Deprivation of Liberty of Children

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Contents

The author wishes to thank Ms. Chris Sandelowsky, LL.M, and Ms. Daniella Zlotnik, LL.M, for their research assistance.

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U. Kilkelly, T. Liefaard (eds.), *International Human Rights of Children*,
International Human Rights, https://doi.org/10.1007/978-981-10-3182-3_15-1

Abstract

International children's rights law is utterly clear. The use of deprivation of liberty of children must be limited to the absolute minimum. If it is nevertheless regarded necessary to arrest, detain, imprison, or institutionalize a child, states have the obligation to safeguard that her or his rights are recognized and adequately protected, regardless of the context in which the deprivation of liberty takes place. This chapter elaborates on the specifics of these two limbs of Article 37 CRC, the core human rights provision for the protection of children deprived of liberty. It analyzes the legal status these children are entitled to, specifies the corresponding negative and positive obligations for states, and explores avenues for an effective implementation.

1 Introduction

The core provision of international children's rights law concerning deprivation of liberty of children is Article 37 of the United Nations (UN) Convention on the Rights of the Child (CRC). This legally binding provision recognizes the impact of deprivation of liberty on children and consequently provides – in para. (b) – that children shall only be arrested, detained, or imprisoned as "a measure of last resort and for the shortest appropriate period of time". In addition, Art. 37(c) CRC stipulates that children who are deprived of their fundamental right to personal liberty must be treated with humanity and respect for the inherent dignity of the human person, and in a manner that takes into account the needs of persons of their age. This essentially revolves around the recognition that each child deprived of his[1] liberty remains entitled to all rights under international human rights law, including the CRC, and that states parties are bound to protect these rights and to enable children to enjoy their rights effectively (Liefaard 2008).

International children's rights law aims to protect children deprived of their liberty because of the impact of deprivation of liberty on children's rights and their short- and long-term interests (UN Human Rights Council 2015, para. 16). Overall, these children are placed in institutions lacking transparency, which challenges oversight by family members and society and which makes the child specifically dependent upon the institution's regime. Deprivation of liberty puts children in a particularly vulnerable position. Children deprived of liberty are often confronted with denial or (gross) violations of their rights including inadequate protection against violence and ill-treatment, lack of adequate services essential for their well-being and development, such as sanitation, nutrition, health care, and education, and lack of family contact (Meuwese 2003; Cappelaere et al. 2005; UN General Assembly 2006; Hamilton et al. 2011; UN Human Rights Council 2012, 2015; Human Rights Watch 2016a, b; Center for Human Rights and Humanitarian Law 2017; see also Liefaard et al. 2014). Moreover, the (over-)use of deprivation of

[1] unless stated otherwise, "he" also refers to "she".

liberty with regard to children is widespread and relates to different systems, such as the juvenile justice system, child protection system, (mental) health systems, and immigration system. Many children "languish in pre-trial detention for months or even years" (CRC Committee 2007b, para. 80), are held in immigration detention for inappropriate reasons (FRA 2017, p. 45) or are subjected to forms of administrative detention, without the necessary safeguards, such as judicial oversight, or without a clear legal or even unlawful basis (see, e.g., Hamilton et al. 2011). Children deprived of their liberty often belong to the most stigmatized groups in society, 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 involved in radical groups or terrorist activities, etc. (Liefaard 2008).

These sombre realities could give reason to advocate for the abolition of deprivation of liberty altogether (Goldson 2005). Goldson and Kilkelly (2013) point at the "manifest tension" between human rights and deprivation of their liberty of children in practice. They underscore the potential of the human rights paradigm, but ultimately advocate for the abolition of deprivation of liberty because of the practical limitations of human rights and the ineffectiveness of "rights-based approaches" in this specific context. From an international legal perspective, however, it is important to acknowledge that deprivation of liberty is not and will not be prohibited. Such a prohibition would simply not be acceptable for states, across the globe. The international community did nevertheless agree that children are a specific group of human beings, in need of special protection when deprivation of liberty is considered and subsequently used. This explains why international children's rights law provides strict(er) rules regarding deprivation of liberty of children; rules that are meant to offer a higher level of protection for children compared to adults.

This chapter addresses the implications of international children's rights law for deprivation of liberty of children. As described in the following paragraph, deprivation of liberty is used in different ways and in different (legal) contexts. This chapter takes a broad approach and is not limited to certain forms of deprivation of liberty. Unless stated otherwise, it aims to reach out to all forms. The chapter elaborates on the main implications of Art. 37 (b) CRC's requirement of lawfulness with a particular focus on the principles of last resort and shortest appropriate period of time (para. 3). Paragraph 4 subsequently addresses the legal status of children while being deprived of liberty and identifies its three components: basic rights, special protection rights, and reintegration rights. Special attention will be given to access to justice for children deprived of their liberty (para. 5). The chapter concludes with some key observations, also in light of the UN Global Study on Deprivation of Liberty of Children[2] (para. 6).

[2]This study has been commissioned by the UN Secretary-General on the basis of a resolution of the UN General Assembly (UN General Assembly 2015. The study aims to get a better understanding of the number of children affected by deprivation of liberty across the world as well as of the conditions under which children are deprived of their liberty; it is led by independent expert Manfred Nowak.

2 Deprivation of Liberty of Children

2.1 Different Forms and Contexts

Children are deprived of their liberty in many different ways, for different reasons and in different (legal) contexts. Deprivation of liberty includes arrest, detention, or imprisonment in the context of criminal justice and placement in child protection or child welfare institutions meant to protect children by offering a form of alternative care. It could also take the form of placement in psychiatric institutions, wards, or hospitals for children with mental health issues and drug rehabilitation centers and institutions for children with disabilities. Placement in reception or deportation centers in the context of (im)migration and detention for (other) administrative, security, or military purposes can also result in the child's deprivation of liberty (Van Keirsbilck et al. 2016, p. 23ff; Hamilton et al. 2011; see also Inter-American Commission on Human Rights 2011). The (legal) context of these forms of deprivation of liberty differs, so do the reasons and/or justifications for their usage. For the determination of the applicability of specific children's rights provisions and related international instruments, the context matters. However, above all, these forms of institutionalization have one thing in common, that is, they amount to deprivation of the child's liberty.

2.2 Defining Deprivation of Liberty

Deprivation of liberty is a limitation of everyone's right to liberty of the person (Art. 9 (1) International Covenant on Civil and Political Rights (ICCPR); see also Art. 3 of the Universal Declaration of Human Rights, Art. 5 (1) European Convention on Human Rights (ECHR), Art. 7 (1) American Convention on Human Rights (ACHR), and Art. 6 African (Banjul) Charter on Human and Peoples' Rights). Children have this right as well. Even though Art. 37 (b) CRC is not as explicit as Art. 9 (1) ICCPR in recognizing the right to personal liberty, it is meant to protect this right. Moreover, children are considered to be protected by the relevant provisions in general human rights instruments (HRC 2014, para. 3; see also Nielsen v. Denmark, para. 58).

The CRC does not provide a definition of deprivation of liberty; nor do the general human rights treaties at the international and regional level. A definition can be found in rule 11(b) of the UN Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), which defines deprivation of liberty as "any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority".[3] Under this definition,

[3]Similar definitions were later incorporated in the Optional Protocol to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT, Art. 4(2)) and the European Rules for Juvenile Offenders Subject to Sanctions Or Measures (Council of Europe 2009, rule 21.5.

placements in (semi-)open institutions from which children are not allowed to leave can also amount to deprivation of liberty as protected under Art. 37 CRC. This broad approach finds support in the position taken by the Human Rights Committee and in the case law of the European Court of Human Rights.[4]

According to the Human Rights Committee, "[d]eprivation of liberty involves more severe restriction of motion within a narrower space than mere interference with liberty of movement" (HRC 2014, para. 5). Examples of deprivation of liberty include according to the committee "police custody, *arraigo*, remand detention, imprisonment after conviction, house arrest, administrative detention, involuntary hospitalization, institutional custody of children and confinement to a restricted area of an airport, as well as being involuntarily transported" (Ibid.). The Human Rights Committee underscores that deprivation of liberty is without free consent. Whether this implies that children can also consent to deprivation of liberty, rendering them without protection under the ICCPR, remains unclear. Normal supervision of children by parents or family, however, may involve a degree of control over movement, especially of younger children, that would be inappropriate for adults, but that does not constitute a deprivation of liberty; neither do ordinary requirements of daily school attendance constitute a deprivation of liberty" (HRC 2014, para. 62, footnote 176). This in contrast to placement of a child in institutional care, which may be required by his or her best interests and amounts to deprivation of liberty (Ibid, para. 62).

The Human Rights Committee, thus, acknowledges that there is a gradual difference between deprivation of liberty and limitation of liberty of movement, and that the individual does not consent. Or as Nowak observes, "An interference with personal liberty results only from the *forceful detention* (emphasis added) of a person at a certain *narrowly bounded location* (emphasis added)…"; "[a]ll less grievous restrictions on freedom of bodily movement (…) do not fall within the scope of the right to personal liberty but instead under the freedom of movement" (Nowak 2005, p. 212).

The European Court of Human Rights has taken a similar approach under Art. 5 (1) ECHR and ruled 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" (Guzzardi v. Italy (1980), para. 93; Ashingdane v. UK (1985), para. 41;

[4]See also Inter-American Commission of Human Rights which defines deprivation of liberty in a similar way as "[a]ny form of detention, imprisonment, institutionalization, or custody of a person in a public or private institution which that person is not permitted to leave at will, by order of or under *de facto* control of a judicial, administrative or any other authority, for reasons of humanitarian assistance, treatment, guardianship, protection, or because of crimes or legal offenses" (Inter-American Commission on Human Rights 2011, para. 38). According to the Commission, "[t]his category of persons includes not only those deprived of their liberty because of crimes or infringements or non compliance with the law, whether they are accused or convicted, but also those persons who are under the custody and supervision of certain institutions, such as: psychiatric hospitals and other establishments for persons with physical, mental, or sensory disabilities; institutions for children and the elderly; centers for migrants, refugees, asylum or refugee status seekers, stateless and undocumented persons; and any other similar institution the purpose of which is to deprive persons of their liberty" (Ibid.).

H.L. v. UK (2004), para. 89; Rantsev v. Cyprus and Russia (2010), para. 314; Stanev v. Bulgaria [GC] (2012), para. 115; De Tommaso v. Italy [GC] (2017), para. 80).[5] The Court considers that deprivation of liberty comprises an objective and a subjective element (Storck v. Germany (2005), para. 74; Stanev v. Bulgaria [GC] (2012), para. 117). The *objective element* is that a person is confined "in a particular restricted space for a not negligible length of time" (Storck v. Germany 2005, para. 74). However, the case law of the ECtHR makes clear that deprivation of liberty is not limited to placement in closed institutions or the "classic detention in prison or strict arrest" (Guzzardi v. Italy, para. 95) and "it is not determinative whether the ward was 'locked' or 'lockable'" (H.L. v. UK (2004), para. 92). Open institutions can also fall under the protection of Art. 5 (1) ECHR (Bouamar v. Belgium (1988)), and placement in an open department of a psychiatric hospital can constitute deprivation of liberty despite the fact that the individual concerned is allowed to leave the hospital without supervision (Ashingdane v. UK (1985), para. 42). The European Court assesses the specific context in which a placement takes place and circumstances under which it is enforced. A range of different criteria is relevant in this regard including "the type, duration, effects and manner of implementation of the measure in question" (Guzzardi v. Italy (1980), para. 92; Medvedyev and Others v. France [GC] (2010), para. 73; Creangă v. Romania [GC] (2012), para. 91; see also Engel et al. v. The Netherlands (1976), paras. 58–59). Other relevant factors include the possibility to leave the restricted area, the degree of supervision and control over the individual's movements (H.L. v. United Kingdom (2004), para. 91), the extent of isolation, and the availability of social contacts (family, other detainees, and staff; Guzzardi v. Italy (1980), para. 95; H.M. v. Switzerland (2002), para. 45; Storck v. Germany (2005), para. 73).

The case law of the European Court is not very child-specific as far as the objective element of deprivation of liberty is concerned. "Age", for example, has not been explicitly mentioned as a relevant factor. A lower threshold for children with regard to the assumption that a certain placement amounts to deprivation of liberty can, however, be defended. This would be in line with Art. 24 of the ICCPR and the position of the Human Rights Committee calling for the adoption of a higher degree of protection for children in this context (HRC 2014, para. 62); a position that can also be assumed to underlie Art. 37 (b) CRC (Liefaard 2008).

Minority has, however, played a role in the case law of the European Court with regard to the *subjective element* of deprivation of liberty, which concerns a person's consent to the placement. According to the Court, "[a] person can only be considered to have been deprived of his liberty if, as an additional subjective element, he has not validly consented to the confinement" (Storck v. Germany (2005), para. 74; see also H.M. v. Switzerland (2002), para. 46). The significance of this subjective element

[5]Examples of limitations of movement (under Art. 2 of the Fourth Protocol to the ECHR) include the curfew, the duty to report to the police and inform the police about whereabouts, restraining orders or instruction to refrain from certain behavior (Trechsel 2005, p. 413; see also De Tommaso v. Italy [GC] (2017) and Human Rights Committee, 2014. Cf. EU Court of Justice, 28 July 2016, C-294/16 PPU.

has been limited by the Court's ruling that "the right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention" (H.L. v. UK (2004), para. 90; Stanev v. Bulgaria [GC] (2012), para. 119; see also De Wilde, Ooms and Versyp v. Belgium (1971), para. 65). This is particularly true "when it is not disputed that the person is legally incapable of consenting to, or disagreeing with, the proposed action" (Storck v. Germany 2005, para. 75; H.L. v. UK 2004, para. 90). The European Court therefore seems to assume that children (i.e., individuals that have not attained the age of majority, Storck v. Germany (2005), para. 75) cannot be considered to have the capacity to consent or object to the placement (see *a contrario* Storck v. Germany (2005), para. 75) and should be granted protection under Art. 5 ECHR. This position by the Court does not only offer a higher level of protection to children, as category of human beings, it also seems to have set aside the Court's earlier ruling that a child's placement by his parent (i.e., legal representative) does not amount to deprivation of liberty (Nielsen v. Denmark (1988)); a position which has met with considerable criticism for its lack of sensitivity to children's rights (Van Bueren 1995, p. 212ff; Kilkelly 1999, p. 35ff; Trechsel 2005, p. 415; Murdoch 2006, p. 314ff).

In conclusion, the definition of the Havana Rules, which is broad and refers to all placements in institutions from which a child is not permitted to leave at will, represents the international standard. It recognizes that children require an adequate and higher level of protection, which starts by acknowledging that many of the widely practiced forms of institutional placement of children amount to deprivation of liberty. And that, as a consequence, the children concerned are entitled to be fully protected under international human rights law, which has many child-specific implications. These implications will be addressed in the following paragraphs.

3 Requirements for Deprivation of Liberty

3.1 CRC Framework: Last Resort and Shortest Appropriate Period of Time

Art. 37 (b) CRC prohibits unlawful and arbitrary deprivation of liberty[6] and it provides that "[t]he arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time". The introduction of the requirements of last resort and the shortest appropriate period of time has been characterized as one "among the most notable improvements and innovations which the [CRC] sets out" (Cantwell 1992, pp. 28–29).

[6]The prohibition of unlawful and arbitrary deprivation of liberty can be found in the general international and regional human rights treaties; see Art. 9 (1) ICCPR, Art. 7 (2) and (3) ACHR, Art. 6 Banjul Charter, and Art. 5 (1) ECHR. The prohibition of arbitrariness cannot be found explicitly in Art. 5 ECHR but is implied; see Trechsel 2005. Art. 37 (b) CRC has been based on Art. 9 (1) ICCPR; Detrick 1999, p. 629.

The requirement of last resort can be found in general human rights provisions preceding the CRC. Art. 9 ICCPR, for example, stipulates that pretrial detention must not be used as a "general rule" (para. 3). Art. 5(1) ECHR provides an exhaustive list of justified reasons for the use of "detention," and the European Court has ruled in favor of release in numerous cases (see, e.g., Smirnova v. Russia, paras. 58–59, which relates to pre-trial detention). The CRC, however, is the only human rights treaty that explicitly acknowledges both requirements as part of the general requirements of lawfulness and non-arbitrariness (Schabas and Sax 2006, p. 78). It can be argued that the CRC provides a higher standard, not only because it is more explicit and further substantiates the requirement of legality of deprivation of liberty, but also because it reaches out to "arrest, detention and imprisonment" and is therefore not limited to pre-trial detention (Van Bueren 1995, p. 210). In fact, the CRC reaches out to all forms of deprivation of liberty, which requires some further elaboration.

3.2 Art. 37 (b) CRC: Not Limited to Juvenile Justice

The scope of Art. 37 (b) CRC has been subject to debate (Van Bueren 1995; Schabas and Sax 2006; Liefaard 2008). This provision's second sentence refers to "arrest, detention and imprisonment", despite the broader reference to deprivation of liberty in the first sentence, as well as in Art. 37 (c) and (d) CRC. During the drafting, the wording of Art. 37 (b) CRC was deliberately changed with the aim to limit the scope of the last resort and shortest appropriate period of time requirements to the context of juvenile justice (Detrick 1992, p. 477). Some countries were not willing to limit their discretion regarding forms of deprivation of liberty outside the scope of juvenile justice. Consequently, one could argue, on the basis of the drafting history, that the last resort and shortest appropriate period of time requirements only apply to juvenile justice cases (Van Bueren 1995, p. 209 and 214).

However, such a restrictive interpretation can be questioned. Only one year later, the Havana Rules were adopted, and this instrument represents a broad approach with a definition of deprivation of liberty that is not limited to juvenile justice (see para. 2). In addition, rule 2 of the Havana Rules provides that deprivation of liberty should be a "disposition of last resort and for minimum necessary period and should be limited to exceptional cases". According to Schabas and Sax, the approach of the Havana Rules forms part of "the trend towards the emancipation of deprivation of liberty standards from the narrower criminal law context to a broader scope of applicability" (Schabas and Sax 2006, p. 55), and with the Havana Rules, the international community deliberately chose to "overcome the traditional narrow perception of deprivation of liberty as a criminal justice issue only" (Ibid., p. 84). Indeed, a restrictive approach would result in a major inconsistency within Art. 37 CRC. It would also be difficult to reconcile it with the context and purpose of the CRC, specific CRC provisions, such as Art. 20 (3) CRC, and related instruments relevant for children deprived of liberty (Ibid, p. 85). Furthermore, it can be argued that the prohibition of discrimination (Art. 2 CRC) stands in the way of a strict interpretation of Art. 37(b) CRC.

More than a quarter of a century later, the protection of children deprived of liberty has clearly moved beyond the context of juvenile justice. The UN Committee on the Rights of the Child (CRC Committee) has expressed its concern regarding the lack of implementation of the requirements of last resort and/or shortest appropriate period of time in different contexts and routinely recommended states parties to implement the Havana Rules (see, e.g., CRC Committee 2012, para. 56(a), 2016b, para. 53(d), 2014, para. 37, 39(a) (g), 2016a, para. 60–61, 2015, para. 55(a). The Committee refers to both requirements in its General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin (CRC Committee 2005, para. 61). In relation to alternative care, the CRC Committee took a similar approach by underscoring that institutionalization, which may very well include forms of deprivation of liberty, must be a last resort (CRC Committee 2003a, para. 35; see also CRC Committee 2017a, para. 45 and Guidelines for the Alternative Care of Children, UN General Assembly 2010, paras. 23 and 132). Yet, the only General Comment in which the CRC Committee has comprehensively elaborated on the rights of children deprived of their liberty is the one on juvenile justice (CRC Committee 2007b).

Regional human right courts and commissions have also developed specific case law on detention of children that concerns the protection of children deprived of liberty in different contexts. The point of departure that deprivation of liberty should only be used if strictly necessary and as short as possible, regardless of its context, is a common standard in this case law.[7] In the context of immigration, it can be argued that the international community has even moved beyond the standards of Art. 37 (b) CRC by advocating for the abolition of the use of detention for immigration purposes (see also Smyth in this book [cross-reference]). And the foreseen Global Study on Deprivation of Liberty of Children is firmly grounded in the belief that all forms of deprivation of liberty should be a measure of last resort and be used only for the shortest appropriate period of time. Thus, it is fair to conclude that the international community has moved beyond the restrictive approach of the 1980s represented in Article 37 (b) CRC's wording. That is not to say that one should not recognize differences in context when it comes to the implementation of Art. 37 (b) CRC.

3.3 Requirements of Last Resort and Shortest Appropriate Period of Time

Introduction

The requirements of last resort and shortest appropriate period of time place states parties under the obligation to use deprivation of liberty regarding children with the utmost restraint and only after careful consideration, that is: based on an individual

[7]See, e.g. Blokhin v. Russia [GC] 2016; Bouamar v. Belgium 1988. The Inter-American Commission and Court have dealt with several cases outside of the criminal justice context, i.e., deprivation of liberty in airports, military bases, psychiatric hospitals, and orphanages; see Inter-American Commission on Human Rights 2011.

assessment regarding the necessity and proportionality of deprivation of liberty, while taking into account the best interests of the child (Art. 3 (1) CRC; Liefaard 2008, p. 84 with reference to Schabas and Sax 2006, p. 81). The complexity of this assessment is a given. In essence, the last resort requirement revolves around the availability and use of alternatives. As far as juvenile justice is concerned, Art. 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."[8] The appropriateness of deprivation of liberty requires an answer to the question of why its use is appropriate in light of the interests of the individual child and the circumstances of the case, which include the interests of others or the society as a whole. Art. 37 (b) CRC rules out the use of mandatory detention (Schabas and Sax 2006, p. 82). Minimum sentences can be challenged under this provision as well. The South African Constitutional Court has declared legislation imposing minimum sentences for 16- and 17-year-olds unconstitutional, since it implied the use of imprisonment as a first and only resort.[9] This not only violated Article 28(1)(g) of the South African Constitution, providing that detention of children should be a measure of last resort and used only for the shortest appropriate period of time, it also did not allow for individualized sentences, potentially resulting in a lower or non-custodial sentence. The Court explicitly referred to Article 37 (b) CRC and related UN resolutions. It quoted rule 17 (1) (a) of the Beijing Rules calling for sentences that are "in proportion to the circumstances and gravity of the offence" and to "the circumstances and needs of the juvenile as well as the needs of society." According to Skelton, the Court identified four principles that follow from international law and should be taken into account when considering the use of deprivation of liberty: "proportionality; imprisonment is a measure of last resort and for the shortest appropriate period of time; children must be treated differently from adults; and the well-being of the child is the central consideration" (Skelton 2015, p. 27). These principles result in a tailor-made approach, different in each individual case. The Court also made clear that the requirement of last resort means that if there is another appropriate option, it should be favored. If no other option can be considered appropriate, the duration of the imprisonment should be mitigated because of the fact that a child is concerned (para. 31).

The reasoning of the South African Constitutional Court underscores that children should be approached differently when it comes to the use of deprivation of liberty. This applies to other contexts as well (i.e., outside the context of juvenile justice), but requires that the application of deprivation of liberty is the result of a

[8]This list makes clear that alternatives could also be made available outside of the context of the juvenile justice system, e.g., through diversion to the child welfare system.

[9]Centre for Child Law v Minister for Justice and Constitutional Development and Others (CCT98/08) [2009] ZACC 18, para. 43 and. 9; see also para. 31.

specific and child-focused decision-making process that is firmly grounded in domestic law.[10]

Last Resort

Last resort presupposes that deprivation of liberty can only be used if other resorts are not considered appropriate or have proven to be inappropriate. This assumes that the objectives of the deprivation of liberty are clear. Both the objectives and the alternatives will be largely defined by the specifics of the context in which the deprivation of liberty takes place. For example, in the context of juvenile justice, it is important to differentiate between arrest, police custody, pre-trial detention, and forms of deprivation of liberty after conviction. These forms of deprivation of liberty serve different objectives, and the implementation of the last resort requirement requires that these objectives are given due consideration (see, e.g., Van den Brink 2018 on pre-trial detention). In the child protection system, deprivation of liberty may serve as a form of alternative care, but should be used only if family- or community-based alternatives, such as foster care or kafalah, are not appropriate (see Art. 20 (3) CRC). Article 5 (1)(d) ECHR allows for the use of detention for "educational supervision" of minors, but this means that the deprivation of liberty should result in placement in an institution that is designed and provided with sufficient resources for this purpose (Bouamar v. Belgium (1988), para. 50; see also D.G. v Ireland (2002) and Blokhin v Russia [GC] (2016)). Within the context of (im)migration, there are different forms of deprivation of liberty serving different purposes, such as immigration control or deportation; also the objective of protection of children is used in this context (see, e.g., Hamilton et al. 2011). The necessity and appropriateness of these forms of detention for children have increasingly been questioned. The CRC Committee has stated that unaccompanied and separated children should not be deprived of their liberty and that "[d]etention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status or lack thereof" (CRC Committee 2005, para. 61). The CRC Committee and the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families have furthermore taken the firm position that children should not be deprived of liberty based on their or their parents' migration status. The committees observe that "the possibility of detaining children as a measure of last resort, which may apply in other contexts such as juvenile 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" (CRC Committee 2017b, para. 10). As a consequence, they argue that "child and family immigration detention should be prohibited by law and its abolishment ensured in policy and practice" and that "[r]esources dedicated to detention should

[10]It is interesting to point at the developments regarding life imprisonment (without parole) in the USA where there is a clear movement toward recognizing that the use of imprisonment with regard to children should be based on an individualized sentence, while recognizing that children are different from adults; see, e.g., Kilkelly 2016; Scott et al. 2016.

be diverted to non-custodial solutions carried out by competent child protection actors engaging with the child and, where applicable, his or her family" (CRC Committee 2017b, para. 12). This firm position can count on the support (see, e.g., UN Human Rights Council 2015; see also Smyth in this book). 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 FRA 2017, p. 30–31).

Shortest Appropriate Period of Time

The implications of the requirement of the shortest appropriate period of time are somewhat unclear. The word "appropriate" was included in the final stages of the drafting and replaced "possible" (Van Bueren 1995, p. 214). It reflects – again – the need for a tailor-made decision in which the best interest of the child is a primary consideration (Art. 3 (1) CRC). In the context of alternative care, "appropriate" refers to the best interests of the child considerations that justify the separation of the child from his parents or family and subsequent institutionalization (Art. 9 (1) in conjunction with 20 (1) CRC). In addition, the placement should be appropriate for the "continuity in a child's upbringing" (Art. 20 (3) CRC). In the context of juvenile justice, appropriateness should be understood in light of the objectives of juvenile justice as laid down in Art. 40 (1) CRC. This means that the duration of deprivation of liberty should be conducive to the child's reintegration. At the same time, "appropriate" is not necessarily the shortest period of time. One could, for example, defend a longer deprivation of liberty if this is considered necessary for the protection of the child's best interests and harmonious development. It needs no explanation that this can be a slippery slope. It can be defended, however, that states parties are compelled to limit the duration of deprivation of liberty as much as possible and that appropriateness should also be understood in the light of the impact of deprivation of liberty on children, including the level of security. In particular with regard to the use of pretrial detention, this finds support in the Beijing Rules (rule 13.1) and the Havana Rules (rule 17) as well as in case law from the European Court of Human Rights in which the Court consistently refers to the shortest *possible* period of time with regard to pretrial detention (Nart v. Turkey (2008); Guvec v. Turkey (2009)). The requirement of the shortest appropriate period of time could also call for the use of a trajectory in which a child is transferred from a closed institution to a (semi-) open institution as soon as possible.

Severe Sentences

The CRC is confusing with regard to the use of deprivation of liberty as a disposition (i.e., in the context of juvenile justice). Art. 37 (a) CRC allows for the use of life imprisonment, provided that there is a "possibility of release". The inclusion of this provision is the result of compromise during the drafting (Detrick 1992, p. 475). It is clearly one of the weakest links of the CRC. Understanding it in light of Art. 37 (b) CRC is difficult and points at a major inconsistency within Art. 37 CRC. The CRC Committee has also observed that "a life imprisonment of a child will make it very difficult, if not impossible, to achieve the aims of juvenile justice despite the

possibility of release" and consequently recommends to "abolish all forms of life imprisonment for offences committed by persons under the age of 18" (CRC Committee 2007b, para. 77). The CRC Committee also underscores that sentences resulting in deprivation of liberty for a longer period of time must be subjected to periodic review (CRC Committee 2007b, para. 77). The position has also been embraced by the European Union in the Directive on procedural safeguards for children who are suspects or accused persons in criminal proceedings that calls for periodic review of all forms of detention by a court (Art. 10 (2) Directive (EU) 2016/800 (Official Journal of the European Union 2016).

Procedural Safeguards

The requirements of last resort and shortest appropriate period of time substantiate the overarching requirement of legality, which encompasses lawfulness and non-arbitrariness (see further Liefaard 2008, p. 174–184) and which can be challenged by the child before "a court or other competent, independent and impartial authority" (Art. 37(d) CRC). This right to *habeas corpus* also relates to the legality of *continued* deprivation of liberty. A form of deprivation of liberty may be justified in the beginning, but this may change over time. Under Art. 5 ECHR, the right to habeas corpus has played a key role in the assessment of prolonged or continued pre-trial detention. Pre-trial detention can only be continued if there are relevant and sufficient reasons to do so, and the threshold for this increases over time (see, e.g., McKay v. UK [GC] (2006), para. 45). Similarly, it can be argued that the inclusion of the requirement of the shortest appropriate period of time in Art. 37 (b) CRC provides a particular legal basis to challenge the legality of the deprivation of liberty over time and essentially calls for periodic review. In light of this, the CRC Committee recommends states parties to set fixed time limits (1) for the duration of pretrial detention and (2) for its judicial review, that is: preferably every 2 weeks (CRC Committee 2007b, para. 83). If deprivation of liberty takes place in the context of alternative care, the legal basis for periodic review can be found in Art. 25 CRC.

Some Concluding Observations

While the requirements of last resort and shortest appropriate period of time steer at the prevention of deprivation of liberty of children as much as possible, their implementation remains a problematic and complex issue. Reality shows that its implementation leaves much to be desired (see, e.g., Kilkelly 2017, p. 43ff; see also para. 1). This is in part related to the lack of specific guidance from both international standards and monitoring mechanisms at the international level on the implementation of these requirements. Other factors relate to lack of legal incentives, in domestic law, to use alternatives or deprivation of liberty only for a short period of time and to provide timely judicial reviews and the availability of alternatives and (financial and human) resources (or lack thereof) to effectively implement alternatives. The lack of awareness among legislators, policymakers, and professionals around the significance of these requirements and knowledge on how to prevent the use of deprivation of liberty is another issue of concern. Regarding the latter, it is important to recognize that social norms and perceptions, in general, but also, for

example, among professionals involved in the decision-making regarding deprivation of liberty may stand in in the way of implementation (see, e.g., CRC Committee 2007b, paras. 96 and 97). This all means that effective strategies related to deprivation of liberty as a last resort and for the shortest appropriate period of time require different kinds of action, at the same time. This action should particularly focus on:

1. the inclusion of strict norms for the use of deprivation of liberty in domestic statutory legislation, including grounds for deprivation of liberty, time limits, the obligation to explicitly consider alternatives, and procedural safeguards, including periodic judicial review; one could also consider the establishment of a minimum age for deprivation of liberty (see rule 11(a) Havana Rules);
2. the creation and availability of adequate alternatives, outside or within the legal system in question (see, e.g., Sampson et al. 2015; Kilkelly et al. 2016);
3. the education and training of decision-makers, which should include addressing existing perceptions.

Only then and only with support of international, regional, and national monitoring bodies, one could expect that something will change.

4 Legal Status of Children Deprived of Their Liberty: Rights and State Obligations

4.1 General Approach Towards Children Deprived of Liberty

Article 37 (c) CRC provides that if a child is deprived of his liberty, he "shall 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". This reflects the general human rights approach toward individuals deprived of their liberty, which assumes that each individual who is deprived of liberty remains entitled to all rights and freedoms under international human rights law (Liefaard 2008). Specifically with regard to children, Article 37 (c) CRC recognizes that each child deprived of liberty is entitled to be treated in a child-specific manner. This in essence boils down to treatment that is sensitive to children, and it places states parties under the obligation to establish special institutions for children (CRC Committee 2007b, paras. 85 and 89). Hence, Article 37 (c) CRC explicitly requires that children must be separated from adults, unless it is considered in the best interest of the child not to do so (cf. Art. 10 (2)(b) and (3) ICCPR). It also recognizes the right of the child to maintain contact with his family through correspondence and visits, save in exceptional circumstances, which essentially refers to the best interests of child as well (Van Bueren 1995, p. 220).

Treatment in accordance with Article 37 (c) CRC furthermore means that it takes into account the needs and interests of the individual child. This implies, also in conjunction with Article 3 (1) CRC, that the best interests of each child should be considered in relation to the child's placement and during his stay in the institution,

which calls for individualized approach. It also means that differences among children ought to be recognized and considered. Differences among children not only relate to age and maturity but also to gender, cultural, religious, and personal beliefs, ethnic background, status and health, including mental capacity, among others. Such differences should be taken into account when accommodating children, when providing basic services including education, (mental) health care, and means to manifest religion or beliefs, or when reintegrating children. Children deprived of their liberty should, in other words, not be regarded as a homogenous group, and institutions must accommodate differences among children through differentiation. According to rule 28 Havana Rules, "[t]he principle criterion for the separation of different categories of juveniles deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and more integrity and well-being". In connection with this, children should have access to means to question and/or challenge their placement and request for alternative placement (see further below).

Despite the differences among children deprived of liberty, it should be acknowledged that all children are entitled to be treated equally and to be protected against discrimination (Art. 2 CRC; Liefaard 2008, p. 228; Schabas and Sax 2006, p. 89). The right to be treated with humanity and with respect for the inherent dignity of the human person, supplemented by the right to be treated in a child-specific manner, implies that states parties are under the obligation to safeguard each child deprived of his liberty a legal status acknowledging:

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 (i.e., deprivation of liberty) 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 rights to be heard (Art. 12 CRC);
3. that the child has the right to an effective remedy against unlawful or arbitrary treatment (Liefaard 2015, p. 254; see also Liefaard 2008, pp. 225–226).

This children's rights approach has implications for many aspects of the deprivation of liberty. Detailed guidance is provided by the Havana Rules and its international and regional equivalents: the Nelson Mandela Rules, the standards of the Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT 24th General Report [CPT/Inf (2015) 1]; hereinafter: CPT standards), the Council of Europe's 2008 European rules for juvenile offenders subject to sanctions or measures (hereinafter: European rules for juvenile offenders or European rules), and the 2010 Guidelines on child-friendly justice. These instruments provide a substantial body of substantive and procedural rules concerning children deprived of their liberty. Many of these rules are relevant for children as they are to adults, but some are child-specific or call for child-specific implementation.

In its 10th General Comment, the CRC Committee calls upon states parties to incorporate the Havana Rules into national laws and regulations and to make them available to professionals, in the national or regional language (CRC Committee 2007b, para. 88). Despite the focus of this General Comment on children's rights in the context of juvenile justice, the committee lists principles and rules that "need to be observed in all cases of deprivation of liberty" (CRC Committee 2007b, para. 89). These include rules and principles relating to the physical environment and accommodation, education, health, contact with the outside world, the use of restraint or force, disciplinary measures, inspection and monitoring, and right to make requests and complaints.

4.2 Rights of Children Deprived of Their Liberty

In concrete terms, the legal status of children deprived of their liberty can be divided into three components: (1) *basic rights*, (2) rights to offer *special protection*, and (3) rights relevant for the children's *reintegration* (Liefaard 2008). These three categories will be briefly addressed below, followed by a paragraph with a special focus on the right to access to justice (para. 5). It should be acknowledged that the three components co-exist, but interrelate at the same time. Basic rights can, for example, be relevant for the child's reintegration, and some specific rights, such as the right to maintain contact with family, can be considered as a cross-cutting right, relevant for all three components.

Basic Rights

The first component of the legal status of children and corresponding (positive) obligations of states parties concern basic rights, such as the right to an adequate standard of living (Art. 27 CRC), to health care (Art. 24 CRC), to education (Art. 28 and 29 CRC), and to leisure and play (Art. 31 CRC). Basic rights have implications for accommodation, including minimum floor space, fresh air, hygiene and sanitation, food and nutrition, and personal care. The CPT standards, for example, refer to the need for rooms, which are "appropriately furnished and provide good access to natural light and adequate ventilation" (CPT Standards, para. 104; see also rule 63.1 European Rules for juvenile offenders referring to "climate conditions and especially (. . .) floor space, cubic content of air, lighting, heating and ventilation"; see also rule 13 Nelson Mandela Rules). Bad conditions can be on strained terms with children's basic rights; they may also amount to degrading or other forms of ill-treatment as prohibited under Art. 37 (a) CRC.[11] The CPT recommends the use of individual rooms and that shared sleeping accommodation should be justified on the basis of the best interests and after consultation of the child (Ibid, para. 104). This is a firmer

[11]It should be noted that the dividing line between violation of Art. 37 (a) and (c) CRC is not very clear; the same is true for the distinction between Art. 7 and 10(1) ICCPR; Liefaard 2008, p. 596; Nowak 2005; Schabas and Sax 2006.

approach than the one that can be found in the Havana Rules, which provides that sleeping accommodation should "normally consist of small group dormitories or individual bedrooms," while taking into account local standards (rule 33 Havana Rules). The CPT argues that "establishments with large dormitories should be phased out" because they put "[children] at a significantly higher risk of violence and exploitation" (CPT Standards, para. 104). The Havana Rules underscore the need for "regular, unobtrusive" supervision of staff of all accommodation, in particular sleeping areas and during the night (rule 33 Havana Rules; see also rule 64 European Rules for juvenile offenders).

The right to health care includes medical checks upon admission, general health care, and dental care (see also CRC Committee 2007b, para. 89). The health of children deprived of their liberty should be an institution's main concern, which is linked to sanitation. Therefore, children are entitled to be accommodated in a way that respects the child's "right to facilities and services that meet all the requirements of health and human dignity" (rule 31 Havana Rules), ideally in small-scale and open detention facilities (rule 30 Havana Rules). The Havana Rules provide that "[s] anitary installations should be so located and of sufficient standard to enable every [child] to comply, as required, with their physical needs in privacy and in a clear and decent manner". Other instruments, such as the 2015 Nelson Mandela Rules, provide more guidance and underscore that accommodation needs to meet the requirements of health and hygiene. In light of this, the position of girls must be acknowledged; girls should be provided "with ready access to sanitary and washing facilities as well as to hygienic items, such as sanitary towels" (CPT Standards, para. 106). Facilities for children should furthermore enable individualized treatment and should be "integrated into the social, economic and cultural environment of the community" (rule 30 Havana Rules). This points at the direct link between respect for basic rights and the reintegration of the child. Sanitation and hygiene are recognized as essential for the well-being of a child and the protection of a child's human dignity.

The rights to education and to leisure and play call for the availability of education and opportunities to participate in play, leisure, and recreational activities (see also Blokhin v. Russia [GC] (2016), para. 170). These kinds of activities should be part of the institution's daily program, which enables a child to engage with other children and which prevents isolation that may have a detrimental impact on his well-being and development. Facilities where children are detained should be safe, supportive to the reintegration of the child, and take into account "the need of the [child] for privacy, sensory stimuli, opportunities for association with peers and participation in sports, physical exercise and leisure-time activities" (rule 32 Havana Rules).

Basic rights also concern the protection of civil and political rights including the right to privacy (Art. 16 CRC), right to family life (Art. 16 CRC), and freedom of religion, thought, and conscience (Art. 14 CRC). The enjoyment of these rights should be fully respected and cannot be limited unlawfully or arbitrarily. This has implications for domestic legislation, which should provide the grounds on which, for example, the child's privacy can be limited, and under whose authority.

These rights also come with positive obligations and relate to the availability of means to enjoy these rights effectively. As far as the right to privacy is concerned, international standards assume that children should be allowed to use their own clothing (see rule 36 Havana Rules). The right to family life has been explicitly acknowledged in Article 37 (c) CRC, which provides for the right of the child to maintain family contact. This right has many implications, among others related to information for parents and family on the detention of their child (see also Art. 9 (4) CRC), the accommodation of the child (i.e., "decentralized", which facilitates family contact, rule 30 Havana Rules), and (non-limitation of) visits, also as part of disciplinary matters (see rule 67 Havana Rules). And the right of child to have his freedom of religion, thought, and consciences respected also comes with negative and positive obligations (Art. 14 CRC). First, a child may not be limited in the exercise of this right without a proper justification. Secondly, a child deprived of his liberty should be able to pray or attend a service, which assumes and implies the availability of representatives of different religions and believes (rule 48 Havana Rules). The freedom of religion also has implications for the food served in the institution (rule 37 Havana Rules).

Thus, the basic rights of the child deprived of liberty enshrine both negative and positive obligations for states parties. International and regional standards provide for detailed guidance, and, according to the CRC Committee, the specifics should be incorporated in domestic (statutory) law.

Special Protection Rights

Although children's basic rights also revolve around the protection of children's dignity and humanity, there are specific entitlements that aim to protect children's fundamental rights and freedoms – the second component of a child's legal status. First, the absolute right to be protected against torture and other forms of ill-treatment has particular relevance for children deprived of their liberty (Art. 37 (a) CRC). In addition, a child deprived of liberty has the right to be protected against all forms of violence as laid down in Art. 19 CRC, since placement in an institution means that that institution becomes responsible for the care and well-being of a child. It goes beyond the scope of this chapter to elaborate on the implications of both fundamental rights, but it is clear that these are directly connected to the special entitlements of children deprived of their liberty. These "special protection rights" correspond with both negative and positive obligations for states, including obligations to set up a regulatory framework for the use of disciplinary and protective measures, screenings measures, and force, to prevent the use of solitary confinement, to provide each child with information on his legal position, to provide for individual files and records, and to provide effective remedies and to safeguard independent oversight (see para 4.3). Some of these rights will be briefly addressed below. The right to have contact with the family, mentioned earlier as a cross-cutting right, can also be regarded as offering special protection to children deprived of their liberty. Family visits and correspondence contribute to the transparency of institution and the visibility of these children, which essentially serves the protection of their rights and interests.

It should be noted that whereas international instruments, such as the Havana Rules, provide detailed guidance on many substantive rights, less guidance is provided on the details of the most far-reaching limitations of and infringements upon rights and freedoms of children. In other words, states seem to have more discretion when it comes to the regulation of disciplinary measures and the use of force and screening measures, among others. The same is true with regard to the monitoring of institutions and access to justice (see further below).

Information and Files

For the enjoyment of rights, it is vital that the child is aware of his rights and understands how to enjoy these rights (Rap and Liefaard 2017). This presupposes that a child is fully informed about his rights upon admission. This corresponds with the duty of the institution to adequately inform a child immediately after he arrives. Rule 24 Havana Rules provides that a child "shall be given a copy of the rules governing the detention facility and a written description of their rights and obligations in a language they can understand". This information should include information on complaint mechanisms (i.e., "the address of the authorities competent to receive complaints," rule 24 Havana Rules) and legal assistance. Information should be provided "in a manner enabling full comprehension" (rule 24 Havana Rules), and institutions should help children "to understand the regulations governing the internal organization of the facility, the goals and methodology of the care provided, the disciplinary requirements and procedures, other authorized methods of seeking information and of making complaints and all such other matters as are necessary to enable them to understand fully their rights and obligation during detention" (rule 25 Havana Rules). In other words, information should be "child-friendly",[12] and information is an essential element of the legal status of children deprived of their liberty. International standards are very clear on the significance of information, on the types of information, and on the duties of institutions not only to provide information but also to make sure that children are capable of understanding it. Although it is understandable that an institution develops standardized information for all children, it needs to pay attention to the level of comprehension of individual children and recognize and subsequently address difficulties children may experience in understanding information. It is recommendable to incorporate the right to information and its specific implications for institutions in domestic legislation (see further Rap and Liefaard 2017 who provide examples of such legislation).

In addition to the child, the child's parents, guardians, or family should receive information. First of all, they should be informed about the deprivation of liberty as such. Second, they should be kept informed about the well-being and whereabouts of their child (see Art. 9 (4) CRC, rule 56 Havana Rules in case of illness, injury, or death of a child). This also includes information in case a child is transferred.

[12]See further the Council of Europe's Guidelines on child-friendly justice, in particular "Section IV. Child-friendly justice before, during and after judicial proceedings"; see further Liefaard et al. 2016; Rap and Liefaard 2017

Another relevant safeguard concerns the child's file (see rule 19 Havana Rules). Each child deprived of liberty should have a personal file which includes records regarding admission, transfer, and placement and personal, legal, and medical matters. A file should be regularly updated and reviewed, and a child should have the right to challenge the content of the file. This right is significant, since the file serves as an important source of information not only for the institution but also for the child himself. This is also relevant in relation to the application of disciplinary measures. A child's file should record decisions regarding limitations of rights, including disciplinary measures, and serves as an important source in case the use of disciplinary measures is being challenged or investigated. In this regard, it is important that domestic legislation regulates who can have access to files, apart from child himself and his parents or other representatives, in a manner that respects the child's evolving capacities. One could, for example, think of inspection and monitoring bodies, complaint committees, and judicial authorities.

Limitations of Rights: Restraint, Force, Screening, and Disciplinary Measures

As mentioned earlier, international children's rights law allows for limitations in the enjoyment of rights if this can be justified, in individual cases, in light of the objectives of the deprivation of liberty and provided that the best interests of the child are a primary consideration and that the right to be heard is respected. It therefore is not surprising that international standards do not prohibit the use of restraint, force, screenings methods, or disciplinary measures, for example, as means to maintain or restore order and safety in the institution and/or to protect children and staff. However, international and regional standards are clear in their claim that the use of restraint, force, screening mechanisms, and disciplinary measures should be limited to exceptional cases only (see, e.g., rule 63 in conjunction with 64 Havana Rules). According to the Havana Rules, "[a]ny disciplinary measures and procedures should be consistent with the upholding of the inherent dignity of the juvenile and the fundamental objective of institutional care, namely, instilling a sense of justice, self-respect and respect for the basic rights of every person" (rule 66). The Havana Rules are also clear that disciplinary measures that constitute cruel, inhuman, or degrading treatment must be prohibited. This includes "corporal punishment, placement in a dark cell, closed or solitary confinement or any other punishment that may compromise the physical and mental health of the juvenile concerned" (rule 67 Havana Rules; CRC Committee 2007b, para. 89). International standards provide more detailed guidance. Family contact should never be limited for any disciplinary purposes; labor should not be used for disciplinary reasons, and collective sanctions should be prohibited.

This approach, which finds support in other international standards and legally binding provisions such as Art. 37 (a) CRC (see also CRC Committee 2007a and 2011), implies that states parties must strictly regulate the use of limitation of rights in domestic legislation. Such legislation should include the prohibitions mentioned above and also provide the grounds for the use of limitations, describe the kind of conduct that could justify a limitation, and stipulate which legal safeguards are available to the child when he is confronted with limitations. These safeguards

include the right to an effective remedy, to information and duties for institution to register the use of limitations, to involve medical practitioners, and to report to external authorities, such as an inspectorate or other monitoring mechanisms (see rule 68ff Havana Rules and rule 72ff Havana Rules; see also rule 90.1ff, 93.1ff, 94.1ff, and 125ff European Rules for juvenile offenders). At the European level, the European Rules for juvenile offenders as well as the CPT standards elaborate quite extensively on the maintenance of good order in institution and draw states' attention to the prohibition of weapons and certain restraints (e.g., chains and irons) and the importance of using isolation, separation, and segregation with the utmost reticence (rules 88.1ff European rules). These instruments also underscore the significance of the role of staff members in avoiding the use of limitations, which can count on the support of the CRC Committee (CRC Committee 2007b, para. 89) and academic research (see, e.g., Liefaard et al. 2014).

Special Focus: Solitary Confinement

Solitary confinement is an issue that raises serious concerns and requires special attention. It is widely practiced in many different forms, and many different terms are used to point more or less at the same phenomenon, that is, a placement of an individual child, which keeps him in isolation from the other children within an institution and which excludes him from taking part in daily activities and having contact with the outside world (cf. rule 44 Nelson Mandela Rules). In general, its impact can be detrimental for the child's health and well-being and its usage on strained terms with international human rights (see below). Solitary confinement is used for a variety of reasons; it can be used for disciplinary purposes, to secure the protection of the juveniles, to control internal order, and for external security purposes (i.e., to prevent escape, Kilkelly 2012). The isolation of a child may be framed as solitary confinement, but also as segregation or separation. Although there is an increasing international trend promoting the abolition of solitary confinement of children, the international and regional European legal frameworks leave room for the isolation of children other than disciplinary reasons.

International Legal Framework

The Havana Rules (rule 67), the UN Standard Minimum Rules for the treatment of prisoners (Nelson Mandela Rules, rule 45(2)), and the European Rules for juvenile offenders (rule 95.3) are clear in ruling out the use of solitary confinement for disciplinary purposes. The CRC Committee also stated in General Comment No. 10 that disciplinary measures in violation of Article 37 CRC, including "closed or solitary confinement," must be strictly forbidden (CRC Committee 2007b, para. 89). The CPT has taken a different and more pragmatic approach by stating that "solitary confinement as a disciplinary measure should only be imposed for very short periods and under no circumstances for more than three days" (CPT Standards, para. 128). It adds that a child in solitary confinement must be provided with "socio-educational support and appropriate human contact" (Ibid.) and that he must be visited regularly ("at least once a day" (Ibid.) by health-care staff and be offered prompt medical assistance and treatment. Reports of recent visits indicate that the CPT might have

altered its course, since it recommended states to abolish solitary confinement on juveniles as a disciplinary sanction (CPT 2017a, b, c, d). The CPT standards, however, do not (yet) reflect this change of course.

Solitary confinement may violate Article 3 ECHR. The ECtHR has not (yet) developed case law specifically regarding the isolation of children deprived of their liberty. In cases with regard to adults, the ECtHR has found that complete sensory isolation coupled with total social isolation can destroy the personality and constitutes a form of inhuman treatment that cannot be justified by the requirements of security or any other reasons (Ocalan v. Turkey (no. 2) (2014), para. 107). At the same time, the ECtHR held that the prohibition of contact with other prisoners for security, disciplinary, or protective reasons does not in itself amount to inhuman treatment or punishment (Ocalan v. Turkey (no. 2) (2014), para. 107), leaving ostensibly much room for the imposition of solitary confinement. The boundaries that the ECtHR has set so far to limit the use of solitary confinement set a high standard for solitary confinement to become in violation of Article 3 ECHR.[13] It can be argued that with regard to children, an even higher standard should be applied (Liefaard 2008).

In many countries, solitary confinement is not only imposed as a disciplinary measure but also used as a protective measure (UN Human Rights Council 2015, para. 44). The European Rules allow in exceptional cases isolation in a calming down cell for a few hours (rule 91.4), separation from the others for security and safety reasons (rule 93.1), and segregation for disciplinary purposes where other sanctions would not be effective (rule 95.4). The CPT standards also refer to "solitary confinement for protection or preventive purposes" and to the use of a "calming-down room", which should be used only in "extremely rare case" or cases that are "highly exceptional" (CPT Standards, para. 129). Thus, the protection of children may provide a justification for the use of certain measures that result in a form of isolation from group processes or other children in particular. It can be argued that states in specific cases are compelled to do so in light of the obligation to provide a safe institutional climate which includes protection against violence from other inmates as well as the protection of other inmates against aggression of the child (i.e., the horizontal effect of the prohibition of torture and ill-treatment, Liefaard 2008, p. 602). An individual treatment program may also require an approach that in a way isolates a child from others. Having said this, the dividing

[13]The ECtHR made clear that *years* in strict isolation, combined with poor prison conditions such as an unheated cell and deprivation of food, amounts to torture and inhuman and degrading treatment (Ilascu and Others v. Moldova and Russia 2004). Piechowicz v. Poland and Horych v. Poland (2012) concerned the detention under a strict regime, with restrictions on visits, without sufficient mental and physical stimulation and without examining if there were concrete reasons for the prolonged application of that regime. This regime, which continued for several years, was also considered in breach of Article 3 ECHR by the ECtHR. The ECtHR does not require the absolute isolation of a prisoner for a situation to become in breach of Article 3 ECHR. A lack of communication facilities and difficulties for visitors to gain access to the prison may be enough to amount to a social isolation in violation of Article 3 ECHR (Ocalan v. Turkey (no. 2) 2014).

line between legally sanctioned used of isolation and unlawful treatment is rather thin (see, e.g., UN Human Rights Council 2012, 2015). It therefore remains critical to limit the use of isolation to the maximum extent possible. International standards are very clear on the obligation to prevent harmful isolation and to provide adequate assistance and safeguards, including duties to report to medical staff and inspection mechanisms, and to provide effective remedies.

Towards an Absolute Ban of Solitary Confinement?

The UN Special Rapporteur on Torture holds the view that the imposition of solitary confinement, of any duration, on juveniles is cruel, inhuman, or degrading treatment and violates Article 7 of the International Covenant on Civil and Political Rights and Article 16 of the Convention against Torture (UN Human Rights Council 2011, para. 77, 2015, para. 44). He recommends states to prohibit solitary confinement of *any* duration and for *any* purpose (UN Human Rights Council 2015, para. 86(d)). The Inter-American Commission on Human Rights (IACHR) supports this recommendation. Pursuant to a 2013 hearing on solitary confinement at the IACHR (C. Soohoo in Sarat 2017, p. 24), it observed that the Special Rapporteur had presented very disturbing information about how solitary confinement is applied to children in different countries to "soften them up", "protect" them, or provide "corrective discipline" and urged states to absolutely prohibit the placement of children in solitary confinement (IACHR 2013). The CRC Committee also supports the ban on solitary confinement in light of the right of every child to be protected against all forms of violence (CRC Committee 2011).

This international agenda reflects a movement toward the abolition of solitary confinement of children. It should be welcomed if one considers the negative health effects of confinement for children (Lutz et al. 2017, p. 167). It has been established that these effects can occur already after a few days in solitary confinement and rise with each additional day spent in such conditions. Research shows that solitary confinement appears to cause "psychotic disturbances." Symptoms can include anxiety, depression, anger, cognitive disturbances, perceptual distortions, paranoia and psychosis, and self-harm (UN Human Rights Council 2011, para. 62). While the acute effects of solitary confinement generally recede after the period of solitary confinement ends, some of the negative health effects are long term. The minimal stimulation experienced during solitary confinement can lead to a decline in brain activity in individuals after seven days. One study found that "up to seven days, the decline is reversible, but if deprived over a long period this may not be the case" (UN Human Rights Council 2011, para. 64). Additionally, lasting personality changes often leave individuals formerly held in solitary confinement socially impoverished and withdrawn, subtly angry, and fearful when forced into social interaction. Intolerance of social interaction after a period of solitary confinement is a handicap that often prevents individuals from successfully readjusting to life within the broader prison population and severely impairs their capacity to reintegrate into society when released from imprisonment (Ibid, para. 65). Apart from the evidence showing the damaging impact of solitary confinement, one should wonder what the use of these measures means for the child's sense of fairness and justice. Solitary confinement

can easily be used as a form of repression and abuse of power and as a way to avoid normal communication between staff and children. If that is the case, the institution runs the risk of contributing to or upholding a climate in which children are treated disrespectfully in which violence among children and between staff and children occurs (and can continue to occur) with long-lasting impact on the well-being, the development, and the reintegration of the children (see further Liefaard et al. 2014).

A total ban on solitary confinement may, however, tie the hands of the authorities responsible for ensuring the order of prison institution and safety of the children. An absolute ban may therefore even be counterintuitive to the protection of children. It is not unthinkable that there are scenarios in which solitary confinement or whatever it is called may be necessary for security or protection reasons. In such situations, international law does allow for it, but under the full implementation of the principle that the best interests of the child are a primary consideration (Art. 3 CRC). This requires a transparent decision-making process, during which the child is consulted (Liefaard 2008, p. 595). It also requires that the child has the right to remedy the decision, that the institution informs the child's parents, guardians, or closest relatives of the placement in solitary confinement. Another important element for the special protection of children deprived of their liberty is that their treatment be independently supervised or inspected (Liefaard 2008, p. 606). This relates to the next element of the special protection rights of child deprived of his liberty.

D. Inspections and Monitoring

Robust inspection and independent monitoring of places of detention is essential to ensure the accountability and the effective protection of the rights of children deprived of their liberty (Kilkelly 2012, p. 24). Hence, the Havana Rules and its international and regional equivalents underscore the significance of such inspection and monitoring mechanisms (see, e.g., rules 83–85 Nelson Mandela Rules). The Havana Rules stipulate that "[q]ualified inspectors or an equivalent duly constituted authority not belonging to the administration of the facility should be empowered to conduct inspections on a regular basis" (rule 72 Havana Rules). Such authorities should also be competent to conduct unannounced inspections, and they "should enjoy full guarantees of independence in the exercise of this function" (rule 72 Havana Rules). The competency of inspection and monitoring bodies should include the inspection of every aspect or condition of "institutional life that affect the physical and mental health of juveniles" (rule 73 Havana Rules) and the duty to report on the findings (rule 74 Havana Rules). Children should also have the right to talk in confidence to inspecting or monitoring officers. This is linked to the right to make requests and file complaints (see, e.g., rule 76 and 77 Havana Rules; see further para. 5).

International instruments provide little guidance on how the independent inspection and monitoring mechanisms should be positioned (e.g., at the national level or closer to institutions), but for their effectiveness, proximity seems relevant (Liefaard 2008). This enables inspectors to visit institutions on a regular basis and ensure that they understand the specific context in which the institution operates. A local

inspection mechanism could contribute to more community involvement. At the same time, a certain distance to the institution administration is important, in order to secure the mechanism's independence and objectivity. Inspection and monitoring mechanisms should also be able to connect with the government, for example, in case of structural problems or serious rights violations, which cannot be solved in the local level. Furthermore, it is important to point at the existence of international monitoring mechanisms, such as the CPT and Subcommittee on Prevention of Torture (under the Optional Protocol to the CAT; SPT), and the importance of cooperation between national and international mechanisms (see, e.g., rule 126.4 European rules for juvenile offenders). States that are party to OPCAT must establish a National Preventive Mechanism which aims to serve as an independent external monitoring body and can liaise between domestic monitoring and the work of the SPT (Art. 3 OPCAT; see further Van Keirsbilck et al. 2016, p. 43).

The same is true for additional national mechanisms that may play a role in the monitoring of institutions, including national human rights institutions, children's ombudspersons or commissioners, or the judiciary. Finally, it is important to highlight that the establishment of independent monitoring bodies does not exempt the state from the responsibility to inspect institution on a regular basis and assess if these are operating in accordance with national and international law (see rule 125 European Rules).

E. Separation Issues

One final issue that can be regarded as part of a child's special protection rights concerns the separation of different categories of children. Article 37 (c) CRC's requirement that children must be separated from adults, unless it is not in their best interests to do so, should primarily be seen as a requirement to protect the child against the negative influences of adults.[14] This seems straightforward, but there are some practical implications requiring specific attention. First, what does separation mean? Rule 13.4 Beijing Rules provides that children in pretrial detention should be separated from adults and be housed in a separate institution "or in a separate part of an institution also holding adults". Similar provisions can be found in rule 26.3 Beijing Rules on children in institutions. Although this leaves room for placement of children in facilities where adults are accommodated as well, the CRC Committee took a firmer stand point by providing that "[s]tates parties should establish separate facilities for children deprived of liberty, which include distinct, child-centred staff, personnel, policies and practices" (CRC Committee 2007b, para. 85). This position is based on rule 29 of the Havana Rules, which provides that "[i]n all detention facilities [children] should be separated from adults, unless they are members of the same family". The Havana Rules do allow for one exception. "Under controlled conditions, [children] may be brought together with carefully selected adults as part

[14]Although it also aims to safeguard child-specific treatment requiring child-specific facilities with specialized staff, among others, Liefaard 2008, p. 259ff

of a special programme that has been shown to be beneficial for the [children] concerned" (Havana Rules Rule 29). This relates the best interests of the child clause of Art. 37 (c) CRC, which "should be interpreted narrowly" and "does not mean for the convenience of the States Parties" (CRC Committee 2007b, para. 85; see also Schabas and Sax 2006, p. 92). One could think of situations in which the facilities for children are inadequate or detention in a separate facility would imply complete isolation (Van Bueren 1995, p. 222).

A related question concerns the position of children who turn eighteen, while being deprived of their liberty, and are technically no longer a child under Art. 1 of the CRC. Should they be transferred immediately to an adult facility? The CRC Committee argues that "[t]his rule does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after he/she turns eighteen" and that "[c]ontinuation of his/her stay in the facility for children should be possible if that is in her/his best interests and not contrary to the best interests of the younger children in the facility" (CRC Committee 2007b, para. 86).[15] This position fits in the increased attention for the position of young adults in the criminal justice system and related systems, such as the child protection system. For example, the European Rules for juvenile offenders provide that "[j]uveniles who reach the age of majority and young adults dealt with as if they were juveniles shall normally be held in institutions for juvenile offenders or in specialised institutions for young adults, unless their social reintegration can be better effected in an institution for adults" (rule 59.3). Outside the context of juvenile justice, there is hardly any guidance regarding children in transition from minority into majority. In the Netherlands, courts have taken the position that when a minor reaches the age of majority, he can in principle no longer be kept deprived of their liberty as a form of alternative. Article 5 (1)(d) ECHR does not allow for detention of others than minors for the purpose of educational supervision (The Hague Court of Appeal, 26 March 2009, ECLI:NL:GHSGR:2009:BH0778, paras. 4.3 and 4.4). At the same time, it can be argued that a certain transitional phase should be provided, among others, to avoid that these young adults do not receive aftercare and support in their reintegration (Liefaard and Bruning 2017).

Reintegration Rights

The third and final component of the legal status of children deprived of their liberty concerns their reintegration. Its relevance lies in the notion that deprivation of liberty should always be limited in time and that children have the *right* to play a constructive role in the society (see, e.g., Art. 40 (1) CRC). As a consequence, reintegration has to be at the core of the approach toward children deprived of their liberty, and this affects children's rights. The negative impact of deprivation of liberty should be minimized,

[15]See further Liefaard 2008, p. 263. In the context of juvenile justice, it can be argued that a child who turns 18, while he finds himself in an institution as part of an intervention (pretrial or post-conviction) for a crime committed before he turned 18, remains entitled to be treated under the protection of the CRC. The CRC Committee has not yet clarified its position in this regard.

and the child should be provided with opportunities (to continue) to develop and to prepare for an independent and constructive role in the society. Among others, this underscores the need for alternatives for closed institutions and activities relevant for reintegration during (and after) the deprivation of liberty. This is why the Havana Rules recommend the use of small-scale and open detention facilities (rule 30 Havana Rules) and to establish strong links between the institution and (services from) the community (see also CRC Committee 2007b, para. 89). It also explains why international standards focus so heavily on providing basic services including adequate and child-friendly accommodation, education and vocational training, and health care and individualized treatment programs (see also CRC Committee 2007b, para. 89; see also Blokhin v. Russia [GC] (2016), para. 170). These programs should be tailored to the individual child on the basis of a careful assessment, made as soon as possible after admission and subjected to periodic review (rule 27 and 28 Havana Rules; see also Art. 25 CRC; see also CPT standards, para. 109). The JDLs are also clear on the need for "arrangements" assisting children in returning to society, education, employment, and family life after release (rule 79 Havana Rules). Furthermore, the accommodation of the child has potential impact on his reintegration. In light of the heterogeneity of the group of children and the interests of individual children, institutions should differentiate between children. As mentioned earlier, rule 28 Havana Rules provides that "[t]he detention of [children] should only take place under conditions that take full account of their particular needs, status and special requirements according to their age, personality, sex and type of offence, as well as mental and physical health, and which ensure their protection from harmful influences and risk situations." In addition, "[t]he principal criterion for the separation of different categories of [children] deprived of their liberty should be the provision of the type of care best suited to the particular needs of the individuals concerned and the protection of their physical, mental and moral integrity and well-being" (rule 28 Havana Rules).

A related question is whether girls should be separated from boys. Apart from rule 28 Havana Rules, children's rights instruments are rather silent on this matter. Rule 26.4 of the Beijing Rules does recognize, however, that girls "deserve special attention as to their personal needs and problems" and that "they shall by no means receive less care, protection, assistance, treatment and training than [boys]". This position has been endorsed by the CPT using the same wording and adding that this requirement applies "despite the fact that their numbers are much lower and that detention centres are nearly always designed for male inmates" (CPT 2015, 1 para. 111). These provisions correspond with the prohibition of discrimination according to gender (Art. 2 CRC, rule 4 Havana Rules) and fit in the global recognition of the significance of gender differentiation, which resulted in general standards referring to the significance of differentiation.[16]

[16]See, e.g. 2015 Nelson Mandela Rules advocating for separation as far as possible and the CPT standards addressing "women deprived of their liberty" as a separate category requiring separate accommodations, CPT 2000

Again, the right to maintain contact with the family is of importance. Not only because the child can benefit from contact and support during his stay in the institution and subsequent reintegration program but also because many children reintegrate into their (extended) family. In light of this right, the location of the institution matters. International legal standards provide that a child should in principle be placed in a decentralized institution, e.g., in the vicinity of the child's family, which essentially supports the view that states should have smaller facilities within the community rather than large-scale institutions far away from family and relatives (rule 30 Havana Rules).

Since the child's placement matters for his reintegration, the child could benefit from the possibility to challenge his placement or request another placement if that particular placement better serves his needs and interests (in terms of treatment, contact with family, leave arrangements, etc.). This can be regarded as an element of the right to access to justice, but international standards do not provide specific guidance on this matter.[17]

Finally, it should be noted that the reintegration of children is not served by a disrespect for the child's humanity and inherent dignity. This first relates to the protection against ill-treatment and violence (in its many forms). It also relates to how children deprived of their liberty are perceived and portrayed in the society and to the attitude and examples set by professionals working in or around the institution. The CRC Committee rightfully observed the following: "If the key actors in juvenile justice, such as police officers, prosecutors, judges and probation officers, do not fully respect and protect [children's human rights and freedoms – TL], how can they expect that with such poor examples the child will respect the human rights and fundamental freedom of others?" (CRC Committee 2007b, para. 13).

5 Special Issue: Access to Justice[18]

5.1 Right to an Effective Remedy and Access to Justice

An essential element of children's legal status when deprived of their liberty is the right to an effective remedy, which forms part of the broader concept of access to justice, a cornerstone of human rights law (Shelton 2015). Prompt access to remedies is seminal to redress rights violations and secure protection against violence and ill-treatment, to enable investigations into the wrongdoing and the punishment of those responsible, and to ensure that children can benefit from adequate treatment, reintegration, and restorative measures. Judicial and other remedies can, in other words,

[17]Dutch law for children deprived of liberty in youth custodial institutions explicitly provides that they have the right to request an alternative placement or lodge a complaint against certain placement before the competent authority; see Liefaard 2008, p. 541ff

[18]This part has been based on one of the author's previous publications, Liefaard 2017

safeguard the enjoyment of children's human rights (Liefaard 2017, p. 62). Children should therefore have opportunities to access justice and challenge unlawful or arbitrary treatment. In addition, they should, in case of human rights violation, receive appropriate reparation, including compensation, and, where needed, measures, to promote physical and psychological recovery, rehabilitation, and reintegration (Art. 39 CRC, CRC Committee 2003b, para. 24).

Remedies must be effective, which concerns the competence of the relevant authorities to take decisions on the merits of the complaints and to provide adequate redress for any violation found (De Schutter 2010, p. 737). The state is subsequently held to make reparations (Human Rights Committee 2004, para. 16). It also enshrines that perpetrators of rights violations are brought to justice and held to account (Ibid.). In all, without an effective remedy, human rights would be toothless (CRC Committee 2003b, para. 24; UN Human Rights Council 2013).

5.2 International Standards for Children Deprived of Liberty: Right to Make Requests and File Complaints

The Havana Rules provide that "every juvenile should have the *right* to make a request or complaint, without censorship as to substance, to the central administration, the judicial authority or other proper authorities through approved channels, and to be informed of the response without delay" (rule 76, emphasis added). They furthermore stipulate 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 Havana Rules correspond with provisions in general international and regional instruments concerning the treatment of prisoners, which more or less provide the same minimum requirements (see, e.g., rule 56 (3) Nelson Mandela Rules).

5.3 The Functions of Complaint Mechanisms

Remedies can be sought through a variety of judicial and non-judicial mechanisms. The choice for a suitable complaint mechanism is – among others – related to the different functions complaint mechanisms can have. One could distinguish four functions (Liefaard 2012):

1. *Remedy against unlawful or arbitrary treatment by the institution*
   First, complaint mechanisms offer a remedy against unlawful or arbitrary treatment by the institution (Liefaard 2017, p. 69). This function offers protection against rights violations. It aims to facilitate investigation, accountability, compensation, reparation, and restoration. The available mechanisms should enshrine ways to formally question the treatment of the child 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.

2. *Dispute settlement*
   Complaints lodged by children deprived of their liberty may very well be about disputes or disagreements, which affect the well-being of children (de Graaf et al. 2016). In this regard complaint mechanisms can serve as a means to settle disputes or mediate between the child and the institution. One could argue that the settlement of disputes is a matter for the institution, and there may be no need to safeguard access to mechanisms outside. However, as indicated by the Havana Rules 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 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 could also be used as part of the procedure concerning rights violations or arbitrary treatment (Liefaard 2017, p. 70).
3. *Safeguarding communication between child and institution – right to be heard*
   The possibilities to lodge complaints and make requests, for example, concerning leave, revolve around safeguarding communication between the child and institution. Every child has the right to be heard, and his views must be given due weight in accordance with his age and maturity (Art. 12 CRC). This has implications for all decisions affecting children, including, for example, the use of disciplinary measures. Complaint mechanisms can safeguard that children's view are indeed taken into consideration. Communication between a child and the institution can assist in preventing the use of complaint mechanisms. The establishment of youth boards, through which there is regular communication between children and the institution administration, could also be helpful in this regard (Liefaard 2017, p. 71).
4. *Increasing transparency and visibility of the child*
   Complaint procedures can moreover make institutions more transparent and children more visible. They can facilitate the exchange of information regarding the treatment of children and give reason for further investigation into specific policies and/or practices. For transparency, one needs mechanisms positioned outside the institution. As mentioned earlier, international standards provide that states should set up independent inspection and monitoring mechanisms. These can play an important role in bridging issues that arise between institution administration and the child (Van Zyl Smit and Snacken 2009, p. 306 with reference to CPT 2nd General Report (CPT 1992, para. 54)). Moreover, they can make remedies accessible for children, pave the way to speedy dispute settlements and mediation, and assist children to find their way to formal proceedings (Liefaard 2017, p. 72).

5.4 Challenges for Children Deprived of Their Liberty to Access Justice: Legal Empowerment

Apart from the general barriers children face when seeking effective remedies,[19] children deprived of their liberty have particular problems with accessing information, receiving legal and other appropriate assistance, and accessing mechanisms in the institution's vicinity that offer, among others, accessible, age-appropriate, safe, speedy, and sustainable remedies (UN General Assembly 2006). The substantiation of claims concerning ill-treatment is often hard to make for children deprived of liberty (Murdoch 2006, p. 32). Furthermore, children deprived of liberty form a stigmatized group, which contributes to the denial of their human rights, including their right to access to justice (Liefaard 2017, p. 65).

In light to these challenges, *legal empowerment of children deprived of liberty* is key and relates to (1) information, (2) legal and other appropriate assistance, and (3) the availability of child-friendly or child-sensitive proceedings. These three elements will be highlighted briefly (see further Liefaard 2017):

1. *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 (CRC Committee 2009, para. 89. See also Penal Reform International 2013, p. 3). This starts with adequate information on the right to complaint, the addresses of the authority competent to receiving complaints and of agencies or organizations that can provide legal assistance, upon admission (Rule 24 Havana Rules; see also Rule 54 of the Nelson Mandela Rules). In the context of disciplinary measures, the child should be informed of the alleged infraction and given proper opportunity to present his defense, including the right of appeal to an impartial authority (rule 70 Havana Rules).

Information should be child-friendly and give due regard to their "evolving maturity and understanding when exercising their rights" (UN Human Rights Council 2013, para. 5). The guidelines on child-friendly justice, developed by the Council

[19]Barriers generally relate to the complexity of justice systems and the fact that children may be unaware of their rights; justice mechanisms may not be child-specific or child-friendly, discriminatory toward children, unsafe for children, intimidating, or stigmatizing (UN Human Rights Council 2013, para. 15), and cultural and social norms can stand in the way of accepting that children lodge complaints and claim redress or in recognizing that the rights of children are violated (UN Human Rights Council 2013, para. 15; see also UNICEF 2015, p. 80ff.); children often face 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 (UN Human Rights Council 2013, para. 16)

of Europe, could be of further assistance since they elaborate on the information and advice for children before, during, and after judicial proceedings.[20]

2. *Legal and other appropriate assistance*
   The right to legal and other appropriate assistance of children deprived of their liberty is considered another prerequisite for effective access to remedies while being institutionalized (Art. 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 but also to the right to an effective remedy during the deprivation of liberty. Other assistance can among others be provided by family members or humanitarian groups (rule 77 Havana Rules).

3. *Child-friendly procedures: effective participation, speediness, confidentiality, and safety*
   Complaint procedures should be child-friendly or child-sensitive,[21] speedy,[22] confidential,[23] and safe.[24] 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 he can understand.[25] The European rules for juvenile offenders provide that "[p]rocedures for making requests or complaints shall be simple and effective" (rule 122.1), which supports speedy and informal procedures over lengthy and formal ones. However, the matter concerned and the function of the remedy may call for careful examination by a higher authority that can issue decisions that are legally binding for the institution and/or the state.

[20]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 justice process, alternative civil proceedings or through other processes" (Guidelines on child-friendly justice, under IV.A.1.1.i and IV.A.1.1.j, resp.).

[21]See UN Human Rights Council 2013, para. 21ff

[22](See rule 76 Havana Rules and the European rules for juvenile offenders; see also Guidelines on child-friendly justice, under IV.D.4.50; rule 57 of the Nelson Mandela Rules gives further guidance and provides a possibility to approach a judicial or other authority in case of rejection of the complaint or in the event of undue delay

[23]Confidentiality is considered crucial, particularly in case of allegations of serious forms of ill-treatment (Murdoch and Jiricka 2015, pp. 73–74), but also in light of particular dependency and vulnerability of children and the risk of retaliation, intimidation, or other negative consequences of having submitted a request or complaint (see rule 57 Nelson Mandela Rules)

[24]Children deprived of their liberty should be able to lodge a complaint "without censorship as to substance" (rule 76 Havana Rules)

[25]See, e.g. Guidelines on child-friendly justice, under IV.D.2.44; see also CRC Committee 2009

6 Some Concluding Remarks

International children's rights law is utterly clear. The use of deprivation of liberty of children must be limited to the absolute minimum, and if it is regarded necessary, arrest, detain, imprison, or institutionalize a child, states have the obligation to safeguard that her or his rights are recognized and adequately protected. This chapter has elaborated on the specifics of the two limbs of Article 37 CRC, which is the core human rights provision for protection of children deprived of liberty and builds on similar provisions in international and regional general human rights treaties. The CRC clearly adds a child-specific and children's rights dimension that comes with specific obligations for states parties. International and regional children's rights instruments provide detailed guidance on how these norms should be incorporated and implemented in the domestic legal systems. International standards are detailed and strong on substantive norms, but less clear on procedural matters. They seem to lean more toward providing services and less on empowering children, including the right to remedy unlawful or arbitrary treatment effectively. This may ultimately mean that children are inadequately protected against ill-treatment and other forms of violence, which is worrisome, in light of the realities that millions of children deprived of their liberty face, across the globe.

Consequently, it remains key to prevent deprivation of liberty as much as possible. The stakes are high – children deprived of liberty find themselves in a delicate situation, which makes them particularly vulnerable and at risk of seeing their future perspectives wasted away. One may prefer complete abolition (see, e.g., Goldson and Kilkelly 2013), which can certainly be supported in the context of immigration, among others. In other contexts, however, such as juvenile justice, mental health, and child protection, it is realistic to assume that there will always be children deprived of their liberty and that these children's short- and long-term interests are used to justify this. This does by no means exempt states parties from the clear obligation to prevent the use of deprivation of liberty and to reduce its impact on children as much as possible, calling for short-term stays in child-friendly, open institutions, with no or minimal security measures and that actively engage with community actors, among others, families, schools, health services, and services offering recreational and cultural activities, sports, etc. In addition, the visibility of children inside the institutions is key. This calls, among others, for more attention for children's right to access justice and for available and accessible, independent monitoring mechanisms. It is highly recommended that the upcoming UN Global Study on Deprivation of Liberty of Children pays specific attention to access to justice mechanisms and identifies good practices of countries in which such mechanisms have been established and operationalized, supported by a sustainable basis in law. The presentation of such good practices should include information on how means to access justice can function effectively in practice, also in light of the particular challenges children face in the context of deprivation of liberty.

7 Cross-References

► Migration, Refugees, and Children's Rights

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