph 4 also related to the remedy's function.

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

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

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

³² De Schutter 2010, p. 733.

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

³⁴ Shelton 2015, p. 94.

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

³⁶ Art. 2 (3) ICCPR.

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

³⁸ Human Rights Committee 2004, para. 16.

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

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

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

b. Children's right to an effective remedy

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

2.3 Challenges and Barriers for Children

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

³⁹ Human Rights Committee 2004, para. 16.

⁴⁰ Human Rights Committee 2004, para. 16.

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

⁴² Shelton 2015, p. 1.

⁴³ Shelton 2015, p. 16.

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

⁴⁵ UN Doc. A/HRC/RES/17/18.

⁴⁶ CRC Committee 2003, para. 24.

⁴⁷ CRC Committee 2003, para. 24.

⁴⁸ CRC Committee 2003, para. 24.

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

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

⁴⁹ CRC Committee 2003, para. 24.

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

⁵¹ UN High Commissioner 2013, para. 15.

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

⁵³ UN Violence Study 2006.

⁵⁴ See e.g. CRIN 2016.

⁵⁵ UN High Commissioner 2013, para. 16.

⁵⁶ UN High Commissioner 2013, para. 17.

⁵⁷ UN High Commissioner 2013, para. 5.

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

⁵⁹ Liefwaard 2016, p. 905.

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

all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity'.⁶¹ Depending on the specific context in which the child finds himself, child-friendly justice has specific implications for the way children can be legally empowered to access justice on the one hand and for specific procedures revolving around effective remedies on the other. Deprivation of liberty is such a context.

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

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

Access to justice is relevant for children deprived of liberty, like it is for every other child.⁶² As mentioned in the introduction to this chapter, children deprived of their liberty must be recognized as rights holder in the first place,⁶³ which includes the right to an effective remedy. The introduction also highlighted the specific relevance of access to justice for children deprived of liberty, including protection against violence and serious forms of ill-treatment. Access to justice can safeguard equitable and child-rights treatment for all children deprived of their liberty, which essentially revolves around respect for the child's best interests, his right to live, survival and development (art. 6 CRC), the right to be reintegrated into society where he can play a constructive role and fair treatment including engagement with and participation in life in the institution.⁶⁴ For children deprived of their liberty, the right to make requests and lodge complaints turns out to be particularly relevant. 'Without access to complaint mechanisms, these children face an increased risk of suffering abuse of authority, humiliation, ill-treatment and other unacceptable deprivation of rights', according to the High Commissioner.⁶⁵ It is precisely because of this that international human rights standards recognize the right to make requests and lodge complaints as an essential feature of the legal status of the child deprived of liberty.⁶⁶ In practice, however, children deprived of their liberty have particular problems with accessing information, receiving legal and other appropriate assistance, including assistance by family members, and accessing mechanisms in the institution's vicinity that are, among others, offering accessible, age appropriate, safe, speedy and sustainable remedies.⁶⁷ Also the substantiation of claims concerning and allegations of ill-treatment are often hard to make for individuals deprived of liberty and this might even be harder for children.⁶⁸ Furthermore, children deprived of liberty belong to the most stigmatized children in society⁶⁹ resulting in the denial of their human rights and access to justice.

⁶¹ Guidelines on child-friendly justice, under II.c.

⁶² Art. 2 CRC.

⁶³ Art. 37 (c) CRC.

⁶⁴ For more on the functions of the right to complaint see para. 4.

⁶⁵ UN High Commissioner 2013, para. 27.

⁶⁶ Murdoch 2006, p. 32. Liefwaard 2008.

⁶⁷ UN Violence Study 2006; see also Liefwaard, Reef & Hazelzet 2014.

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

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

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

The position of the individual deprived of his liberty has received specific attention in international and regional human rights treaties and revolves around the requirement to treat them with respect for humanity and the inherent dignity of the human person⁷⁰ and to protect him against torture or other forms of cruel, inhuman or degrading treatment or punishment.⁷¹ This also concerns children deprived of liberty, although article 37 CRC additionally and explicitly provides that the child deprived of liberty is entitled to be treated in a child-specific manner, which among others implies that he must – in principle – be separated from adults and has the right to maintain contact with his family.⁷² The many international and regional standards developed for the treatment of prisoners and others deprived of liberty provided more detailed guidance on how to protect the substantive and procedural rights and interests and this includes access to complaints mechanisms.⁷³ Before going more into the specifics, it is important to note that most of the international standards reach out to different forms of deprivation of liberty. This is particularly true for the UN Rules for the Protection of Juveniles Deprived of their Liberty (JDLs; unofficially known as the Havana Rules), the most prominent international legal instrument for *children*, which is applicable to all forms of deprivation of liberty.⁷⁴

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

involved in radical groups or terrorist activities etc.

⁷⁰ See art. 10 ICCPR.

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

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

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

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

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

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

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

4.1 Introduction

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

⁷⁶ Rule 76.

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

⁷⁸ CRC Committee 2007, para. 89. See also Human Rights Committee 1992.

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

In practice, one comes across a wide variety of mechanisms for individuals deprived of their liberty to seek remedies or to access justice in other ways. And, in many countries, there is some kind of (formal or informal) complaint mechanism for prisoners, including children (see further below).⁷⁹ However, not much is known about how these complaints mechanisms for children operate in practice. In addition, there is hardly any evidence on what works or not, let alone that we understand how children experience these mechanisms themselves.⁸⁰ The following part is therefore largely based on international assumptions and consensus regarding what access to justice should entail—as a minimum—for children deprived of their liberty. However, one should be realistic; what is laid down in international regional human rights standards and subsequently called for by international (non)governmental organisations, including the CRC Committee, does not guarantee their effective application in practice⁸¹ and much more research is needed.⁸²

4.2 Forum and Functions of Complaints Procedure

The first category of issues relates to the forum or authority (hereinafter: forum) before which children can make requests or lodge complaints. As highlighted in paragraph 2, remedies can be sought and found through a wide variety of judicial and non-judicial mechanisms. International instruments too refer to different fora in- and outside the institution, but are not always consistent in this regard. This lack of clarity or guidance can be explained by (and explains in itself) the wide variety of complaints mechanisms one comes across at the country level. Van Zyl Smit & Snacken refer to four groups of mechanisms.⁸³ The first concerns *lay independent monitoring boards*, also called ‘board of visitors’, known in England and Germany. These boards can be approached informally and can mediate and resolve disputes. In general they cannot issue legally binding decisions, but they can make recommendations to the authorities on how to deal with complaints. The second mechanism is that of an *ombudsperson* for requests and complaints, a model that is for example present in many Central European countries. These ombudspersons, specialized in prisons or with a more general mandate, have the competence to investigate specific complaints and can make recommendations. The third model is the model in which local complaints committees can make binding decisions, which can be appealed to a central administrative organ, which also issues binding decisions. This model can be found in the Netherlands and Belgium⁸⁴ and include quasi-judicial elements. Fourth, there are examples of countries (e.g. Italy, France and Germany) in which judges and courts can play a role in matters concerning complaints or requests of individu-

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

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

⁸¹ See e.g. Goldson & Kilkelly 2013.

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

⁸³ Van Zyl Smit & Snacken 2009, p. 308-310.

⁸⁴ Cf. De Graaf, Christiaens & Durmortier 2016.

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

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

a. Remedy against unlawful or arbitrary treatment by the institution

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

⁸⁵ Van Zyl Smit & Snacken 2009, p. 310.

⁸⁶ Liefwaard 2012.

⁸⁷ Rule 77.

⁸⁸ Rule 57 (3) Nelson Mandela Rules.

⁸⁹ Rule 122.3 European rules for juvenile offenders.

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

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

b. Dispute settlement

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

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

⁹¹ UN Rapporteur on Torture 2015, para. 16ff; Liefaard 2008.

⁹² Shelton 2015, p. 94.

⁹³ Rule 56 (3) Nelson Mandela Rules.

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

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

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

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

The possibilities to lodge complaints and make requests, for example concerning leave, contact with family or transfer to another facility, as recognized in international standards essentially revolve around safeguarding communication between child and institution. This can be regarded as a third function of these mechanisms. It is connected to children's participation in the institution, in general and in decision-making affecting them. Children should be able to connect with life in the institution⁹⁷ and to participate in decision-making affecting them. Children are entitled to be taken seriously and the child's right to be heard is key in this regard.⁹⁸ Every child has the right to be heard and his views must be given due weight in accordance with his age and maturity.⁹⁹ This has implications for all decisions affecting children, including for example the use of disciplinary measures. Complaints mechanisms can safeguard that children's views are indeed taken into consideration.

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

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

⁹⁵ See Liefwaard 2008 for more on this Act and its application in practice.

⁹⁶ Liefwaard 2012, p. 248-249; see also Liefwaard 2008.

⁹⁷ Van Zyl Smit & Snacken 2009, p. 305.

⁹⁸ See also CRC Committee 2009.

⁹⁹ Art. 12 CRC.

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

d. Increasing transparency and the visibility of the child

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

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

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

¹⁰¹ Murdoch & Jiricka 2015, p. 73.

¹⁰² Van Zyl Smit & Snacken 2009, p. 306.

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

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

¹⁰⁵ See also Murdoch & Jiricka 2015, p. 73-74.

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

4.3 Legal Empowerment of Children

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

a. Information

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

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

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

¹⁰⁹ UN High Commissioner 2013, para. 5. See also Art. 5 CRC.

¹¹⁰ Guidelines on child-friendly justice, under IV.A.1.

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

b. Legal and other appropriate assistance

The right to (legal) assistance of children deprived of their liberty is considered another prerequisite for effective access to remedies. Every child deprived of his liberty has the right to legal and other appropriate assistance on the basis of article 37 (d) CRC. Legal assistance is directly relevant for the legal empowerment of children, not only in relation to the legality of the deprivation of liberty as such,¹¹⁵ but also to the right to an effective remedy during the deprivation of liberty. Children should have access to legal assistance¹¹⁶ and they 'should be considered as fully fledged clients with their own rights and lawyers representing children should bring forward the opinion of the child'.¹¹⁷ Additional forms of assistance can be considered here as well. Rule 77 JDLs provides that children should have the right to request assistance 'from family members, legal counsellors, humanitarian groups or other where possible, in order to make the complaint' and that '[i]lliterate juveniles' should be provided with special assistance they need to lodge a complaint. However, it is important to recognize that article 37 (d) CRC grants children deprived of their liberty the right to legal *and* other appropriate assistance. Other forms of assistance should be considered in addition to legal assistance and the importance of legal assistance should not be denied; moreover, the relevance of legal assistance is not limited to complaints mechanism, but can also play a role in other matters concerning the deprivation of liberty, including for example medical care, treatment plans, leave arrangements and decisions concerning placement and transfer. Both the CRC Committee's general comment no. 10 and the Guidelines on child-friendly justice underscore the need for specialized legal assistance,¹¹⁸ which includes the capability of communicating with children at their

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

¹¹² Guidelines on child-friendly justice, under IV.A.1.2.

¹¹³ Guidelines on child-friendly justice, under IV.A.1.3. and IV.A.1.4.

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

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

¹¹⁶ CRC Committee 2007, para. 82.

¹¹⁷ Guidelines on child-friendly justice, under IV.D.2.40.

¹¹⁸ See CRC Committee 2007, para. 92.

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

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

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

A final set of issues discussed here relates to child-friendly or child-sensitive¹²² complaints procedures. Complaints procedures should be speedy, confidential and safe. In addition, the authorities competent to receive complaints should be specialized and capable of communicating with children in order to enable children to participate effectively in the procedures. This also requires that children can exercise their right to be heard and are entitled to receive a duly reasoned decision, which they can understand.¹²³ Rule 76 JDLs underscores the importance of speedy proceedings; the child 'should have the right (...) to be informed of the response without delay'. Rule 57 of the Nelson Mandela Rules gives further guidance and provides for a possibility to approach a judicial or other authority in case of rejection of the complaint or in the event of undue delay. This possibility of appeal in case of undue delay cannot be found in the JDLs, but can indeed be regarded as an important legal safeguard, also for children deprived of their liberty. The requirement of undue delay is of critical importance for children, which is reason why the European Rules for juvenile offenders as well as the Guidelines on child-friendly justice also stress the need to avoid undue delay.¹²⁴

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

¹¹⁹ Guidelines on child-friendly justice, under IV.D.2.39.

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

¹²¹ Rule 121 European rules for juvenile offenders.

¹²² See UN High Commissioner 2013, para. 21ff.

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

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

¹²⁵ Rule 76 JDLs.

¹²⁶ Murdoch & Jiricka 2015, p. 73-74.

¹²⁷ See rule 57 Nelson Mandela Rules.

¹²⁸ Dünkel & Staňdo-Kawecka 2010.

¹²⁹ UN Doc. A/HRC/C/25/35, para. 29.

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

5. Conclusions

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

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

¹³⁰ CRC Committee 2009.

¹³¹ Rule 123 European rules for juvenile offenders.

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

¹³³ CRC Committee 2003, para. 25. See also CRC Committee 2007, para. 88.

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