

Edited at WEST UNIVERSITY IN TIMISOARA / Romania  
The Centre of Research in Child-Parent Interaction (CICOP)

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## **Children Deprived of Liberty**

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The Center of Research in Child-Parent Interaction (CICOP)

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*Editors of the current issue:* Prof. **Philip D. Jaffé**, Director of the Center for Children's Rights Studies, University of Geneva (Switzerland) and **Snejana Sulima**, PhD, Associated researcher to the Center for Children's Rights Studies University of Geneva (Switzerland), Lecturer at the Faculty of Law, Alexandru Ioan Cuza University of Iasi (Romania)

**Founding Editor:**

**Ana Muntean**

Tel/fax +40 256 592657

**Address: str. Bogdăneștilor, nr. T32A, cam. 315, Timișoara,  
Romania**

**ana.muntean@e-uvt.ro**

The Journal TCTP can be accessed at:

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Secretary of the current issue:

**Ana MUNTEAN**

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# INTRODUCTION TO THE SPECIAL ISSUE: CHILDREN DEPRIVED OF LIBERTY

**PHILIP D. JAFFÉ**  
**SNEJANA SULIMA**  
**JULY 2017**



**Philip D. Jaffé, Prof.**

*Director of the Center for Children's Rights Studies, University of Geneva (Switzerland)*



**Snejana Sulima, PhD**

*Associated researcher to the Center for Children's Rights Studies University of Geneva (Switzerland), Lecturer at the Faculty of Law, Alexandru Ioan Cuza University of Iasi (Romania)*

From a Darwinian perspective that banks on the species' survival, children represent through the ages one of humanity's reliably greatest investments. Children are the recipients of massive societal material resources and, for communities and families, they are a constant and intense source of preoccupation in terms of protection and education. Overall, the success of children is not only the key to the human race's future, it is their very success as future adults, for a significant part, that sets the tone for how comfortably, both emotionally and materially, their parent's generation will enjoy the rest of their lives. In short, society and its members, whether as individuals or as families, should and do care a great deal about children. So, it is somewhat surprising that, in all countries, there are some glaring deficiencies in the way we treat children and, hence, reducing society's degree of peace of mind over the long term. One of these deficiencies has to do with the practice of depriving children of liberty and, as such, is ample justification for a Special Issue of the journal *Today's Children are Tomorrow's Parents (TCTP)*. By accepting to dedicate this issue to the question of children deprived of liberty, TCTP has boldly covered various facets of this phenomenon, indeed at times counterintuitively. This spe-



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cial issue has also strived to include quality contributions from a multidisciplinary array of authors that are based on legal and policy analysis with a more theoretical approach, while also welcoming more evidence-based empirical research.

- Timing is everything and TCTP delves into the heart of the world's current human rights agenda. Indeed, the international community is currently preoccupied with the 2017 launch of the Global Study on Children Deprived of Liberty, sanctioned by the United Nations in the Fall of 2016. **Anna D. Tomasi**'s contribution to this issue explains how this international priority percolated up through the supranational institutions and seized the global agenda.
- This issue of TCTP illustrates how, contrary to general laypersons' acceptance, the notion of children's deprivation of liberty is not limited to the stereotypical child and/or adolescent locked away in traditional prison-like institution designed to punish a so-called juvenile offender. Indeed, according to the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), commonly known as the Havana Rules, the very definition of what deprivation of liberty refers to is "any form of detention or imprisonment or the placement of a person under the age of 18 in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority". This covers a myriad of forms of placement, including of course detention and imprisonment, but also placement in mental health institutions, welfare institutions, administrative facilities, as well as numerous institutions which are not necessarily locked but where there is an implicit expectation that you are not allowed to leave.

Case in point, detention of children is often outright outrageous and has nothing to do with the children themselves. In two separate contributions spanning two continents, **Snejana Sulima** examines the issue of detention in relationship to migration of children towards Europe and **Andrea F. Chavarria** as it pertains to children and families reaching the United States of America from Central and South America. And to illustrate a dimension of how detention affects children in a counterintuitive manner that is often not well recognized, **Hannah Lynn**, **Céline Droz** and **Viviane Schekter** show how children, while themselves free and pursuing their lives in the community, are deeply affected by the incarceration of their parents. These authors provide examples how the adoption of good practices in favor of children caught in this predicament by no fault of their own can mitigate its effects.

- Throughout this special TCPT special issue there are several contributions that underscore the importance of recognizing children's fundamental human rights within the framework set out by the United Nations Convention on the Rights of the Child (CRC). In particular, CRC art. 37(c) requires that "Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. (...)". **Jean Zermatten**, a former Chair of the UN Committee on the Rights of the Child, provides a rich historical and panoramic commentary on children's deprivation of liberty as it pertains to the CRC and other pertinent supranational human rights instruments. A more focused analysis by **Stephanie Rap** and **Ton Liefwaard** addresses the central importance of the child's right to information in relationship to the complex and confusing process through which children transition when deprivation of liberty is considered an outcome option.
- What is the positive value of deprivation of liberty and what alternatives should be considered? **Kristen Hope** draws on research carried out in Palestine and how

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non-custodial measures and principles of restorative juvenile justice, such as mediation, are put into practice in a jurisdiction in which customary justice co-exists with state justice.

- One of the overarching goals of any intervention with children and adolescents who are in contact and/or in conflict with the law is to remain focused on ensuring that what is implemented favors healthy non-recidivistic pathways. This angle is covered by **Rachel Horan** who presents the notion of desistance and how the juvenile justice system can empirically favor this process of disengaging from future reprehensible behavior, ideally without the need to deprive children of their liberty. Finally, **Frank DiCataldo, Cory Linder, Jaclyn Neddenriep, Maxwell Christensen, Sean Domas** and **Robert Kinscherff** examine a small sample of juveniles convicted of homicide in the USA, subsequently detained, and released as adults. They find low recidivism rates and suggest that aging out may be a factor, whereas violent behavior during deprivation of liberty may be a better predictor of the presence of post-release recidivism.

We do hope that our selection of quality contributions inspires the various professionals of different disciplines active in the field of child protection to consider how the notion of deprivation of children's liberty acts as somewhat of a metaphor. It is a complex issue that requires substantial knowledge of fundamental principles of human rights in general, and of children's rights in particular, to ensure that as few children as possible are deprived of liberty, only for strictly defined justifiable reasons and for the shortest period of time. Procedural precautions should always be in place to avoid arbitrary and cruel deprivation of liberty of children in situations of migration, for no other reason than being on the move unaccompanied or with their families. Child-friendly guidelines should underpin how children are treated and lead to dispositions that authentically take into account their best interest.

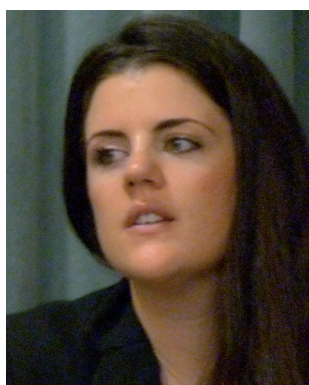
Society as a whole is indebted to all the children who are now adults, as well as prospectively to those who will in the future compose the adult portion of society. It is our interest to understand that while many children, if not most, may break rules and that some do indeed act in disturbing ways, depriving them of liberty is hardly ever a mature and effective response. Alternative community-based measures that nourish the natural development of healthy social trajectories and avoid deprivation of liberty serves the common good.

Victor Hugo, the famous French author, once stated: "He who opens a school door, closes a prison". We consider that no doors of institutions that deprive children of their liberty should ever be opened, but for the most exceptional and extreme circumstances.

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# A GLOBAL STUDY ON CHILDREN DEPRIVED OF LIBERTY – CREATING AN INTERNATIONAL PRIORITY

**Anna D. Tomasi**



**Anna D. Tomasi**

*Defence for Children International (DCI)*

## **Abstract**

Defence for Children International (DCI), together with a coalition of civil society organizations, called upon the United Nations General Assembly to undertake a Global Study on Children Deprived of Liberty in order to comprehensively collect data and statistics from across regions on the number and situation of children in detention; share good practices; and formulate recommendations for effective measures to prevent human rights violations against children in detention and reduce the number of children deprived of liberty.

The United Nations Secretary General's Study on Violence against Children (2006) identified the dearth of data and information on the numbers of children deprived of liberty and their conditions. UNICEF and the United Nations Committee on the Rights of the Child have also repeatedly expressed their concern about the lack of statistical data on the treatment of children in contact with the law.

**Keywords:** children; deprivation of liberty; detention; juvenile justice; data collection.

## 1. Between Rights and Reality – where the differences lie

International human rights law, and in particular the United Nations Convention on the Rights of the Child (CRC), establishes the clear obligation for ratifying States to use detention as a last resort, for the shortest period of time and to apply measures that are in the best interests of the child that aim at rehabilitation (art. 40 of the CRC). These obligations, however, are continuously violated by governments around the world. It is estimated that over 1,000,000 children are in criminal detention worldwide (UNICEF, 2009a). This number does not include the many cases that remain unreported or the other forms of detention, beyond criminal.

Deprivation of liberty is a broad term and would include “any form of detention or imprisonment or the placement of a person under the age of 18 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” (UNGA, 1991). It includes police custody, remand detention, involuntary hospitalization and institutional custody. It also includes children deprived of their liberty by private entities that are authorized by public officials to exercise powers of arrest or detention (UNHRC, 2015: 5).

Children are, for instance, detained in the context of immigration based on their or their parents’ migration status, which clearly violates the prohibition on arbitrary detention. The United Nations Committee on the Rights of the Child has explicitly recognized that immigration detention of children always constitutes a child rights violation, and calls on member States to “expeditiously and completely cease the detention of children on the basis of their immigration status” (UNCRC, 2012). Nevertheless, and increasingly in recent years, governments continue to detain migrant children.

Children may also be confined in health care institutions, including on the basis of disability or in the name of treatment for addiction. The vast majority of States have legislation in force that permits the detention of children

for psychiatric health purposes (Hamilton et al., 2011: 140). The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), however, explicitly reads: “the existence of a disability shall in no case justify a deprivation of liberty” (UNHRC, 2015: 11). Furthermore, children who use, or are suspected of using, drugs are commonly involuntarily confined in “rehabilitation centres” (UNHRC, 2015: 11).

In the case of criminal detention, the majority of children detained in criminal justice systems are in pre-trial detention (UNICEF, 2009), which contravenes the right to due process. In cases where children have been sentenced by judicial decision, it is generally for petty offences (Office of the SRSG on Violence Against Children, 2012). Many have been arrested and detained for offenses that are only a crime when committed by children. These “status offenses” include truancy, or running away from home. Others have committed no offense at all, but have been rounded up for vagrancy, homelessness, or simply being in need of care and protection. Detention is often completely unnecessary and generally not the last resort. In addition, alternatives to detention or non-custodial measures are not explored (in law or practice).

In all cases, detention is fundamentally harmful for children. It jeopardizes their development and consequently that of society. Children deprived of liberty are exposed to increased risks of violence and abuse by police, adult prisoners, prison officials and other detained children. Their civil, political, economic, social and cultural rights are denied. In addition, conditions of detention too often fall below international norms and standards. Children can be kept in squalid facilities without nutrition or recreation and without access to education. Deprivation of liberty is not supposed to entail deprivation of liberties; human rights are not to be completely negated (A/RES/45/111), particularly if the juvenile justice system aims ultimately at social reinsertion, for the child to assume a constructive role in society (art. 40(1) of the CRC).

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## 2. Out of (social) sight, out of (political) mind?

In the over twenty-five years since the adoption of the UNCRC the issue of child detention has never been adequately addressed and continues to lag behind compared to other areas of the international treaty. Detention of children is an extremely serious issue, not only violating basic international obligations (*sensu lato*), but exposing each and every child who is detained, for whatever reason, to further human rights violations (*sensu stricto*). With immigration detention currently on the rise, there seems to be more regression than improvement in the situation.

The fundamental obligations of States under international law have clearly not been understood, accepted or acted upon. A clear indicator is the number of times States have been urged by international human rights mechanisms to end inhumane practices that constitute *per se* human rights violations, for the use of the death penalty, torture, etc. The underlying concern, compared to other situations (child labour, trafficking, etc.), is that children in detention are actually in the “care” of the State, so whatever happens behind bars is effectively a conscious choice.

The issue of children in detention is not high on the social agenda either. What is failed to be understood is that child detention is not “merely” an issue of international legal obligations not being fulfilled, but it is also a social concern: there is strong evidence that detention worsens recidivism rates (UNICEF, 2009b). While detained, children are exposed to increased violence and deprived of education, making their future lives outside bars even harder. Furthermore, it has been found that detention of children increases public expenditure.

Deprivation of liberty of children has short- and long-term impact on the child and society at large.

## 3. The (civil society) way forward

States must seriously commit to concrete and effective implementation of the human rights codified in international human rights

instruments, primarily the UNCRC in respect to children deprived of liberty. States parties are required to only use deprivation of liberty in conformity with the law, as a measure of last resort and for the shortest appropriate period of time (art. 40 of the CRC). Measures which do not involve judicial proceedings must be promoted, such as diversion. Diversion avoids stigmatization and has positive outcomes for children and public safety, as well as being cost-effective. In cases where judicial proceedings are necessary, social and educational measures are to be the primary option as the “need to safeguard the well-being and best-interests of the child and promote reintegration must outweigh other considerations” (UNICEF, 2009b).

To turn human rights into reality we must firstly analyze and understand the scope and the scale of the problems on the ground. It has in fact been officially recognized that there is a severe lack of data relating to the situation of children in detention (UN, 2005: 191; OHCHR & UNODC, 2012); and as aforementioned, the general number of reference (1,000,000) is not comprehensive or certain. On such basis, Defence for Children International (DCI) decided to launch a campaign to call upon the members States of the United Nations General Assembly (UNGA) to commission the United Nations Secretary-General (UNSG) to undertake a Global Study on Children Deprived of Liberty (UNGA, 2014). The Study will take into account deprivation of liberty in all its forms, including: children in conflict with the law; children confined due to physical or mental health or drug use; children living in detention with their parents; immigration detention; children detained for their protection; national security; etc. In order to ensure that deprivation of liberty is clearly understood and thus effectively used as a measure of last resort, there is also critical need to improve the clarity around key concepts which are related to children’s rights and deprivation of liberty (such as last resort; shortest possible time; best interests of the child; access to justice; pre-trial detention; diversion; restorative justice; formal and informal justice systems; alternative measures; protective measures; age of criminal respon-



sibility; rehabilitation and reintegration; administration detention; inter alia).

The campaign calling for a Global Study on Children Deprived of Liberty – having obtained eager and strong support following numerous meetings with the CRC Committee, non-governmental organizations (NGOs), academics, UN experts and entities, and key member States (“the famous four”: Austria, Ethiopia, Qatar and Uruguay) – was officially launched at the office of the United Nations in Geneva in March 2014. The loose group of NGOs which launched the campaign, formalized into the “NGO Panel for the Global Study on Children Deprived of Liberty”.

In June 2014, the NGO Panel (co-convened by Defence for Children International and Human Rights Watch) organized an expert consultation in Geneva to discuss the Study, the strategy to have it formally requested by the United Nations General Assembly (UNGA) and the potential methodology to be followed in its realization. Many experts, academics, representatives of States took part and provided their insight on how to best proceed.

Two missions (June and October 2014) to New York were carried out by Defence for Children International (DCI) to lobby State representatives in light of the drafting of the UNGA child rights resolution which formally requested the Study (December 2014).

In September 2015, the UN Secretary General appointed the Special Representative to the Secretary General on violence against children (SRSG/VAC) to facilitate the initial coordination of the Study. The SRSG/VAC formed an apposite UN Task Force composed of: the SRSG for children and armed conflict; UNICEF; the Office of the High Commissioner for Human Rights (OHCHR); United Nations Office on Drugs and Crime (UNODC). The UN Task Force worked with the NGO Panel to galvanize momentum and continued support towards the Study and in particular the appointment of an Independent Expert to lead its realization.

In October 2016, the UN Secretary General appointed Professor Manfred Nowak as Independent Expert to conduct the Study, with the support of an apposite Advisory Board com-

posed of renowned experts in the field of human rights. The UN Task Force will also continue to support the realization of the Study, as well as the NGO Panel. The Study is set to formally commence its implementation phase in January 2017 and take approximately two years to conduct.

To undertake a Study of such caliber - which would comprehensively and scientifically analyze the status of the situation of children in detention worldwide and consider the good practices worth following - will take close coordination with States and other actors, and of course financial and human resources. The Study does not intend to be an end in itself, but rather a starting point: to get the ball rolling on this stagnant and even regressive issue, by getting all actors involved and thus placing child detention on the political and social agenda of countries worldwide. Through the Study, governments will be able to realize and improve their national policies and practices, while serving the best interests of both the child and society at large.

For more information, visit the NGO Panel website: <http://www.childrendeprivedofliberty.info/>

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# CHILDREN DEPRIVED OF THEIR LIBERTY IN THE MIGRATION CONTEXT IN EUROPE. THE ROLE OF THE LEGAL APPROACH

**Snejana Sulima**



**Snejana Sulima, PhD**

*Associated researcher to the Center for Children's Rights Studies, University of Geneva (Switzerland)/ Lecturer at the Faculty of Law, Alexandru Ioan Cuza University of Iasi (Romania)*

## **Abstract**

Although a growing body of regulations inspired by the CRC ban children's detention, an increasing number of data shows that the detention of migrant children is a too frequently privileged solution applied by authorities in European countries. Meanwhile, the procedures meant to identify the status of the children on the move (child status – below 18 years old, unaccompanied minor, irregular migrant, asylum seeker) are difficult and frustrating.

Based on relevant international and European regulations and on the case-law database of the European Court of Human Rights related to detention of migrant children, we aim to emphasise the importance of the legal constraining approach when national authorities disregard the human rights of migrant children. By its role in the legal and procedural harmonisation in the field of human rights, the Court can, from Strasbourg, compel the authorities of member states to be more efficient in protecting and respecting the rights of migrant children.

Also, based on different legal frameworks, policies and practices, we seek to identify better ways to deal with the situation of these children in order to avoid their detention and preserve

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the possibility to be properly received and efficiently integrated in host European societies according to child's rights incentives.

**Keywords:** Children's Rights, migration, child detention, European Law, European Court of Human Rights, Europe.

## 1. Introduction

In Europe the legal framework applied to migration is designed by three main actors: the States, the European Union and the International community. The rights and the limit to the rights of migrants are set by domestic law, by European directives and by international regulations. When it comes to migrating minors the domestic policies entail two different directions, sometimes opposed, depending on prioritized domain: childhood or migration. If applied policy consider the young migrants as children first, based on child-rights principles promoting their protection, the detention is most likely to be excluded. If the status of "migrant" is preferred, often at the expense of the childhood status, the approach to the children's liberty become more restrictive including the possibility to apply a detention regime to the minors. Yet, the retention of migrants in closed facilities, the "camp" (Bietlot, 2005), induces the stigmatisation against the "normality", and has as a consequence the association of the immigration with criminality. Furthermore, the detention becomes a common element of the politics applied to migrants and can induce a predominantly negative perception on migration.

In line with the European Convention of Human Rights (ECHR) the legality of the confinement of the person has to be as soon as possible controlled by a judge who will decide the immediate release of the person if the detention appears to be illegal. When the State's Court does not succeed to protect the individual's liberty the European Court of Human Rights (ECtHR) can interfere by responding to the applicant's individual request. This human rights control jurisdiction has a dual role. On the one hand, the European Court forces the domestic authorities to stop the violation of human rights of the applicant(s). Beyond the individual impact,

the State will be warned about its attitude in similar circumstances in order not to be condemned again. On the other hand, by a more general effect, the jurisprudence from Strasbourg can influence in a favourable manner the policies applied to migrants, in line with the principles of their human rights protection. In case-law related to children the Court recalls all the time that the extreme vulnerability of a child is a paramount consideration and must take precedence over the status as an illegal alien. Therefore, under the influence of the Court the States are encouraged to have a more active role by implementing positive measures for these children. Overall, the implication of the European Court in protecting migrant children's rights by the force of legal constraint could influence the politics of control over children migration in Europe. After unfolding the living reality of migrant children on the bases of reports released by several NGOs, agencies or international organisations (I), we review the international regulations which proclaim the principle of non-detention of migrant children (II). Furthermore, we explore the European regulations applicable to these children and the reactions of the European Court of Human Rights (ECtHR) when they claim violations of their rights, as protected by the European Convention of Human Rights (III). Finally, based on the data presented and on the interpretation of legal regulations by several organisations specialised in dealing with the problems of migrating children, we examine which could be the best practice in solving their problems, avoiding the detention (IV).

### I – Living reality of migrant children arriving in Europe

The context of children migration includes various situations: unaccompanied migrant children, children with families, asylum seeking and refugee children, and also children

whose parents are seeking asylum or are refugees. The presence of a child in a country without a legal status does not justify his/her detention. Unfortunately, in Europe, the cases of *de facto* migrant children detention are legion, in both transit and destination countries. The EU *acquis* on asylum and return sets specific standards concerning detention of children, which can be applied only as a solution of last resort, when other possibilities aren't sufficient. In practice, however, children, whether accompanied or not, are detained to prevent unauthorised entry or to facilitate their removal, sometimes in accommodations that are not equipped to cater to their needs (FRA, 2016). The use of detention can occur in various situations, at different times during legal procedures: while entering the borders, after the refusal of asylum seeker status, when the minor falls into irregular status, in case of delinquency, even if only presumed. When the status of the whole family is in question, the particular treatment of the child should be addressed through a child-protection lens. Even if the ultimate decision is the deportation of the parents because of their migration status, the decision involving children should not have a punitive approach (Cernadas, 2015). In the cases of asylum seekers, the courts assess whether or not the state authorities could apply a less radical measure as an alternative to deprivation of liberty. Yet, all too often, refugee children, asylum seekers or irregular migrants are put in detention. The decision to detain children in these situations is based solely on their own migratory status or the similar status of their parents, in conditions of arbitrary detention. Several NGOs and international organisations have often raised awareness on the tendency of European countries to detain unaccompanied migrant children and children with their parents in detention. Researching for more than ten years the situation of migrant children in Europe and beyond, Human Rights Watch has documented serious violations of children's rights arising from immigration detention of children (HRW, 2016a). Mainly, violations are due to the arbitrary detention, frequently with adults, being subjected to brutal treatment by authorities, and poor

conditions of detention. Recently, they found unaccompanied children facing routine and arbitrary detention in spite of the international law, the binding European directives and national law, according to which the detention of unaccompanied children can be used only as a measure of last resort, in exceptional circumstances, and for the shortest appropriate period (HRW, 2016b). For instance, the protective measure of detention of these children while awaiting transfer to a shelter is accepted by Greek law for 25 days, and up to 45 days under very limited circumstances. Yet children are frequently detained for much longer than that. Moreover, in detention facilities they face unsanitary and degrading conditions and abusive treatment, including detention with adults and ill-treatment by police. Also, the children are not provided with critical care and services (medical treatment, psychological counseling, and legal aid in a language they understand) (HRW, 2016b). Greece, which is one of the major gateways for migrants entering the EU, has particularly bad conditions for migrant children (HRW, 2008). In these conditions, children can spend months in detention centres, often with unrelated adults, in unacceptable conditions, as qualified by the Committee for the Prevention of Torture (CTP, 2016).

The comparative report released by the European Union Agency for Fundamental Rights in 2010 also revealed sometimes difficult conditions for accommodating minors in several EU member states. The type of accommodation varied: some lived in open accommodation centres for asylum seekers or in closed centres providing protected care; others lived in residential care centres for local children, in foster care or, in the case of older children, in semi-independent accommodation; some others were placed (in Netherlands) in detention facilities or 'protected reception', which was considered child-appropriate by some of the adult respondents (FRA, 2010).

In Malta, for instance, although according to government policy asylum-seeking children are to be placed in special, separated residential centres, in practice, when their age is disputed, these children may remain for months in overcrowded and unsafe adult detention



centres because of the very long procedures (FRA, 2010). In this country, the migration policy leads automatically to the detention of irregular incomers, including children (FRA, 2010). Here, authorities have the habit of presuming that anyone who is not ‘visibly’ a child, meaning anyone who looks older than *circa* 12, is an adult. Consequently, migrants claiming to be children must go through a prolonged age determination process, being locked up in an adult jail for weeks or months while the proceedings unfold. In those inappropriate detention facilities, children may be exposed to violence or exploitation (Farmer, 2013).

In France, in some cities where shelter space was overcrowded, and it was inappropriate that children share accommodation with adults, separated children ended up living in streets. In these situations, an NGO sent ‘prevention teams’, usually by night, to offer protection to those children found roaming the streets (FRA, 2010).

According to the Social Welfare Services of Cyprus, unaccompanied children have to be placed either in relevant institutions or in foster accommodation. But, according to the NGO respondents, separated asylum-seeking children are accommodated in shelters only in exceptional circumstances and they are never placed with foster families, as they are considered ‘too old’. In these circumstances, they have no choice but to find private accommodation, which is frequently deficient (FRA, 2010).

Recently, the United Kingdom (UK) House of Lords Committee Report on ‘Children in crisis: unaccompanied migrant children in the EU’ (2016) reveals evidence suggesting that “a number of underlying, cross-cutting problems affect unaccompanied migrant children” facing “a culture of disbelief and suspicion” in Europe. As to their accommodation, the report notices that “even when they have been correctly identified, unaccompanied migrant children may be accommodated in inappropriate, squalid facilities, amounting in effect to detention”. Many times children have been found classified as adults in UK detention, based on the person’s appearance. Some of them were being held in detention

centres for months, in conditions they describe as ‘distressing’ and ‘scary’. Based on examples driven from Bulgaria, Cyprus, Estonia, France, Germany, Greece, Hungary, The Netherlands, Poland, Slovenia, Sweden and the UK, the report assesses that the reception conditions “often include detention registration and identification” (House of Lords European Union Committee, 2016).

All these data indicate a deepening cleavage between the European countries’ declarative subscription to the children’s rights, without discrimination, and the reality lived by immigrant children that are very often confronted with the violation of their rights in these countries being incarcerated without guilt.

## **II – The principle of non-detention of migrant children**

Under the impetus of 1951 Geneva Refugee Convention, penalties must not be imposed on the refugees who, coming directly from territory where their life or freedom is threatened, enter the territory without authorisation, if they present themselves without delay to the authorities and show good cause for their illegal entry or presence (Article 31). The non-detention of migrant children is one essential principle which must drive every migration policy with the aim to adjust it to the standards of the child’s rights based approach. This principle is an essential standard for all cases, requiring, conversely, the adoption of special protective measures according to the vulnerable position of these children (UNICEF, 2012: § 93), it is a valid principle both for unaccompanied children and for children migrating with their parent(s). Some states’ authorities erroneously argued that, to preserve family unity, children could be detained along with their parents. According to a correct interpretation of the Convention on the Rights of the Child (CRC, 1989) and its principles – best interest of the child, family unity, and non-detention – this type of situation must lead to releasing the entire family and, if necessary, housing all its members in social protection open centres, which are not locked facilities (UNICEF, 2012, OHCHR, 2010, Special Rapporteur, 2009, 2012). On the contrary, the interpretation of the Article

18 of the CRC in relation to the migrant children's situation leads to recognise the member States' obligation to ensure the establishment of institutions, facilities and services adjusted to the care of those children. Moreover, maintaining children in detention with their parents on the premise of favouring family unity violates the principle of the best interest of the child, principle which must prevail and be utilized as the key evaluation tool in all decisions affecting migrant children (Special Rapporteur, 2012).

Within the framework of Juvenile Justice, the Article 37 (b) of the CRC allows the detention of children, but exclusively as a measure of last resort and for the shortest appropriate period of time. This article is applicable only in those cases where the minor has committed a criminal offence, and not an administrative transgression such as irregular migration. Consequently, the detention of children on the sole basis of migration status is not in accordance with the CRC (CRC Committee, 2012: 22). In the same spirit, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) argued that the status of irregular migration of a child cannot, or very rarely could, justify his/her deprivation of liberty. Therefore, the lack of resident status, being unaccompanied or separated, cannot justify child detention (CPT, 2009). The deprivation of liberty encompasses placement of a child in any custodial settings from which s/he is not permitted to leave. In 2012, Jean Zermatten, then Chair of the Committee of the Rights of the Child, underscored that the rights of all children could only be ensured if children were respected as full and independent rights-holders, regardless of circumstances and status (Committee on the Rights of the Child, 2012).

In all the circumstances we reviewed, States are urged to ensure a rights-based approach for both unaccompanied and accompanied children and to mobilise the essential child protection system. The International Detention Coalition (IDC) promotes models of alternative measures to detention of migrant children that are in line with the CRC. These measures involve "preventive procedures and

legislation, child rights and needs based assessment and referral procedures, timely and rights-based case-management procedures; regular, periodic reviews of the situation of children in migration accommodation; safeguard against abuse and access to complaint and remedial mechanisms in instances where such occurs; and defined case-processing timelines that ensure resolution within a reasonable duration" (IDC, 2016).

### **III – The European legal enforcement**

Although according the European Convention on Human Rights (ECHR) the liberty of the person is a general principal and a binding rule for member states, it comprises a list of grounds for the legal limitation of the persons' liberty (Article 5 § 1). Based on the interpretation of Article 5 (1) f, the Convention allows the lawful arrest or detention of the person "against whom action is being taken with a view to deportation", facilitating this way the removal of an unauthorized person. Nevertheless, under the EU law, the overarching principle is that the detention of persons seeking international protection and of those into pending return procedures must be necessary (FRA, 2015). In order not to become arbitrary, the detention has to be motivated and the detainee must be offered the access to speedy judicial review.

At the EU level, several binding norms establish the framework of legality regarding the persons on the move in Europe and regulate the possibility to limit their freedom (II.1). By interpreting the European Convention of Human Rights (ECHR) in cases related to the detention of migrant minors, the European Court of Human Rights (ECtHR) ascertained in many occasions the violation of the rights of these children (II.2).

#### **III.1. European Law**

As interpreted by the Strasbourg Court, the difference between "deprivation of liberty" and "restriction on freedom of movement" is one of degree or intensity and not of nature or substance (ECtHR, *Guzzardi v. Italy*, 1980). In the Reception Conditions Directive (2013/33/EU), the "detention" is characterized as the "confinement of an applicant by

[an EU] Member State within a particular place, where the applicant is deprived of his or her freedom of movement” (Article 2 (h)). In any case, the detention must be a last resort and all alternatives must be exhausted first, unless such alternatives cannot be applied effectively in every individual case (Article 8 (2) of the revised Reception Conditions Directive (2013/33/EU), Article 15 (1) of the Return Directive (2008/115/EC)). Therefore, detention can be applied only after the careful consideration of all possible, less constraining alternatives. The states have to lay down rules for measures alternative to detention into national law (Article 8 (4) of Reception Conditions Directive). Such possible alternative measures include: reporting obligations at regular intervals to the police or immigration authorities; surrender the passport or travel document; respecting residence requirements (living and sleeping at a particular address); release on bail with or without sureties; guarantor requirements; release to a care worker support or under a care plan with community care or mental health teams; electronic monitoring by tagging (FRA, 2015). Although measures alternative to detention do involve restrictions on the freedom of movement, they are far less constraining than detention.

Several provisions contain specific rules for minors, which, in the sense of European law, are considered to be “vulnerable persons” (Article 9 of the Return Directive (2008/115/EC); Article 11 of Reception Conditions Directive (2013/33/EU)). They can only be detained as a measure of last resort and all necessary efforts must be made in order to release and place them in accommodations which are suitable for them. Detention is an exception for unaccompanied minors seeking asylum and must not be applied in prison accommodations. EU laws also set some minimum standards regarding the accommodation.

The Qualification Directive on the refugees (Council Directive 2004/83/EC, article 30) and the Reception Conditions Directive on asylum seekers (Council Directive 2003/9/EC, article 19) stipulate that unaccompanied children have to be placed either with adult relatives, a foster family, in specialized centres for minors or in other suitable accommodation facilities for children. Moreover, the child must be put in the position to express his/her view regarding the choice of placement and the expressed opinion has to be taken into account (Council Directive 2004/83/EC, article 30). Overall, the EU laws encourage member states not to put migrant children behind bars and to use legal possibilities alternative to detention, taking into account the best interests of the child.

Nevertheless, as it was fairly observed, the European asylum framework is unfair in several respects. It disproportionately burdens some EU states, such as Greece, which are often those with the lowest capacity to receive and process asylum seekers, while allowing others such as the Czech Republic, Baltic States, Slovenia and others<sup>1</sup> to largely avoid responsibility. The applicable Dublin regulations should be replaced with ways to share responsibility equitably among EU members (Bochenek, 2016a; Guild et al., 2015).

### **III.2. The legal constraint of the European Court of Human Rights**

Under the ECHR, the place, regime and conditions of detention of the person must be appropriate, otherwise they may raise an issue under Articles 3, 5 or 8. The Court will look at the individual features of the conditions and their cumulative effect. This includes, among other elements: where the individual is detained (airport, police cell, prison); whether or not other facilities could be used; the size of the containment area; whether it is shared and with how many

<sup>1</sup> According to the Eurostat the distribution of asylum seekers across the EU is highly uneven, see *Eurostat news release 112/2015*, 18 June 2015. As to the applicants considered unaccompanied minors in the EU Member States the highest number was registered, in 2016, in Germany (with almost 36 000 unaccompanied minors, or 57% of all those registered in the EU Member States), followed by Italy (6 000, or 10%), Austria (3 900, or 6%), the United Kingdom (3 200, or 5%), Bulgaria (2 750, or 4%), Greece (2 350, or 4%) and Sweden (2 200, or 3%). In contrast, the States which recorded the least share in all minor applicants in the EU are Spain (0.7%), Lithuania (0.6%), Latvia, Poland (2.4%), France (3.1%), and zero or no data from Czech Republic or Estonia (Eurostat, 2017). See *Eurostat news release 80/2017*, 11 May 2017.

other people; availability and access to washing and hygiene facilities; ventilation and access to open air; access to the outside world; and whether the detainees suffer from illnesses and have access to medical facilities. An individual's specific circumstances are of particular relevance, such as if he or she is a child, a survivor of torture, a pregnant woman, a victim of trafficking, an older person or a person with disabilities.

A large number of judgments deal with the lawfulness of the detention of migrants in general and of children in particular. Such detention will be lawful where a removal procedure is pending against adult migrants. If the removal proves to be impossible, the detention can no longer be justified (Sicilianos, 2015).

Many times, Strasbourg judges interpreted children's detention from the perspective of the inhuman or degrading treatments, finding the violation of Article 3 of the ECHR, prohibiting torture and the inhuman or degrading treatment. For instance, the Court qualified the detention of a five-year old Congolese child for two months in a transit center for adults run by the Aliens Office near Brussels airport as an inhuman and degrading treatment (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 2006). The Court found that "the measure taken by the Belgian authorities had been far from adequate in view of their obligation to take care of the child" and observed that "the conditions of detention had caused the child considerable distress" and that "the authorities who had detained her could not have been unaware of the serious psychological effects that her detention in such condition would have on her".

The European Court accepts the possibility to detain a child for reasons of migration control, but only if the deprivation of liberty can be proved necessary (*Muskhadzhiyeva e. a. v. Belgium*, 2010). In the exceptional cases when children are located in a facility for families or unaccompanied children, those facilities should be designed in order to cater to their specific needs (CPT, 2009; *Kanagaratnametalii v. Belgium*, 2011). The placement of migrant children in detention should not be a punitive or a disciplinary measure,

and must be addressed from the approach of the child protection. The facilities should be coordinated by inter-institutional agencies, as well as staff trained in children's rights, with a specific mandate for child protection, not security guards or immigration authorities within the migration control system.

Other cases concern the particular conditions in which minors are held in detention centers. The extremely vulnerable individual situation in the case of *Rahimi v. Greece* (2011) made the Court find that the applicant's conditions of detention were as serious as to be considered an affront to human dignity. In this case, the Court had to assess the presence of a degrading treatment, in spite of the brief period of detention (two days). In the same case, the applicant alleged the lack of information on the reasons for his arrest and of any remedies in that connection. The Court found the violation of Article 5 § 1 (right to liberty and security) of the ECHR. The Greek authorities had given no consideration to the best interests of the applicant as a minor and had not explored the possibility of replacing detention with a less drastic measure. In addition, the Court found a violation of Article 5 § 4 (right to have lawfulness of detention decided speedily by a court).

The administrative detention of children in the context of deportation procedures against their parents, in France, led to the conviction of French authorities in five recent cases in 2016 (*A.B. and others v. France*; *A. M. and Others v. France*; *R.C. and V.C. v. France*; *R.K. and others v. France*; *R.M. and Others v. France*). The Court found that "given the child's age and the duration and condition of his detention in the administrative detention centre, the authorities had subjected him to treatments which had exceeded the threshold of seriousness required by Article 3". The children were *de facto* deprived of their liberty facing administrative detention. The Court observed that the authorities did not take all the necessary steps to enforce the removal measure as quickly as possible. There had been a violation of Article 5 § 1 (right to liberty and security) and a violation of Article 5 § 4 (right to speedy review of the lawfulness of detention) in respect of the applicant's



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child, as well as a violation of Article 8 (right to respect for private and family life) in respect of both the children and their parents.

#### **IV – Possible approaches to migrant children in line with children-rights based perspective**

Based on the child's best interest principle, in 2013, the UN Committee on the Rights of the Child urged states to "expeditiously and completely cease the detention of children on the basis of their immigration status" (UN Committee on the Rights of the Child, 2013). In November 2016, the 10th European Forum on the rights of the child organized by the European Commission addressed the protection of children in migration, looking at the existing tools and mechanisms, gaps and possible solutions. The same year, the Joint statement from 78 organisations active in the field of children's rights assessed that children represent a significant proportion of migrants and refugees. In 2016, at least 1 in 3 people arriving to Greece by sea were children and the number of unaccompanied children arriving to Italy has doubled compared to 2015 (Joint statement from 78 organisations, 2016). Yet, too little attention was paid to their needs. The effectiveness of responsiveness depends also on the capacity of the State's authorities to systematically tackle the best interests of those children and their specific needs. However, if a detention measure is ordered based upon the migration circumstances of an unaccompanied child, the decision should be adopted within the framework of legal due process. The due process of law should be guaranteed to migrant children both *de jure* and *de facto* in all decisions (border admission, deportation or repatriation, detention or alternative measures and so on). In this regard, the OHCHR (2010) has stated, that with respect to border control, orders for return, or access to social services, decisions should not be reached without consulting the affected children in line with their right to be heard and participate. Children should also be able to be heard in a variety of judicial or administrative settings related to their migration status. The irregularity of their journey should not limit their right to participation, on the contrary,

their voices must be considered (Bochenek, 2016b).

Also, all the other guarantees should be available for migrant children: the right to be informed of all matters concerning their rights, migration procedures and safeguards; the right to an interpreter; the right to access justice and effective remedies, in both administrative and judicial procedures; and the right to free legal and consular assistance (CRC Committee, 2005: §21, 33-37). Addressing the major gaps between, on the one hand, migration policies and legislation, and, on the other, the obligations deriving from CRC, one of the key challenges is to introduce correctly the CRC principles into migrations policies and programmes applied to children in this situation (Cernadas, 2015). Governments should establish and employ true alternatives to detention in order to avoid the deprivation of liberty of children (Bochenek, 2016b).

According to the Recommendations of the Committee on the Rights of the Child in the context of migration (2012), the migrant child should be approached first and foremost as a child, whatever the condition he or she may find himself or herself in. Based on CRC principles, the Committee reiterates the following needs for States in addressing the children affected by migration: to conduct individual assessments and evaluations of the best interests of the child at all stages of decisions on any migration process affecting children, and with the involvement of child protection professionals, the judiciary as well as children themselves; children should not be criminalized or subjected to punitive measures because of their or their parents' migration status, therefore, States should expeditiously and completely cease the detention of children on the basis of their immigration status; States should adopt alternatives to detention that fulfill the best interests of the child, along with their rights to liberty and family life through legislation, policy and practices that allow children to remain with family members and/or guardians if they are present in the transit and/or destination countries and be accommodated as a family in non-custodial, community-based contexts while their immigration status is being resolved; in any



instance where a child is nevertheless deprived of liberty, States are urged to impose such measure for the shortest time and in conditions that meet, at least, the minimum standards of detention as set out in human rights law. This includes ensuring a child-friendly environment; separation from adults who are not the child's parent or guardian; child protection safeguards; independent monitoring. In light of the concerns for the situation of child migrants going missing or unaccounted for from reception centres and/or other equivalent facilities, States should ensure concrete guidelines for reception centre procedures/facilities and conditions which are in full accordance with the Convention and the United Nations Guidelines for the Alternative Care of Children (Committee on the Rights of the Child, 2012).

Based on three fundamental principles anchored in the CRC – primary approach to migrant children as children; the best interest of the child in any action concerning the child; the liberty of the child as a fundamental human right – the International Development Coalition (IDC) has developed a model for preventing the immigration detention of children. The consideration of these principles regarding the migrant children shifts the focus from the state's right to supervise the free movement of the people within its territory to the rights of refugee, asylum seeker and irregular migrant children to be free from the risk of being incarcerated due to the state's desire to control migration. The five-step Child sensitive Community Assessment and Placement model upholds states' interests to manage migration, while recognising the value of child liberty as a part of the best interest of the child (Corlett, 2013). It provides a decision-making model for governments, NGOs and other stakeholders to prevent detention by taking five steps: prevention, assessment and referral, management and processing, reviewing and safeguarding, and case resolution.

Step 1: Prevention: is a presumption against the detention of children. It applies prior to the arrival at a state's territory of any children who are refugees, asylum seekers or irregular migrants.

Step 2: Assessment and Referral: takes place within hours of a child being discovered at the border of, or within, a state's territory. It includes screening the in-

dividual to determine age, the assignment of a guardian to unaccompanied or separated children, the allocation of a caseworker to children who are travelling with their families, an initial assessment of the child or family's circumstances, strengths and needs, and the placement of the child or family into a community setting.

Step 3: Management and Processing: is the substantive component of the child-sensitive assessment and placement model. It involves 'case management', including an exploration of the migration options available to children and families, a 'best interests' determination, and an assessment of the protection needs of children and/or their families.

Step 4: Reviewing and Safeguarding: involves ensuring that the rights of children and their best interests are safeguarded. It includes legal review of decisions already taken regarding children and their families – including decisions about where they are accommodated and about their legal status. It also includes an opportunity for states to review the conditions tied to the child or family's placement in the community following a final immigration status decision.

Step 5: Case Resolution: is the implementation of sustainable migration solutions.

Source: International Detention Coalition (2012). *Captured Childhood. Introducing a new model to ensure the rights and liberty of refugee, asylum seeker and irregular migrant children affected by immigration detention*. Available on line at: <http://idcoalition.org/wp-content/uploads/2012/03/Captured-Childhood-FINAL-June-2012.pdf>

As we can see all proposed solutions highlight the importance of child rights based approach to migrant children avoiding their detention.

## 2. Conclusion

How to reconcile the States' objective of migration control with the human rights of migrants? Guided by the principles and obligations of the CRC, when addressing the migrant children's issues the states are obliged to consider them first and foremost as children and then as migrants. Therefore, states' authorities are compelled to have an active role in designing legal measures to avoid migrant children's detention and always decide in line with the best interest of the child. This approach entails the inclusion of alternative measures to detention, which must be implemented effectively. If ultimately, in the case of unaccompanied children, the proven best interest of the child is his or her accommodation, than it is essential that the child is sheltered in a place that has adequate conditions

for carrying out this purpose.

The State sentenced by the ECtHR is constrained to apply the decision entirely. Consequently, on the one hand, the local authorities have to solve the personal situation of the applicant(s), by taking every necessary measure in order to end the violation of his or her rights. On the other hand, the state must have an active role, by crafting the necessary legal or procedural mechanisms which will lead to the further respect of the persons in the similar situation within its territory. Otherwise, the state can be subjected to another conviction for the same reasons, due to structural, legal or procedural problems.

The legal control assumed by the ECtHR can act as a powerful coercion in crafting politics applied to migrant children. Under its influence the 'control apparatus' over the migrants' life would be more attentive to children rights perspective.

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# THE TREATMENT OF CHILDREN DETAINED BY UNITED STATES IMMIGRATION AUTHORITIES AND THE CONSEQUENCES AND CHALLENGES

**Andrea F. Chavarria**



**Andrea F. Chavarria**

*Attorney*

*The Chavarria Law Firm*

*Immigration & Nationality Law*

## **Abstract**

This article describes the legal situation of accompanied and unaccompanied children arriving in the United States and how U.S. government agencies respond. There are significant concerns related in particular to high levels of detention of minors. Despite well-documented evidence that the detention of children has a negative impact on them, the government continues the harmful practice of detaining children. Additionally, this article reports how the government repeatedly fails to comply with its legal obligations. The government continues to assert its right to detain children. This article also addresses the need to provide a fair and just legal process for children, including providing legal representation. The government is not obligated to provide lawyers to children who are in removal proceedings. Often, children end up representing themselves in adversarial court hearings, which severely affects their chances of succeeding in court. This article further explains how continuous advocacy and litigation by the legal community and human rights organizations is essential in ending the practice of family detention and inhumane treatment of children.

**Keywords:** Children, Flores Agreement, Family Detention, Liberty, Asylum, Law, Trauma.

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## **1. The Treatment of Children Detained by United States Immigration Authorities and the Consequences and Challenges**

Many organizations and individuals have been highly critical of the United States government and how it has handled the treatment of children detained by its immigration authorities. Detaining children in jail-like conditions is mentally and physically damaging to them. Additionally, they are faced with many challenges, including a lack of legal representation.

## **2. Children Arriving in the United States and the Government's Role**

There are various agencies within the Department of Homeland Security (DHS) that handle the apprehension, processing, and repatriation of a child. (Kandel, 2016) The Department of Health and Human Services (HHS) handles the care and custody of an unaccompanied child. (Kandel, 2016) The Executive Office for Immigration Review (EOIR), which is part of the United States Department of Justice (DOJ) conducts immigration removal proceedings. (Kandel, 2016) The Surge. In the summer of 2014, referred to as the “surge”, tens of thousands of children and families originating from Mexico and the Northern Triangle of Central America - El Salvador, Guatemala, and Honduras - were arriving in the United States each month. (Barrack, 2016) In fiscal year 2014, 52,000 unaccompanied non-citizen children and 68,000 family units from Central America crossed into the United States from Mexico. (Cassidy & Lynch, 2016) Most unaccompanied children and families who were arriving in the United States were from the Northern Triangle, where high rates of violence and homicide have prevailed in recent years and economic opportunities became increasingly scarce. (Restrepo & Garcia, 2014)

Even though the number of unaccompanied children apprehensions dropped in the fiscal year 2015, at the beginning of the fiscal year 2016, there was an increase in the number of unaccompanied children apprehended along the southern border in comparison to the

same time period from the previous before. (Manuel & Garcia, 2016) The government's reaction to these influxes has had a negative impact on detained children.

The Flores Settlement. The 1997 Flores Settlement regulates the treatment and conditions of minors in federal immigration custody. (Flores v. Reno, 1997) Under the agreement, all minors in immigration custody shall be treated with dignity, respect, and special concern for their particular vulnerability as minors. (Flores v. Reno, 1997) Each detained minor shall be placed in the least restrictive setting appropriate to the minor's age and special needs. (Flores v. Reno, 1997) With limited exceptions, a minor shall be released from custody without unnecessary delay. (Flores v. Reno, 1997)

How a child is treated at the time of apprehension depends on what country the child is from and whether the child is unaccompanied. If a child is from a contiguous country — Mexico or Canada — the DHS officer will screen the child to determine if he or she can make independent decisions, is a victim of trafficking, or fears persecution in his or her home country. (American Immigration Council, 2015) If none of the conditions apply, the officer will return the child back to his or her home country. (American Immigration Council, 2015)

When a child from a non-contiguous country, such as El Salvador, Guatemala, or Honduras, is apprehended at the border, the immigration officer will make the determination as to whether the child is an unaccompanied alien child (UAC). Pursuant to section 462 of the Homeland Security Act of 2002, as amended, an unaccompanied alien child, is defined as a person who:

1. is under the age of 18;
2. lacks lawful immigration status; and
3. either (1) has no parent or legal guardian in the United States or (2) has no parent or legal guardian in the country who is available to provide care and physical custody of the child. (Homeland Security Act of 2002)

If a child is determined to be a UAC, the child is transferred from the Department of Homeland Security (DHS) custody to Department of Health and Human Services (HHS), Office



of Refugee Resettlement (ORR) custody. (Manuel & Garcia, 2016) The child must be transferred within 72 hours of apprehension. (8 U.S.C. § 1232(b)(3)) ORR is then responsible for the custody and care of the child until he or she can be released to a family member or other individual or organization while the child's court proceedings go forward. (American Immigration Council, 2015) By law, the UAC must be placed in the least restrictive setting that is in the best interest of the child. (8 U.S.C. § 1232(c)(2)) Majority of the unaccompanied children are cared for through a network of state-licensed ORR-funded care providers. (U.S. Department of Human and Health Services, 2016)

If a child arrives in the United States with a parent or guardian, the child is considered accompanied. (American Immigration Council, 2015) If a child is considered accompanied, then DHS retains custody of that child. (American Immigration Council, 2015) In such cases, the child may be detained by DHS in a family detention center. Following the "surge" in the summer of 2014, DHS Secretary Jeh Johnson stated that families would be detained in order to deter others from coming to the United States. (U.S. Department of Homeland Security, 2014)

The treatment of detained children has been a subject of controversy for years and progress has been slow. After the Flores Settlement, the former immigration agency, Immigration and Naturalization Service (INS), did not immediately comply with the terms of the agreement. (Human Rights First, 2016) It wasn't until 2003 when the ORR assumed responsibility for the care and custody of unaccompanied children that visible changes were implemented. (Human Rights First, 2016) The changes were only possible after years of advocacy by human rights organizations, religious organizations, and political leaders. (Human Rights First, 2016)

### 3. Family Detention Centers

**Licensing Issues.** Today, accompanied children continue to be detained in family detention centers despite the mounting evidence that detaining children is a harmful practice.

(Talbot, 2008) There are currently three family detention centers: Berks Family Residential Center in Berks County, Pennsylvania (Berks), Karnes Residential Center in Karnes City, Texas (Karnes) and South Texas Family Residential Center in Dilley, Texas (Dilley). (Family Detention, n.d.) Dilley and Karnes are managed by private, for-profit corporations. Dilley is operated by CoreCivic, formerly Corrections Corporation of America (CCA), while Karnes is operated by the GEO Group. (Aguilar, 2016) Berks is operated through an inter-governmental service agreement. (County of Berks Pennsylvania Department, n.d.) On January 27, 2016, state officials notified Berks that it would not renew the Berks County Residential Center's license because the center's operation as a federal immigration facility is inconsistent with its licensing as a child residential center. (The Morning Call, 2016) In December 2016, a Texas judge ruled that the Texas Department of Family and Protective Services (DFPS) could not issue childcare facility licenses to Dilley or Karnes. (Duffy, 2016)

In the past, former family detention centers have been plagued with controversy and shut down. In 2006, T. Don Hutto Family Detention facility, a former prison, was transformed into a family detention center. (Barrack, 2016) However, in 2009, DHS announced that it was ending family detention at that facility. (Del Bosque, 2009) Similarly, in 2014, the government announced it was closing the controversial Artesia Family Residential Center. (McCabe, 2014) Despite controversies surrounding prior family detention centers and a lack of childcare licenses, Berks, Karnes, and Dilley remain operational.

**A Material Breach.** On July 24, 2015, the District Court Judge Dolly Gee found that DHS was in breach of the Flores Settlement. (Flores v. Johnson, 2015) The judge ruled that the Flores Settlement applied to children apprehended with their parents and that the government's detention of these children was a serious violation of the agreement. (Preston, 2015) Additionally, the judge found that the Dilley and Karnes family detention centers were a "material breach" of provisions requiring that minors be placed in facilities

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that are not secured like prisons and are licensed to take care of children. (Preston, 2015) On January 15, 2016, the government filed a brief with the Ninth Circuit Court of Appeals in *Flores v. Lynch*. (Byrne, 2016) The government argued that the judge erred in finding that the agreement applies to accompanied children. (Byrne, 2016) On July 6, 2016, the Ninth Circuit confirmed the lower court's ruling and held that the *Flores Settlement* applies to accompanied and unaccompanied minors. (Carcamo, 2016)

#### **4. The Dangerous Effects of Detention**

Despite the ruling, DHS continues to detain accompanied children. (Southern Poverty Law Center and The Georgia Latino Alliance for Human Rights, 2016) There is compelling evidence that immigration detention has a detrimental impact on the mental and physical health of those detained. (International Detention Center, 2012) The DHS advisory committee, itself, recognizes that the harmful effects of detention on children are well established. (Immigration and Customs Enforcement, 2016) One report found that children and survivors of abuse suffer negative health consequences within weeks of detention. (Byrne & Acer, 2015) Detention is harmful to children and families, even when detention lasts for less than two weeks rather than months. (Byrne & Acer, 2015)

**Psychological Harm.** On July 24, 2015, the American Academy of Pediatrics wrote a letter to DHS Secretary Jeh Johnson expressing concern over the health and well-being of children who are detained in family detention centers. (Hassink, 2015) The letter states that detention is associated with poorer health outcomes, higher rates of psychological distress, and suicidality, which makes the situation for already vulnerable children even worse. (Hassink, 2015) Psychologists have detected high levels of anxiety, depression and signs of developmental regression in detained children. (Lucas, Obser, & Werlin, 2015) Changes in a child's environment - as a consequence of toxic stress - can have quantifiable effects in the child's developmental trajectory. (Hassink, 2015) The changes can

have a lifetime effect on a child's educational achievement, economic productivity, health status, and longevity. (Hassink, 2015)

**Substandard Medical Care.** Further, complaints against family detention centers such as Dilley and Karnes have been filed with the DHS Office for Civil Rights and Liberties (CRCL) and the Office of Inspector General (OIG) for lack of adequate medical access. (Byrne & Acer, 2015) One complaint described how women and children sometimes had to wait up to 14 hours to be seen by a medical staff member. (Feliz, 2016) Another complaint explained how more than 250 children were given adult doses of the Hepatitis A vaccine. (Feliz, 2016) In a different complaint, a child who was vomiting blood was told to drink water and was not referred to external medical care until three days later. (Feliz, 2016) Dr. Sandra G. Hassnik, president of the American Academy of Pediatrics, in a letter addressed to DHS, questions whether the existing family detention facilities can provide generally recognized standards of medical and mental health care for children. (Hassink, 2015) The answer is no; the detainment of children is inhumane.

#### **5. Children's Rights**

**Legal Representation.** Besides mental and physical health issues, many detained children are faced with the issue of representing themselves before an immigration judge without legal representation. Thousands of children act as their own lawyers in adversarial hearings, pleading for asylum or other immigration benefit, in a complex legal system they do not comprehend. (Santos, 2016) In the United States, immigration laws are civil offenses therefore, the government has no obligation to provide lawyers to indigent children. (Santos, 2016) No other legal system in the United States requires that children represent themselves against a government lawyer. (Santos, 2016) Immigration judge, Jack H. Weil, who is responsible for training other judges, was scorned by legal and child-psychology experts after he stated: "I've taught immigration law literally to 3-year-olds and 4-year-olds. It takes a lot of time. It takes a lot

of patience. They get it. It's not the most efficient, but it can be done." (Markon, 2016) Under the Transactional Records Access Clearinghouse, almost fifty percent of unaccompanied children are unrepresented by counsel at any point in their court process. (Breisblatt, 2016) Access to legal representation is essential because a child may face life-or-death consequences if returned to his or her home country. The lack of appointed counsel may have a severe impact on a child's ability to receive a fair hearing. (Eagly & Shafer, 2016) Those with legal representation are more likely to succeed in their immigration cases. (Eagly & Shafer, 2016) In February 2016, members of the United States Senate introduced the "Fair Day in Court for Kids Act", which seeks to provide unaccompanied children and other vulnerable populations with attorneys for removal proceedings in immigration court. (Breisblatt, 2016) The bill has yet to become a law.

Legal Justice through Advocacy. The government has continuously failed to change its policies on the detainment of children and on recognizing the need to provide children in removal proceedings with legal representation. Some senators have called for the end to family detention, but the inhumane treatment continues to exist. (Carle, 2016) The Catholic Legal Immigration Network, the American Immigration Counsel, the Refugee and Immigrant Center for Education and Legal Services, and the American Lawyers Association, collectively known as CARA, advocate and litigate for the end of family detention as well as provide pro bono legal services to women and children detained in family detention centers. (Family Detention Pro Bono Project, n.d.) Organizations, such as the Detention Watch Network, have exposed the conditions and treatment women and children face in family detention centers. (Grewal & Shah, 2014) There are other organizations, like Kids In Need of Defense (KIND), who work with attorneys, law firms, law schools, and bar associations to provide pro bono representation to unaccompanied children. (Kids in Need of Defense, n.d.) It is crucial that lawyers, human rights advocates, and non-profit organizations continue to advocate and litigate for

the end of family detention and for the right to access to legal counsel. Without their tireless efforts to change the current policies on the treatment of detained children, many more children will suffer cruel treatment and lack adequate due process at the hands of the United States government.

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# CHILDREN OF PRISONERS: THE HIDDEN FACE OF THE DEPRIVATION OF A PARENT'S LIBERTY

**Hannah Lynn, Céline Droz and Viviane Schekter**



**Hannah Lynn**

*Assistant Director, Children of Prisoners  
Europe (COPE)*



**Céline Droz**

*Program Coordinator, REPR, Relais En-  
fants Parents Romands*



**Viviane Schekter**

*Director, REPR, Relais Enfants Parents  
Romands*

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## Abstract

The incarceration of a parent affects the whole family and may cause serious and long-term damage to the psychological, economic and social well-being of the child. In this specific context, the rights of the child are also compromised by the constraints linked to current justice and prison systems. This article provides a detailed analysis of the situation of those children considered “collateral victims” of the deprivation of liberty of their parents. The authors first focus on the children’s experience: what is it like to grow up separated from a parent in prison? Facing unusual life circumstances, children with imprisoned parents are a vulnerable population and both their rights and needs require special protection. Identifying examples of relevant international and regional standards and mechanisms, the authors examine their potential for positive impact in specific cases. Drawing on the plethora of good practice across Europe which considers their needs, the authors highlight, in particular, the work of two non-governmental organisations: REPR’s support of the child-parent bond in Switzerland and Buff’s parent support model in Sweden.

**Keywords:** Children, collateral victims, children’s rights, parental imprisonment.

### 1. Parental imprisonment: the challenges for children

On a given day each year, there are an estimated 800,000 children separated from a parent in prison in the European Union; a figure which rises to 2.1 million across Council of Europe Member States.<sup>1</sup> In general, national criminal justice policies do not include a child rights angle when a parent is imprisoned and most state policies for children do not address the rights and needs of these children (Ayre, 2015). The result is a considerable policy gap in most Member States. Described as “‘forgotten children’, ‘collateral victims’, ‘hidden victims of imprisonment’ or ‘orphans of justice’” (Philbrick, Ayre & Lynn, 2014, p.17), these children rarely see their rights and needs taken into account in criminal justice matters. As Schekter, Ienca & Elger (2016) point out: “Children of prisoners are usually perceived as nobody’s concern, hence are almost invisible” (p.22). The specific risks to the children’s well-being and development are regularly overlooked.

Although the experience of parental imprisonment varies from one child to another and therefore requires individual consideration, children will on the whole experience some

negative consequences as a result of the imprisonment of a parent. Robertson (2012) identifies five main areas of risk associated with parental incarceration:

1. Deprivation of basic necessities and opportunities
2. Danger of secondary victimisation and depersonalisation
3. Deterioration of overall situation of a child
4. Distance from incarcerated parent
5. Descent into antisocial behaviour (p.2).

The imprisonment of a parent undeniably causes multiple practical changes in a child’s day-to-day life. However, it can also negatively impact other areas of the child’s life, development and well-being, such as their physical and mental health, their behaviour and school performance and the family’s financial stability. Children of Prisoners: Interventions and Mitigations to Strengthen Mental Health (Jones et al., 2013), informally known as the Coping project<sup>2</sup>, found that children with a parent in prison “have a significantly greater risk of mental health problems than children in the general population” (p.47). Crucially, this study went on to identify different resilience factors and coping strategies which frequently contribute to how children effectively deal with the imprisonment of their parent: a

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<sup>1</sup> COPE network extrapolations using World Prison Brief figures and based on a 1999 study undertaken by the French institute for statistics, INSEE, which determined a parenting rate of 1.3 children per male prisoner.

<sup>2</sup> This was the first pan-European research study focusing on the psychological health needs of children of prisoners, with over 1,500 respondents (children, parents, caregivers and other stakeholders).

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supportive family structure, encouraging school environment and quality, regular contact with the incarcerated parent were found to be vital in helping children cope (Jones et al., 2013).

## **2. Rights of children with imprisoned parents**

Children with imprisoned parents are at risk of a double punishment which could jeopardise their development. Not only does the absence of a parent impact the child's physical, emotional, psychological and social well-being, but the child's rights as enshrined in the United Nations Convention on the Rights of the Child (UNCRC) may also be violated. The UNCRC—comprehensive, yet vague enough to allow crucial room for interpretation—is a vital international mechanism protecting children's rights. In signing the UNCRC, the first legally binding international convention on child rights, States Parties committed themselves to guaranteeing all children, *regardless of the legal status or activity of their parents*, all rights enshrined in the Convention. Children with imprisoned parents share the same rights as any other group of children, and are most specifically impacted by Articles 2 (right to protection from discrimination on the basis of the status or activities of the child's parents); 3 (right to have their best interests taken into consideration); 9 (right to contact with their parents) and 12 (right to express their views in all matters concerning them).<sup>3</sup>

Children with imprisoned parents frequently experience significant stigma and discrimination:

It has been well recognised by practitioners that children with parents in prison are vulnerable to stigma at school and in their home community. Parental imprisonment can lead to children being labelled as different, as having an undesirable characteristic and being in a category of “them” as opposed to “us” (Philbrick, Ayre & Lynn, 2014, p.44).

The children, although separated from the crime, are often associated with society's (typically) negative view of the parent in prison. The parent's imprisonment thus becomes “contagious”, with the child feeling responsible for the crime committed and experiencing feelings of shame and guilt as a result of being the child of a prisoner (Jones et al., 2013). Concerning the right to protection against discrimination (Article 2), States should take measures to ensure that children of incarcerated parents are not discriminated against in any way.

The underlining principle of the UNCRC is that the child's best interests be taken into account in any decision that affects them, as surely the sentencing and imprisonment of a parent does (Townhead, 2015). How are the best interests of the child (Article 3) taken into account in criminal justice proceedings involving a parent? At the time of sentencing, States should ensure that elements such as the type, length and location of the parent's sentence are considered with the best interests of the child in mind. The best interests of the child should similarly be taken into account in determining visiting conditions (public transport access, visiting hours, visiting areas, etc.) and providing other means of communication (email, Skype, phone calls, letters, etc.).

Maintaining a quality relationship between children and their imprisoned parents is an essential factor in the child's resilience, but it is also a child's right (Article 9.3), a right sometimes compromised by the constraints linked to justice and prison systems, particularly at the remand stage. Prison spaces are often not designed with children's visits in mind—there is often no room dedicated solely to children's visits—and child-friendly facilities are often limited, as are permitted activities which would encourage positive family bonding and relationships. Visiting a parent in prison can be a traumatic experience for a child. Without child-friendly provisions for support during the visit, the child's fears

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<sup>3</sup> See also Articles 5 (States shall respect the responsibility of the child's parent to uphold the child's rights); 6.2 (right to survival and development); 9.1 (right to live with their parents unless this is contrary to best interests); 31 (right to engage in play and recreational activities appropriate to their age).

can be exacerbated. Imposing gates; the security search process; drugs dogs; stern prison officers; the lack of play area or child-oriented decorations and pictures: can all heighten a child's fears. Child-friendly prison design, regulations and initiatives can help children and parents reconnect. All too often, toys, books and games are prohibited on visits for security reasons (violating the child's right to play as stipulated in Article 31 of the UNCRC), as are other objects that are often part of the child's day-to-day life (from school report books to comfort blankets, for example). Due to unfavourable visiting times, children often have to miss school or extra-curricular activities in order to visit the imprisoned parent. Access to the prison can be limited for families due to financial and organisational issues: some prisons are far from home or not served by public transport.

With respect to the child's right to an opinion, to be listened to and taken seriously (Article 12), how is the child informed of their parent's arrest and subsequent imprisonment (its location and the length of the sentence, for example)? Who is responsible for informing the child? How can the child find out about visiting opportunities, rules and times? Deciding what—or how much—to tell the child about their parent's incarceration is a fundamental issue; lies or secrets often used by parents or caregivers with a view to protecting children can in actual fact have an effect even worse than the truth would (Schekter, Ienca & Elger, 2016). “Children of incarcerated parents should therefore be given every opportunity to make sense of and understand the facts behind their circumstances”, as Robertson (2012) notes (p.6). Parents should be supported in understanding the importance of telling the child about their imprisonment as well as supported in how to tell them; if anyone other than the parent does so, the trust between child and parent can be broken. Parents should be encouraged to talk to the child in such a way that is appropriate for the child's age and development.

Provisions and practices vary not only de-

pending on the prison or local authority responsible, but also on the State:

The importance of ensuring that children see their parents and the extent to which the concept of keeping families together is considered important varies from country to country, as does the value placed on parental contact (Philbrick, Ayre & Lynn, 2014, p.24).

### **3. International standards and mechanisms**

The aforementioned policy gap and the inconsistencies in provisions and practices on the national level can be eased by international standards and mechanisms as well as good practice examples and precedents.

States Parties are obliged to submit reports every five years to the United Nations Committee on the Rights of the Child (CRC) on the implementation of child rights on the national level.

The Committee uses the UNCRC as a basis for its Concluding Observations to States, such as those on Sweden in 2015, relating to Article 9.3 of the UNCRC<sup>4</sup>.

The Committee is concerned [...] that the “principle of closeness”, rather than being mandatory, is only one factor among others taken into consideration, which can mean children travelling long distances to visit their parents [in prison], with some families not being able to undertake such journeys owing to economic constraints. The Committee is also concerned that having to travel a long way does not automatically constitute a justification for extending the duration of visits in some prisons (CRC/C/SWE/CO/5, 2015). In 2005, in its General Comment on Implementing Rights in Early Childhood, the Committee explicitly recognised that: “Children's rights to development are at serious risk where they are [...] deprived of family care or where they suffer long term disruptions to relationships [...] (e.g., due to [...] parental imprisonment [...])” (CRC, 2005).

In 2015, a revised version of the UN Standard Minimum Rules for the Treatment of

<sup>4</sup> States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents, except if it is contrary to the child's best interests.



Prisoners was adopted by the UN General Assembly (A/RES/70/175, 2015). These Rules are the key international framework used in the monitoring of the treatment of prisoners. Although focused on the rights of the prisoner, the Rules play a crucial role in upholding their right to family contact and social rehabilitation, thus impacting the child (see Rules 7(f), 29, 43.3, 58, 59, 75, 88.2, 106, 107)<sup>5</sup>.

While the 2010 UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) further underscore the rights of imprisoned mothers to contact with their children (A/C.3/65/L.5, 2010), Article 30 of the African Charter on the Rights and Welfare of the Child (ACRWC), explicitly concerns children of incarcerated parents, asserting that authorities should take into account the best interests of a child affected by decisions at all stages of the criminal justice process of a parent (arrest, pre-trial, sentencing, imprisonment and resettlement). The significance of this change in frame must not be underestimated. Rather than framing the issue as a mother's right to contact with her child, Article 30 uses a more holistic, child-centred frame, addressing the issue from the child's perspective and identifying children as active rights-holders.<sup>6</sup> Recommending that non-custodial sentences be considered when sentencing parents or primary caregivers, with respect to custodial cases, Article 30 stipulates that contact be facilitated if in the child's best interests. Crucially, General Comment No. 1 on Article 30 of the ACRWC underlines that these provisions not only apply to mothers but also to fathers and other primary caregivers, such as foster parents or other family members (ACRWC, 2013).

Likewise, a groundbreaking South African Constitutional Court case in 2007 set the precedent for taking into account the best interests of the child during the sentencing of a primary caregiver. In the case of *S v M* ((CCT 53/06) [2007] ZACC 18), the Court ruled that the applicant (a single mother) be granted a non-custodial sentence of house arrest, community service and a suspended sentence, on the grounds that the potential harm to her young children were she to be given a custodial sentence should be weighed against the nature of the crime and the likelihood of the applicant causing harm to society (Skelton & Mansfield-Barry, 2015). The Court ruled that a "nuanced weighing of all the interlinked factors in each sentencing process" was required (*S v M*, 2007). The judgment, spearheaded by Justice Albie Sachs<sup>7</sup>, considered the best interests of the child in deciding the fate of the parent: if a parent's custodial sentence would be detrimental to the child, "the scales must tip in favour of a non-custodial sentence", except in cases where this would violate society's right to protection from crime (*S v M*, 2007). The prevention of further complications and harm to the lives of the applicant's children was considered a positive solution. This pioneering judgment set the precedent for many South African cases, both bail proceedings and sentencing (Skelton & Mansfield-Barry, 2015).

#### 4. European mechanisms

The European Convention on Human Rights (ECHR) entered into force in 1953. The European Court of Human Rights (ECtHR), established in 1959, rules on individual or State applications alleging violations of the civil

<sup>5</sup> Collection of data on family members including names, ages, location, and custody or guardianship status of children (7(f)); children in prison shall never be treated as prisoners (29); sanctions shall not include prohibition of family contact (43.3); communication with family shall include telecommunications, electronic, digital, and by receiving visits (58); sentence shall be carried out in a location as close to home as possible (59); training of prison staff (75); maintaining family ties (88.2); maintaining and improving relationships between a prisoner and his family if in the best interest of both (106); encouragement and assistance to maintain or establish relations with persons outside to promote rehabilitation and best interests of the family (107).

<sup>6</sup> See recent work on frame reflective analysis relating to children with imprisoned parents by the Children of Prisoners Europe (COPE) network, 2016.

<sup>7</sup> "If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them." Justice Albie Sachs, *S v M* (CCT 53/06) [2007] ZACC 18

and political rights laid out in the Convention. Its judgments are binding. The right of individual petition has been recognised since 1965, although such applications are only possible after exhausting all domestic remedies. Prisoners have always been one of the main groups to use this system, most often citing breach of Articles 2-12 (Loucks, 2000). Earlier in 2016, the ECtHR found breach of Article 8 in the cases of *Stoyanov and Others v. Bulgaria*, *Alexey Petrov v. Bulgaria* and *Petrov and Ivanova v. Bulgaria*. In the first case, the Court found that the children had been “severely affected by the events” surrounding Mr. Stoyanov’s arrest (armed police breaking into their home and handcuffing not only Mr. Stoyanov but also his 18 year-old son). In another case in 2003 (*Nowicka v. Poland*), the Court held that the restriction of the applicant’s visiting rights to one visit a month “did not pursue, and was not proportionate to, any legitimate aim”, and was therefore in violation of Article 8. In the 2012 case of *Horych v. Poland*, the ECtHR found that the applicant’s Article 8 right to family life had been violated in part due to the deplorable visiting conditions which meant that his daughters ceased visiting him in prison.

The European Prison Rules, although not legally binding, are widely used as guidelines in national administrations and courts across Council of Europe Member States (Loucks, 2000). Of particular relevance to children of imprisoned parents are Rules 8 (prison staff training); 24.1 (communication with family); 24.4 (visits and maintaining family relationships “in as normal a manner as possible”); 24.7 (home leave); 60.4 (punishment shall not include prohibition of family contact); 107.4 (preparation for resettlement).

It is clear from the above examples that maintaining and fostering child-parent ties in prison is upheld by international law and standards. Regrettably, the tendency is for States to treat the European Prison Rules and other treaties and instruments as the ultimate objective or goal rather than as *minimum* standards for the treatment of prisoners (Vagg & Dünkel, 1994, as cited in Loucks, 2000). Thankfully, this is not the case for all States; indeed in some European States cross-sectoral mo-

mentum on the issue of children of imprisoned parents is building.

The landmark 2014 Memorandum of Understanding on children with imprisoned parents, signed by Italian Minister for Justice, Ombudsman for Childhood and Adolescence and NGO *Bambinisenzasbarre*, is an example of a practical, comprehensive text that manages to maintain that crucial room for interpretation. Its nine articles ranging from judicial orders and staff training to child-friendly visits practices, information and support schemes, cover a relatively exhaustive list of provisions for children separated from or living with an imprisoned parent. Although the agreement is not legally binding, the Italian Ministry for Justice has incorporated it as a set of guidelines and is building on it to improve the situation for children across the country (since 2014, ninety-five per cent of Italian prisons now have a child-friendly visits room). This Memorandum is an example of holistic best practice with clear protocols that recognise the rights of the child, while working within a framework that promotes the best interests of each child.

Momentum is also gaining in Europe. The 2014 European Parliament Resolution on the 25<sup>th</sup> anniversary of the UNCRC contains an article on children of imprisoned parents (Article 13), underlining the impact of a parent’s imprisonment on the rights of the child. The recently adopted Council of Europe Strategy on the Rights of the Child 2016-2021 explicitly includes children with imprisoned parents as a group of vulnerable children in need of protection. This represents a major step forward in the child rights agenda of the Council of Europe. The authors likewise welcome the Council of Europe Council of Penological Co-Operation’s recent decision to draft a Committee of Ministers Recommendation on children of imprisoned parents.

The cases cited above, although ultimately benefiting the children, both in terms of direct impact and increased recognition for the issue, deal, for the most part, with the rights of the parent arrested or imprisoned, and not the child directly. In *H.S. and Others v. the UK*, the Third Party Intervenor (Action for Prisoners’ Families and the Children of Prisoners

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Europe (COPE) network, then Eurochips) argued that the Article 8 rights of the prisoner's family and particularly those of the children warrant separate consideration (*H.S. and Others v. the UK*, 2009).<sup>8</sup> An interesting example of a judge taking into account the child's right to information can be found in *Lancashire County Council v M and others* (2016), where the judge made an effort to communicate his decision in simple language and with explanations that the children involved would understand.

In cases where upholding the prisoner-parent's rights is of ultimate benefit to the child, to what extent is this sufficient from a child rights perspective? To what extent should we be satisfied that the child is receiving the best outcome for their development and well-being, if the means to this end did not consider the rights of the child nor their best interests? Indeed, if a prisoner is granted leave to encourage his rehabilitation, but the child's rights and best interests are not considered, might we not in fact risk—albeit unintentionally—negatively impacting the child? The child's rights must be weighed alongside those of their parents. As Townhead (2015) points out, a child's best interests are of paramount importance, but without proper assessment, we cannot assume to know what these best interests are. Indeed, even with adequate assessment, defining those best interests remains a challenge, ideally requiring case-by-case analysis (Bouregba, 2016). International standards and regulations, as well as examples of good practice, may be of assistance to the decision-maker, but individual assessment and an international rights instrument specifically for children with imprisoned parents remain the ideal. The entry into force of the Third Optional Protocol on a communications procedure (OP3) in 2014, allowing children to take cases of rights violations directly to the CRC through the individual complaints procedure, might also provide a remedy (Townhead & Brett, 2015). For both case-by-case analysis and effective protection of these

children's rights, cooperation between States and non-governmental organisations with expertise in the field is paramount.

## 5. Examples of good practice

Some examples of positive cross-sectoral collaboration (governmental and third sector, as well as other types of partnerships) do already exist. In France, imprisoned parents are authorised to follow their children's school progress, as stipulated in *Circulaire n° 94-149* (13 April 1994). In addition, prisoners can spend from six to seventy-two hours with their dependent children and another family member or relative, without supervision, in one of the “Unités de Vie Familiale”, residential buildings for family visits on the prison grounds. In the Netherlands, exceptional visits for children and imprisoned parents are mandated by the Justice Ministry so as not to interfere with school hours. Recognising the stigma and disruption experienced by many children on the imprisonment of a parent, the Irish government has explicitly committed to ensuring adequate access by children to an imprisoned parent in its National Policy Framework for Children 2014-2020: Better Outcomes, Brighter Futures, and guidance for sentencers to encourage them to check the immediate care arrangements for dependent children at the point of placing a parent or carer in custody has been re-issued to all courts in England and Wales. In Northern Ireland, prisoners at H.M.P. Magilligan are given access to Skype for personal video calls to family in a move to foster rehabilitation and reintegration back into their family and community. In Norway, every prison establishment has a designated “Children's Ambassador”, monitoring the provisions for the needs of children visiting their relatives in prison. Children of Prisoners Europe (COPE<sup>9</sup>) is a pan-European network representing twenty-five NGOs working with and on behalf of children of imprisoned parents. The network aims not only to highlight good practice at

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<sup>8</sup> The case concerned the UK authorities' refusal to transfer the first applicant—an elderly prisoner who had serious health concerns—to the Netherlands where his family was living, including the third and fourth applicants, young teenagers at the time.

<sup>9</sup> <http://childrenofprisoners.eu/>

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the European level—advocating for positive change on behalf of children with imprisoned parents—but also to share good practice between its members, thus benefiting more children on a broader level. Provisions, policies and practices can vary widely depending on national and regional laws, politics and culture, among other factors. Studies such as the Coping project above are crucial in highlighting the fundamental needs of children with imprisoned parents; crucial in determining their best interests and how best to provide support. Two innovative support models are detailed below.

#### **6. Switzerland: The Relais Enfants Parents Romands (REPR)**

Providing both information and support, the Relais Enfants Parents Romands (REPR<sup>10</sup>) is a Swiss non-profit organisation, whose mission is to “accompany” children in their relationship with their incarcerated parent, while raising public awareness on the effects of the imprisonment of a family member.

REPR is committed to upholding the rights enshrined in the UNCRC in its work with children and families. In particular, this means protecting the child’s right to maintain a relationship with their imprisoned parent by organising child-focused visits in prison—individually or through creative workshops in groups—and supporting other forms of contact (mail, phone calls, etc.), while considering the best interests of each individual child. REPR also promotes the right of the child to be informed and to express his or her views by encouraging prisoner-parents to talk to their child about their imprisonment as well as supporting them in dealing with any specific questions or needs the child may have.

REPR does not believe in one unique model of parenting, preferring to help the children through their individual experiences without systematising or normalising their response. The concept of “accompanying” the child-parent bond is of key semantic significance: the child is supported in their relationship with their parent yet allowed to freely express

his or her emotions, “taking charge of his own life experience”, without any “preconceived truths or formulas” for how to provide that support (Bornand & Schekter, 2013, p.7). REPR’s philosophy lies in supporting each individual child in their own personal experience of the situation; guiding them, with support, but above all allowing them the freedom to express their feelings in their own way. As Bornand and Schekter (2013) explain, “we should not aim to find out what a ‘good’ visit consists of, but [...] we should allow the child to express [his or herself] with their parent in whichever way *they feel is right*, be that through joy or through tears or by sulking or not wanting to speak” (p.6, emphasis added). This can be a challenge. In order to be able to provide this highly individualised support, it is important for REPR to regularly meet with the parents and children on their own, to review each situation on a case-by-case basis. Offering support to all children separated from an imprisoned parent in the French-speaking region of Switzerland, REPR implements two programmes:

- support through visits in prison
- support for children of prisoners in the outside community

The first involves accompanying children into prison, with child-centred visits organised by REPR. During these visits, where groups of children meet with their parents for an hour or more, REPR social workers are available to provide support where required. Importantly, the non-imprisoned parent is not present during these special visits: the bond between child and imprisoned parent is therefore given priority. The REPR social workers also carry out vital work with the prison staff in order to organise the time and space effectively and appropriately for the children’s visits.

The second programme provides support through face-to-face meetings, phone calls and emails for any child who is concerned about their mother or father’s incarceration. What should I tell my friends, my teachers? How can I still respect him? What is my role at home now? REPR’s trained psychologists

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<sup>10</sup> <http://repr.ch/>



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and social workers spend time with every child and his or her family to find the best way for them to cope with their specific situation. Children and families can contact REPR through their website, as well as via social media and a telephone helpline.

## 7. Sweden: Bufff

Providing direct support for children of prisoners across the country, NGO Bufff<sup>11</sup> is a national organisation in Sweden. Bufff organises youth and support groups, as well as one-to-one sessions in eight local charity offices. Like REPR, they have a national helpline and use Facebook groups and other media to provide online chat functions and forums for children affected by parental imprisonment. Bufff also supports the various caregivers and professionals who come into contact with these children.

Bufff also organises parent support groups in prison, entitled “For Our Children’s Sake”. In the group workshops, prisoner-parents learn about the specific needs of their children, as well as the risk and protective factors relating to their healthy development. Introduced to new perspectives on parenting and offered a platform and space for reflection, not only do participants find their parenting skills are developed but they also often discover new motivation to make changes towards a life without crime. This is an innovative way of indirectly supporting the children—by helping their parents hone their parenting skills from within prison. This benefits not only the child and his or her parent, but also society. By supporting prisoner-parents in their parenting, Bufff helps improve children’s experience of parental imprisonment and boosts their ability to cope. In these schemes, working with prison staff is key: Bufff acts as an interface with the prison.

Research shows that reasons for high reoffending rates among prisoners include stigma, social exclusion, social education, a lack of social bonds and low levels of social skills. Studies have found that if a prisoner is adequately prepared for release and supported in

their relationship with their family, they are more likely to cope outside prison, and thus are less likely to reoffend. This is one example of a motivating factor for Bufff’s work with prisoner-parents, their children and prison staff. In 2007, Project Metropolitan—a transnational study focusing on the UK and Sweden—found that societal attitudes play a key role in the well-being of children of prisoners. The study found that both family-friendly prison policies *and* more sympathetic public attitudes towards crime and punishment acted as “protective factors” for children with imprisoned parents. With regard to cross-sectoral collaboration, this is why the awareness-raising and advocacy efforts of NGOs must accompany efforts to implement policies that support children of prisoners; changing attitudes in the long term.

The need to support children of imprisoned parents is gaining in recognition across many sectors, and momentum is certainly increasing on the European and international levels. With increased appreciation of the wider benefits of supporting the bond between child and imprisoned parent—to society as well as to the prison—, children affected by parental imprisonment are enjoying many more rights than they were some years ago. The recent increased interest in “dynamic security” should help further this, child rights being compatible with the security concerns of a prison. More, however, remains to be done on many fronts. Children’s rights are of paramount importance and children separated from a parent in prison should enjoy the same rights as any other group. In particular, the child-parent bond should be fostered and quality, direct contact encouraged in appropriate, child-friendly conditions. Parenting support for imprisoned parents should be systematised to enable them to be responsible and effective role models and to contribute to their child’s healthy development. Prison staff as well as any other professionals who come into direct contact with children of imprisoned parents should receive appropriate training. Above all, children’s rights, needs and best interests should be taken into account at all stages of

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<sup>11</sup> <http://bufff.nu/>



the criminal justice process involving a parent.

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# CHILDREN DEPRIVED OF THEIR LIBERTY: AN OBSESSION FOR THE CRC COMMITTEE

**Jean Zermatten**



**Jean Zermatten Dr. h.c.**

*Former Chair of the UN Committee on the Rights of the Child (2005-2013)*

*Former President and Dean of the Juvenile Court of the Canton of Valais (1980-2005)*

## **Abstract**

The field of juvenile justice is, in comparison with all children rights' domains, the one where the international treaties has been the most developed, because of the particular position of the child facing the power of the State, in particular from the point of view of the deprivation of liberty, and the regrettable reality of the violence perpetrated by the States against young offenders (for centuries, the systematic response to criminal offences of children was characterized by the severity of the penalties: capital punishment and deprivation of liberty in prisons or institutions). The UN CRC establishes the right of the child to a specific and specialized Juvenile Justice System (art. 37 and 40) and the respect of the principle of dignity, even for children in conflict with the law. The CRC Committee does not like deprivation of liberty, makes clear that this solution can be only the ultima ratio solution, and accepts the use of deprivation of liberty only under strict conditions of execution. For the Committee, deprivation of liberty has very negative consequences for the child's harmonious development. This article asserts the position of the CRC Committee in the field of deprivation of liberty in its Concluding Observations, as well in its General Comments, in particular in GC 10 (2007).

**Keywords:** Child in conflict with the law, Juvenile Justice, deprivation of liberty, UN CRC, CRC Committee, General Comment 10, penalty, punishment, dignity.

## 1. Introduction

Children rights constitute an inescapable new situation. They have transformed the child from a beneficiary of protection, and a beneficiary of care, assistance and services' position to a status of rights' holder. This new posture by which children are themselves holders of rights that they can exercise personally including in a independent way - according to their age and degree of maturity - has drastically changed the relationship between adults and children.

The field of juvenile justice (children in conflict with the law and in contact with the law) is also impacted by this new status and by the four general principles of the CRC, in particular by the right of the child to have his/her best interests taken into account as a primary consideration (art. 3.1 CRC) and the right of the child to be heard in all decisions having an influence on him/her (art. 12 CRC). And juvenile justice, in comparison with the various fields of children rights, is the one in which international treaties have been most developed. This is rather curious way, because juvenile justice does not concern the largest number of children; on the contrary, it is a field occupied by a minority. But probably this can be explained by the particular position of the child facing the power of the State - in its judicial role and holder of the right to punish - and by the high social stakes created by the possibility of deprivation of liberty.

Moreover, in the field of the juvenile justice, deprivation of liberty occupies a very significant place: it is the domain where the possibilities of violations of rights by the States themselves and their agents are the most obvious, violations that can take place during the phase of pre-trial detention, or during that of detention after judgment, very often as well in the form of disciplinary measures, or administrative decisions (e.g., migration situations). It is therefore not surprising that the international legislator, as well the national one, has taken important precautions.

The UN Convention on the Rights of the Child adopted on November 20, 1989 (hereafter the Convention or CRC), which is bind-

ing, promulgates this new status of the child as a subject of rights and the said "rights based approach" which must inspire any intervention for and with the children and make a reference to two basic rules. This is even more critical when children are in situations of vulnerability; such as typically when the child is deprived of his/her liberty.

Apart from the four principles (no-discrimination, best interests, right to life, survival and development and right to be heard), applicable for every substantive right enshrined in the CRC, the two basic rules command all interventions in juvenile justice:

The first has to do with the notion of **Dignity**. The CRC Preamble, as well art. 40 par. 1 CRC, emphasize the fact that the child is a deserving person and thus that any action or intervention must be based on the notion that s/he must be afforded respect as a person. This respectful approach must be granted to the children whatever the way in which they came into contact with the judicial system, independently of their status or their legal capacity, before judgment (observation or preventive) or after judgment.

The second falls under the principle of the **superiority of the right**. In the same way it applies to adults, all procedural guarantees must be recognized and applied to children as well. A famous saying states: "*a child in conflict with the law should never receive worse treatment than an adult*". Indeed, on the contrary, the judicial system should make every effort to treat the child better, that is to protect him/her against the violations of his/her rights more than we would do with adult offenders.

Particularly for serious disciplinary situations while a child is detained, the right for legal advice and the right of appeal must be guaranteed and cannot be ignored just because the children are deprived of liberty or designated as juvenile delinquents. In addition institutions where children are detained must offer an independent and effective mechanism of complaint.

In what follows I will tackle the judges' approach to children deprivation of liberty, which needs to be updated in line with children's rights principles (I), then I will present

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the position of the CRC Committee regarding the juvenile justice (II), finally I will seek for new instruments for the CRC Committee to enhance children's rights while applying justice to minors (III).

### **I. The needed update of judge's approach to children's deprivation of liberty**

For centuries, the unvarying, systematic response to criminal offences committed by children and adolescents was characterized by the severity of the penalties decided by governments (Ministries of Justice and the Interior and the corresponding judicial authorities), a very regrettable reality of violence perpetrated by the States against young offenders, through means of capital or corporal punishment, and the deprivation of liberty for long, medium or short periods of time in prisons or institutions.

Only recently, the States, through their judicial and/or penitentiary authorities, have recognized that they have a responsibility towards children in conflict / contact with the law and they have begun to act in a less violent way, have questioned their approach and sought to show compassion, to take measures of care, manifest support and good will. During that time, judicial systems have oscillated between retribution-repression and protection, swinging between the "Justice Model" and the "Welfare Model", depending on the political, ideological or humanitarian imperatives and also often the trends (if not fashions) of the moment...

Accordingly, the 20th century, during which the juvenile justice system was invented with specialized professionals and courts different from ordinary courts, presented a long gyration between these two models, driven by media sensationalism or the pretext of concern for public safety (zero tolerance), on the one hand, and the need to protect the most vulnerable (the child offender seen as a victim), on the other. A common outcome was social exclusion and the fatalistic conclusion: '*nothing works*'!

At this present junction in the history of juvenile justice, all professionals - whether acting on behalf of the state (as police officers, pros-

ecutors, magistrates, social workers, prison officers,...) or as private individuals (doctors, psychiatrists, lawyers,...) or on behalf of society or NGOs (especially those who run open or closed institutions on behalf of the State or charities...) - must recognize that for a very long time they have been operating **by trial and error** and that they have **not acted in ways that were best for children**. All these people (myself included as a juvenile justice magistrate for over three decades) must recognize the significant mistakes that were made.

It seems necessary to repeat and emphasize that behind every juvenile justice situation, every case, every file, there is a child – a young boy or girl, or an adolescent – in other words a human being of made of flesh and feelings each with his/her own history, sadness and misfortune. For these children, we can imagine what their life experience has been due to the judicial outcome, but it is most often impossible to fathom the degree of their suffering. We are unable to fully sense what it was like to be them from their own perspective.

And thus, unfortunately, all too often juvenile justice is conducted in a somewhat abstract manner. We talk about cases, records, files and represent the reality of the child as a number or a set of initials. We use unsatisfactory, stigmatizing vocabulary ("minors", delinquents, dangerous, violent, deviant...) and we penalize a whole range of children who have committed no more than petty offenses, without considering or thinking through the consequences. Yet we have to sit in judgment with children in conflict with the law, hear witnesses and protect and compensate victims somehow or other. We have to understand the children as well as we can, be sensitive to the signals they are sending, interpret their messages, and find solutions that will not stifle their development but rather nurture their physical, mental, social, family, economic and spiritual growth and encourage their inclusion not their exclusion. Inclusion means that juvenile justice systems must incorporate answers that can be tailored to each child and not systematic, automatic responses that merely repeat the mistakes of the past and



can only lead to children being excluded. In fact deprivation of liberty does not remotely correspond to these qualifications and criteria!

## II. The criticism of the CRC Committee to States' incapacity to avoid children detention

If we now examine the position of the CRC Committee, it must be said that Juvenile Justice has been a recurrent concern of the 18 members of this Treaty Body, who devoted much time, significant efforts and multiple recommendations to this issue since it came into existence.

All the numerous actions of the CRC Committee are based on the provisions of art. 37 CRC which has set the following leading principles for the use of deprivation of liberty:

- (a) the arrest, detention or imprisonment of a child shall be in conformity with the law,
- (b) shall be used only as a measure of last resort,
- (c) for the shortest appropriate period of time,
- (d) with the possibility to challenge the decision,
- (e) for a serious crime,
- (f) and under the condition of maintaining the relationships with parents and relatives
- (g) with the right to do something (education, at least activities),
- (h) under the strict condition that no child shall be deprived of his/her liberty unlawfully or arbitrarily.

A careful reading of these rules and principles shows that **the CRC does not particularly endorse deprivation of liberty, and it makes clear that this solution can be only the *ultima ratio* solution**, under the strictest conditions of execution. For the Committee, deprivation of liberty has very negative consequences with regard to the child's harmonious development (art. 6 CRC, or the ultimate goal of the Convention) and children

deprived of liberty are exposed to serious risks of abuse, violence, social discrimination and denial of their rights. Furthermore, it is obvious that certain groups of children are particularly disadvantaged (indigenous, girls, children with disabilities, migrant children...) and data shows that they are detained more frequently than other groups of children in conflict or in contact with the law. This situation has direct effects on the concerned children, but also on the society at large, since deprivation of liberty increases social exclusion, recidivism, need of care, measures of rehabilitation and reinsertion, and has an important impact on public expenditures (direct and indirect costs).

This position will be repeated, year after year, in almost all the recommendations made by the Committee to States, and included in all the international norms and standards which appear after the promulgation of the Convention in 1989 at the universal, regional or national levels.

Furthermore, juvenile justice received special attention of the Committee, the subject of a General Comment, the GC no 10 in 2007 (Committee on the Rights of the Child, General Comment No. 10: Children's rights in juvenile justice (CRC/C/GC/10, 25.04.2007)). In this text which asserts the Committee's doctrine, deprivation of liberty holds a particularly crucial place. Specifically, in GC No. 10, the Committee asserts:

*71. The Committee wishes to emphasize that the reaction to an offence should always be in proportion not only to the circumstances and the gravity of the offence, but also to the age, lesser culpability, circumstances and needs of the child, as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the leading principles for juvenile justice spelled out in article 40 (1) of CRC*

Consequently:

*In cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safe-*

guard the well-being and the best interests of the child and to promote his/her reintegration

80. The Committee notes with concern that, in many countries, children languish in pre-trial detention for months or even years, which constitutes a grave violation of article 37 (b) of CRC.

Therefore:

*An effective package of alternatives must be available for the States parties to realize their obligation under article 37 (b) of CRC to use deprivation of liberty only as a measure of last resort. The use of these alternatives must be carefully structured to reduce the use of pretrial detention as well, rather than “widening the net” of sanctioned children...*

84. The right to challenge the legality of the deprivation of liberty includes not only the right to appeal, but also the right to access the court, or other competent, independent and impartial authority or judicial body, in cases where the deprivation of liberty is an administrative decision (e.g. the police, the prosecutor and other competent authority).

Therefore:

*The right to a prompt decision means that a decision must be rendered as soon as possible, e.g. within or not later than two weeks after the challenge is made.*

85. Every child deprived of liberty shall be separated from adults. A child deprived of his/her liberty shall not be placed in an adult prison or other facility for adults. There is abundant evidence that the placement of children in adult prisons or jails compromises their basic safety, well-being, and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of CRC, “unless it is considered in the child’s best interests not to do so”, should be interpreted narrowly; the child’s best interests does not mean for the convenience of the States parties.

Consequently:

*States parties should establish separate facilities for children deprived of their liberty,*

*which include distinct, child-centred staff, personnel, policies and practices.*

As another example of this obsession of the CRC Committee, I want to quote some of the numerous international instruments taken in the field of juvenile justice, where the CRC Committee has a clear responsibility<sup>1</sup> (each of these instruments having provision-s on deprivation of liberty):

- “The UN Guidelines for the Prevention of Juvenile Delinquency” (The Riyadh Guidelines or GPJD), 1990
- “The UN Rules for the Protection of Juvenile Deprived of their Liberty” (The Havana Rules or RPJDL), 1990
- “The UN Standard Minimum Rules for Non-custodial Measures” (The Tokyo Rules or RNCM), 1990
- “The UN Rules for the Treatment of Women Prisoners and Non-Custodial Sanctions for Women Offenders” (The Bangkok Rules or RTWP), 2010
- “The Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) Guidelines on national preventive mechanisms”, 2010
- “The UN Standard Minimum Rules for the Treatment of Prisoners” (The Mandela Rules or SMR), 2015...

I could also mention the “UN Standards Minimum Rules for the Administration of Juvenile Justice” (The Beijing Rules or RAJJ), 1985, even if these Rules precede the CRC, because they have been integrated in the CRC (art. 37 and 40) and are considered as the sources of the Committee’s concerns about juvenile justice.

But certainly it is while examining the Concluding Observations the Committee has made, makes and will continue to make for the States which present their periodic report, that we gain a greater awareness of the impact that the Committee has on States’ practices and on the very particular attention which it grants to juvenile justice. To my knowledge,

<sup>1</sup> To underscore the responsibility of the Committee is to assert that the doctrine of the Committee and the Concluding Observations which the Committee made to very numerous States has led the international community to legislate in this sensitive domain

there is no State which escapes the criticism of the Committee on this topic. We could certainly go back to the first sessions of the Committee and follow 25 years of examination of the States' reports to demonstrate the important questions that Committee's members have put to States and especially the recommendations which they have addressed to them.

For this article, I will only quote some recent examples of Concluding Observations for some countries in 2015; the examples which follow are random, emanate from year 2015 (not to be too old) and try to illustrate geographical realities for States with diverse levels of development.

#### **TIMOR LESTE, CRC/C/TLS/CO/2-3 (October 2015)**

*Par. 63:*

...

(c) Promote restorative justice and alternative measures to detention, taking into consideration gender differentiated programmes for boys and girls in conflict with the law, such as diversion, probation, mediation, counselling or community service, wherever possible, and **ensure that detention is used as a last resort and for the shortest possible period of time and that it is reviewed on a regular basis with a view to withdrawing it;**<sup>2</sup> ...

(d) In cases where detention is unavoidable, **ensure that adequate facilities exist for children in conflict with the law, that children are not detained together with adults, and that detention conditions are compliant with international standards, including with regard to access to education and health services;** ...

#### **CHILE 2015CRC/C/CHL/CO/4-5 (October 2015)**

*Par. 86.*

...

Ensure that prosecutors and judges duly take into consideration alternative measures to detention, such as diversion, probation, media-

tion, counselling or community service, and **only consider detention as a last resort and for the shortest possible period of time that it is reviewed on a regular basis with a view to withdrawing it;** ...

(c) Review existing **pre-trial precautionary measures** to ensure that children are not exposed to a lengthy period of pre-trial detention and ensure that reduced sentences do not constitute a measure of pressure for children to recognize their responsibility to avoid burdensome judicial processes;

(d) Improve the infrastructure of **detention centres** to ensure adequate security, dignity and privacy to children and access to health services, education and professional training, taking into account their particular needs based on gender;

(e) Establish independent, confidential, child-friendly and child-sensitive mechanisms for children to report human rights violations, **in particular when deprived of their liberty;**

#### **IRAQ CRC/C/IRQ/CO/2-4 (March 2015)**

*Par. 87*

...

a) Immediately remove all children from death row and ensure that the explicit prohibition of the imposition of the death penalty or life imprisonment for crimes committed by persons under 18 years of age is implemented effectively by giving clear instructions in this respect;

(b) Promptly review the files of all prisoners on death row or serving a life sentence and ensure that their death or life sentences are revoked if they were under 18 years of age when they committed the crime for which they are being punished, and where it is not possible to determine conclusively the age of the child at the time of the offence, presume that he or she was under 18 years of age;

(c) Ensure that a child's case is brought to court for a decision on the lawfulness of his or her detention within 24 hours after his or her arrest;

(d) Promote **alternative measures to detention, such as diversion, probation, media-**

<sup>2</sup> quotes in bold reflects this author's purpose of enhancing the emphasis

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tion, counselling or community service, and ensure that detention is used as a last resort and for the shortest possible time and that it is reviewed on a regular basis with a view to withdrawing it;

URUGUAY CRC/C/URY/CO/3-5 (March 2015)

*Par. 69*

...

(b) Promote **alternative measures to detention**, such as diversion, probation, mediation, counselling or community service, wherever possible, and ensure that **detention is only used as a last resort and for the shortest possible period, and that it is reviewed on a regular basis with a view to its withdrawal**; (c) In cases where detention is unavoidable, ensure that **detention conditions are compliant with international standards**, including with regard to access to education and health services;

SWEDEN, CRC/C/SWE/CO/5 (March 2015)

*Par. 58*

...

Committee urges the State party to:

(a) Ensure that children who are detained have the reasons for their detention and their rights explained to them immediately in a manner that is understandable to them, in particular the right to have **immediate access to a lawyer**, the right to a medical examination by an independent doctor, preferably of their own choice, and the **right to notify a relative**, and consular authorities if appropriate, and also ensure that no statement given in the absence of a legal advisor may be used during legal proceedings;

(b) Promote **alternative measures to custody and detention**, and ensure that detention, including custody and pretrial detention, is used **as a last resort, for the shortest possible period, and that it is reviewed by a judge on a regular basis** with a view to its

being terminated;

(c) Incorporate a **maximum duration of deprivation of liberty in all settings into all relevant legislation**;

(d) Ensure that **all children in detention have an equal statutory right to education**.

and SWITZERLAND CRC/C/CHE/CO/2-4 (March 2015)

*Par. 73*

...

Expedite the process of establishing adequate detention facilities in order to ensure that **children are not detained with adults**.

### III. New instruments for the CRC Committee to enhance children's rights within Juvenile Justice system

It is very interesting to note that recent events brought to the Committee a new framework for its action, which affects the juvenile justice in a specific way, as well other domains of children rights. Evidently, we focus here on the consequences for juvenile justice.

**a) The adoption of the Optional Protocol to the Convention on the Rights of the Child to Provide a Communications Procedure (OPIC)**<sup>3</sup>, adopted on December 19<sup>th</sup> 2011, by the UN General Assembly represents a landmark step for children's rights, since it allows for a child in his or her own right and capacity to complain directly to the Committee. The new possibility offered to the child to complain is consistent with the right of the child to be heard, so important in juvenile justice. This means that the child who is capable of forming his/her own views has the capacity to act by him/herself in accordance with age and maturity, and his/her evolving capacities in his-her cause as an offender, a victim or a witness.

The Protocol opened for signature the 28<sup>th</sup> of February in 2012, and it entered into force upon ratification by 14 UN Member States, in April 2014. To date, there are 27 States being parties to the OPIC<sup>4</sup>. It is important to note

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<sup>3</sup> This Protocol is also called familiarly **OPIC**: Optional Protocol on Individual Complaints.

<sup>4</sup> January 2016.



that the possibility to file a complaint to the children under the jurisdiction of States that ratified it.

It is certain that the domain of the juvenile justice will be one of the most important fields of intervention in cases of children's complaints, notably due to decisions related to deprivation of liberty whether it is in prison or in institutions. And yet another expected effect will be that the OPIC will enhance children's access to remedies at local and national levels. As States parties will not be too interested in being judged by an international committee, they are likely to establish mechanisms of remedies at local and national levels in order to deal with violations of the right of the child domestically.

Some countries provide for such possibilities but, in many States parties to the CRC, it is very difficult for children to have direct access to court and to appeal court decisions. Considerable progress has been made with the recognition of the possibility to appeal against a juvenile justice court decision; but many States do still not have provisions in their procedural code to do so and have no judicial capacity to receive and consider complaints. It will be interesting to see how this mechanism will provide impetus for States to establish at domestic level the possibility for children to obtain redress and justice.

#### **b) A global study on children deprived of liberty**

The Resolution adopted by the UN General Assembly on 18 December 2014 "invites the Secretary-General to commission **an in-depth global study on children deprived of liberty**, funded through voluntary contributions and conducted in close cooperation with relevant United Nations agencies and offices. It has to include good practices and recommendations for action to effectively realize all relevant rights of the child, including supporting the implementation of the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice, and invites the Secretary-General to submit the conclusions of the study to the General Assembly at its seventy-second session..." (A/RES/69/157, par.52 d).

I would like to mention the role played by the CRC Committee in the support of the Global Study, expressing, one more time, its obsession with regard to the use of deprivation of liberty and the negative effects on children themselves, the community and the society at large. The Members of the Committee supported individually and institutionally the Call from the civil society for this Study. Moreover, five former Chairpersons of the Committee on the Rights of the Child, being gravely concerned that far too many children are subjected to excessive and punitive confinement that violates their rights and has a long-lasting negative impact on their psychological and social development, have urged UN States to support the Global Study on Children Deprived of Liberty and have also encouraged the appointment of a well-respected, independent expert to lead this important initiative.

This decision of the UNGASS is very important in order to have the possibility to undertake, at the universal level a global study in order to prevent human rights violations against children in custody and reduce the number of children deprived of liberty. The appointment of an independent expert at the end of 2016 concretizes the efforts of the international community and numerous civil society organizations.

According to the initiators: "There is a great lack of quantitative and qualitative data (particularly disaggregated data), research and verified information on the situation of children deprived of their liberty. The Study will take into account deprivation of liberty in all its forms, including: children in conflict with the law; children confined due to physical or mental health or drug use; children living in detention with their parents; immigration detention; children detained for their protection; national security etc. In order to ensure that deprivation of liberty is clearly understood and thus used as a measure of last resort, there is also critical need to improve the **clarity around key concepts which are related to children's rights and deprivation of liberty** (such as last resort, shortest possible time, best interests of the child; access to justice; pre-trial detention; diversion; restorative



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justice; formal and informal justice systems; alternative measures; protective measures; age of criminal responsibility; rehabilitation and reintegration; administration detention; inter alia).”<sup>5</sup>

Without doubt, this study will have an important effect on the practices and decisions on deprivation of liberty and should bring States to be even more careful when they think to answer the crimes committed by of the youngest.

## 2. Conclusion

The international framework on juvenile justice, and particularly the CRC in art. 37(c), requires that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and set out fundamental guarantees for children under the age of 18 who are deprived of their liberty”.

The Havana Rules detail the treatment that children should be provided with and the con-

ditions of their detention, with the precision in art. 11, lit. b, that deprivation of liberty applies to all children in a “public or private custodial setting, from which a person is not permitted to leave at will, by order of any judicial, administrative or other public authority” (United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted by UNGASS resolution 45/113 of 14 December 1990). These standards were developed “with a view to counteracting the detrimental effects of all types of detention and to fostering integration in society” (art. 3).

The CRC Committee is the guardian of these basic rules. Furthermore, it has the responsibility to monitor if the 195 States parties to the CRC meet their commitments. It is not surprising from then on that for a matter as sensitive as the freedom of the individuals under age 18, it shows a permanent, watchful and acute attention.

**To the point to make of it a true obsession, in the best sense of the word.**

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<sup>5</sup> Call for a Global Study on Children Deprived of liberty (Defense for Children, 2014) [www.childrendeprivedofliberty.info](http://www.childrendeprivedofliberty.info)

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# RIGHT TO INFORMATION: TOWARDS AN EFFECTIVE LEGAL POSITION FOR CHILDREN DEPRIVED OF LIBERTY

Stephanie Rap and Ton Liefwaard



**Stephanie Rap, Dr.**

*Assistant professor at the Department of Child Law, Leiden Law School*



**Ton Liefwaard, Prof. Dr.**

*Holder of the UNICEF Chair in Children's Rights at Leiden Law School  
Programme director of the LL.M. programme Advanced Studies in International Children's Rights*

## Abstract

Children who are deprived of their liberty find themselves in a particular vulnerable position. Rights violations in detention take place on a large scale, regardless the reason for detaining the child. Article 37 of the UN Convention on the Rights of the Child is the core human rights provision for children deprived of their liberty. It recognizes the impact of deprivation of liberty on children's lives, as well as the need for a child specific approach. This article provides a framework in which the effective legal position for children deprived of their liberty is conceptualised. Next to rights aiming at the protection of children and providing basic services, an effective legal position of children requires procedural rights, including the right to information, which is the specific focus of this article. Procedural rights form an essential part of the legal position of children deprived of liberty and can also be regarded as a prerequisite for the effective protection of their rights. In this article, it is concluded that too little is known about the right to information – in theory and practice – in the specific context of deprivation of liberty. What has become clear is that providing information to children without them understanding it, is meaningless. Therefore, children should be educated about their rights and the effective enforcement of these rights.

**Keywords:** Right to information, deprivation of liberty, children's rights, UN Convention on the Rights of the Child, effective legal position.

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## 1. Introduction

Children who are deprived of their liberty find themselves in a particular vulnerable position. Rights violations in detention take place on a large scale, regardless the reason for detaining the child (UN Human Rights Council, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 5 March 2015, A/HRC/28/68). Deprivation of liberty of children takes place on various legal grounds and in different systems including, among others, the juvenile justice system, the child protection system, the (mental) health care system and the migration system.

Article 37 of the UN Convention on the Rights of the Child (CRC) is the core human rights provision for children deprived of their liberty. It recognizes the impact of deprivation of liberty on children's lives, as well as the need for a child specific approach while children are detained (Liefwaard, 2008). As a starting point deprivation of liberty of children must be used only as a measure of last resort and for the shortest appropriate period of time (art. 37 (b) CRC) and children have the right to challenge the legality of the deprivation of liberty before a court or other competent, independent and impartial authority (art. 37 (d) CRC). In addition, article 37 (c) CRC provides that children deprived of their liberty are entitled to be treated with humanity and respect for their inherent dignity, and in a manner that takes into account their needs as a child. For the protection of children deprived of their liberty, it is vital that they can effectively enjoy their rights under the CRC, which ultimately revolves around their legal position as children deprived of their fundamental right to liberty of the person (see, among others, art. 9 of the International Covenant on Civil and Political Rights).

This paper provides a framework in which the effective legal position for minors deprived of their liberty is conceptualised. Next to rights

aiming at the protection of children and providing basic services, as set forth in article 37 CRC and related international standards, an effective legal position for children requires procedural rights, including the right to information. The framework presented in this paper goes beyond article 37 CRC and includes other relevant international and regional human rights treaties, standards and jurisprudence. It will be argued that procedural rights aiming at safeguarding fair treatment, including the right to be heard, the right to an effective remedy and the right to information form an essential part of the legal position and serves as a prerequisite for the effective protection of the rights of children deprived of their liberty. This article focuses on the right to information. In addition, the article will provide examples of the conceptualisation of the right to information for children deprived of their liberty in practice through legislation and specific policies.

## 2. Legal position of children deprived of liberty under international law

Deprivation of liberty can be defined 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'.<sup>1</sup> As a consequence, deprivation of liberty can include many different forms of placement, including arrest, detention or imprisonment in context of criminal justice, placement in child protection or welfare institutions or other facilities meant to provide for alternative care, placement in psychiatric institutions, wards or hospitals, immigration detention and forms of administrative or military detention. In addition, this broad definition of deprivation of liberty encompasses both institutions that can be considered as closed (i.e. targeted at preventing children from escaping) and institutions that

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<sup>1</sup> Rule 11 (b) UN Rules for the Protection of Juveniles Deprived of their Liberty (JDLs). Similar definitions can be found in article 4 (2) of the Optional Protocol to the Convention against Torture (OPCAT) and rule 21.5 European Rules for juvenile offenders subject to sanctions or measures. This definition to a large extent covers 'detention' under article 5 European Convention on Human Rights (ECHR) as developed under the case law of the European Court of Human Rights (ECtHR); see e.g. Trechsel (2005, p. 412ff).

(semi-)open, but where children are ordered to stay also if they do not want to.

As mentioned in the introduction, each child deprived of his<sup>2</sup> liberty is entitled to be treated with humanity and respect for his inherent dignity, and in a manner that takes into account his needs as a child (art. 37 (c) CRC). This means that if a child is deprived of his liberty he remains entitled to all rights under international human rights law, including the CRC. This places states and, *de facto*, institutions under the obligation to provide for basic rights, rights that offer special protection and rights that enable children to reintegrate into society (Liefwaard, 2008, p. 595ff). *Basic rights* include rights related to living conditions in institutions (see art. 27 CRC), health care (art. 24 CRC, education (art. 28 & 29 CRC), recreation, play and cultural activities (art. 31 CRC) and freedom of religion, thought and conscience (art. 14 CRC). The right to maintain contact with family can also be regarded as a basic right (art. 37 (c) CRC; see also art. 9 (3) CRC). *Special protection rights* revolve around the protection of children against violence (art. 19 CRC) and forms of ill-treatment or -punishment (art. 37 (a) CRC), which relates to adequate protection against unlawful or arbitrary treatment or punishment, including the use of force and disciplinary measures, and to effective remedies, including the right to file a complaint and to have access to independent supervisory bodies, and the right to legal and other appropriate assistance (art. 37 (d) CRC). The right to be separated from adults (art. 37 (c) CRC) should also be seen in light of the need to protect children who are deprived of their liberty. In addition, special protection rights are connected to the more fundamental right to be treated fairly and in child-friendly manner, which enshrines the right to be heard and to effective participation in decision-making affecting him. The right to information should also be understood in this context. If a child is unaware of his rights, the risk to becoming subjected to unlawful or arbitrary treatment increases. In addition, there is no point in having rights if you

are not or only partly aware of that (for more on the significance of adequate information see further below).

Some rights are particularly important for the child's *reintegration* into society. These include the right to education and to maintain contact with family, but also the right to be adequately protected against violence is relevant for the child's reintegration. Moreover, international legal standards call upon states to tailor the reintegration to the interests and needs of each individual child, which calls for adequate selection and placement procedures and periodic review (art. 25 CRC; see also rule 27 JDLs), an individual plan recognizing the needs of the child, including the need for (medical) treatment (art. and after care (see e.g. the UN Guidelines on alternative care, chapter *E Support for aftercare*).

The rights of the child deprived of liberty are not absolute. However, international human rights law implies that the limitation of the enjoyment of right can only take place (i.e. can only be justified) in case such a limitation is strictly required and proportionate in light of the objectives of the placement of the child, and only while taking into account the best interests of the child (art. 3 (1) CRC) and the views of the child (art. 12 CRC). Effective remedies should be available to enable the child to challenge (alleged) unlawful or arbitrary treatment. Altogether, states are under the obligation to safeguard a legal status, which acknowledges:

- 1) that the child deprived of his liberty remains entitled to all rights under international human rights law, including the CRC;
- 2) that the enjoyment of rights can only be limited if strictly required by the objectives of the child's condition and only while respecting the general principles of the CRC, in particular the best interests of the child (art. 3 (1) CRC) and the child's rights to be heard (art. 12 CRC);
- 3) and that the child has the right to an effective remedy against unlawful or arbitrary treatment (Liefwaard, 2017).

The child's legal status must be translated

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<sup>2</sup> For the purpose of uniformity it is chosen to refer to persons with 'he' or 'him', while meaning 'she' or 'her' as well.

into concrete terms<sup>3</sup> and can benefit from further elaboration into (statutory) domestic legislation (CRC Committee, 2007, para. 88). This has a number of advantages including that it hardens the legal value of many international and regional standards that are part of soft legal instruments and as such not legally binding, it can contribute to their acceptance at the domestic and local level – i.e. it brings the standards closer – and it enables states to target the specific rules to the specific context in which the deprivation of liberty takes place.

### 3. Legal basis of the right to information

The right to information can be regarded as one of the most fundamental elements of the legal status of the child in deprivation of liberty. In general terms, the right to information is laid down in article 17 of the CRC. The right to information has close ties to the right to be heard (art. 12 CRC). The UN Committee on the Rights of the Child (2009) has stated that the right to be heard implies that the child should be informed about ‘the matters, options and possible decisions to be taken and their consequences’ (General Comment No. 12, para. 25). The right to receive adequate information is seen as a precondition for the child to be able to give his informed views and make clarified decisions (General Comment No. 12, para. 25; 80). The UN Committee states that ‘children should be provided with full, accessible, diversity-sensitive and age-appropriate information about their right to express their views freely’ (para. 134 (a)). This information should be given to children in a way that takes into account their age and capacities and concerning their rights, national legislation, regulations and policies, local services and appeals and complaints procedures (para. 82). Recently, the UN Committee (2016) has acknowledged that digital media play an increasingly important role regarding children’s right to information. Therefore, states should make sure that children have

equal access to digital forms of information and training should be provided to children to enhance their digital information and media literacy skills (General Comment No. 20, para. 47).

International and regional standards elaborate on the right to information specifically in the context of juvenile justice. With regard to juvenile justice proceedings children should, first of all, be informed promptly and directly about the charges against him, in a language he understands (art. 40 (2)(b) CRC; UN Committee on the Rights of the Child, 2010, General Comment No. 10, para. 47). Preferably, this information should be provided orally to the child (para. 48) and to his parents in such a way that they understand the charge and the possible consequences (Guidelines on child-friendly justice, 2010, IV, A, para. 1 (5)).

In the European context two EU regulations apply specifically to the right to information in juvenile justice proceedings. First, in the Directive on the Right to Information in Criminal Proceedings (EU Directive 2012/13), which applies to adults as well as children, the right to information is laid down. In article 3 it is stated that suspected persons should be provided with information concerning specific procedural rights, such as the right of access to a lawyer, the right to be informed of the accusation, the right to interpretation and translation and the right to remain silent (art. 3 (1)). In particular, the information should be provided in ‘simple and accessible language’ appropriate to the needs of vulnerable persons, such as children (art. 3 (2)). Second, in the recent Directive on procedural safeguards for children suspected or accused in criminal proceedings the right to information specifically for children in conflict with the law is assured (Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings, 2016). This means that, next to information about the general applicable procedural rights, specific rights should be addressed when a child

<sup>3</sup> See further the JDLs and similar regional standards, such as the European rules for juvenile offenders subject to sanctions or measures (2008), the Guidelines on child-friendly justice (2010) and the recently updated CPT standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (2015). See also the case law of the European Court of Human Rights under article 2 and 3 ECHR (FRA, 2015).



is accused or suspected of an offence. These rights are inter alia to have a parent or guardian informed and to be accompanied by a holder of parental responsibility during the proceedings, the right to privacy, the right to individual assessment and medical examination and assistance, and the right to limitation of deprivation of liberty, the use of alternative measures, including the right to periodic review of detention (art. 4).

Specifically concerning children deprived of liberty, the Havana Rules (United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990) provide minimum standards for the protection of children deprived of their liberty in any form (rule 3). Two sets of principles as set out in the Havana Rules are related to the right to information for children who are deprived of their liberty. First, it is stated that children on admission should 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' (rule 24). Moreover, information should be provided about where children can lodge complaints and where they can seek legal assistance. In case the child is illiterate or cannot understand the information in written form, another form of conveying the information should be sought (rule 24). Efforts must be made to enable children to understand their rights and obligations during deprivation of liberty. This implies that information should be provided about the 'house rules' of the institution, the care provided, the disciplinary procedures and other methods of seeking information (rule 25). The second set of principles relates to making complaints while deprived of liberty. In rule 25 it is also stated that juveniles have the right to make complaints and that they should be assisted in understanding this right. In rules 75-78 the right to lodge a complaint is further elaborated upon. For example, children should be able to make requests or complaints to the director of the facility (rule 75) and to a higher authority (rule 76), an independent office or ombudsman should be established to investigate complaints (rule 77) and children have the right to request as-

sistance in order to file a complaint (rule 78). To conclude, the Guidelines on child-friendly justice are worth mentioning in this regard. The Guidelines, adopted by the Council of Europe in 2010, 'articulate in a holistic manner the key elements of the justice system from a children's rights perspective' (Liefwaard & Kilkelly, n.d., p. 1). Although being legally non-binding principles, they give practical guidelines on how to protect children's rights in the justice system (Liefwaard & Kilkelly, n.d.). With regard to the right to information the Guidelines provide that 'children should be provided with all necessary information on how to effectively use the right to be heard' (First Part, ch. IV, at para. 48). Moreover, several matters are listed of which children should be informed when involved with the justice system, such as concerning the duration of proceedings, access to appeals and complaints mechanisms, the role the child plays in the procedures, the time and place of court proceedings and the outcomes of proceedings (First Part, ch. IV, at para. 1.1). It is also stated that 'child-friendly materials containing relevant legal information should be made available and widely distributed, and special information services for children such as specialised websites and helplines [should be, *sec*] established' (First Part, ch. IV, at para. 1.4). However, it can be noted that no specific provisions are formulated regarding the right to information for children deprived of their liberty. The guidelines formulated in the first paragraph should therefore be seen as also applying to this specific group of children, albeit this not being explicitly mentioned. In the same line of thought the UN High Commissioner for Human Rights states explicitly in the 2013 report on access to justice for children that children should be empowered with child-sensitive information and that child-sensitive procedures form a prerequisite for effective access to justice for children, such as access to complaints mechanisms while deprived of liberty (UN High Commissioner, 2013, paras. 18ff and 21ff.). The 'CPT-standards' developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

(CPT)<sup>4</sup>, contain more specific guidelines with regard to information provision to children deprived of their liberty. When children are taken in police custody they should immediately be given an information sheet explaining their rights and safeguards. This sheet should be ‘child-friendly, written in simple and clear language and available in a variety of languages. Special care should be taken to ensure that juveniles fully understand the information’ (para. 98). Moreover, when are placed in an institution they should inter alia be provided with a copy of the rules governing the institution, a written description of their rights and obligations and information on how to lodge a complaint. When the child is not able to understand the information in written form it should be made sure that his full comprehension is reached by using another form of communication (para. 130).

In conclusion, the right to information has been explicitly recognized under international human rights law. The implications of this right as well as the obligations that can be derived from it differ depending on the context the child is in. However, it is clear that children deprived of their liberty have a right to information and that, as part of this right, information is presented to them in a child-friendly manner. Therefore, states should develop specific legislation to target the right to information to the different contexts in which children deprived of their liberty find themselves. These specific regulations should include the kind of information that has to be provided to the child. In addition, it should provide when the designated authority ought to provide the information and rules regarding additional safeguards, including the right to legal and other appropriate assistance (art. 37 (d) CRC).

#### **4. Why is receiving adequate information of importance?**

Deprivation of liberty can cause children much stress and feelings of anxiety, especial-

ly in the earliest stages of the placement in an institution or detention facility (Van Keirsbilck, 2016; Van der Laan & Eichelsheim, 2013; Neubacher et al., 2011; Van der Laan et al., 2008). Poor adaptation to imprisonment can cause risky situations involving self-harm, (attempted) suicide and aggressive behaviour, negatively affecting the person himself, other inmates and the staff (Van der Laan & Eichelsheim, 2013). Moreover, children deprived of their liberty generally have particular problems with, among others, accessing information, receiving legal and other appropriate assistance, including assistance by family members (UN Violence Study, 2006; see also Liefwaard, Reef & Hazelzet, 2014).

To reduce these feelings of stress and anxiety receiving adequate and child-friendly information, which takes into account the age and maturity of the child, is of importance (Liefwaard, 2017). Here a link can be drawn with fair treatment of children by authorities. From a procedural justice perspective, it can be argued that the extent to which people perceive procedures and treatment as fair influences the acceptance of the decisions made by authorities and results in a more positive evaluation of the decision maker (Tyler, 2003). This also applies in prison situations, where rule compliance is higher when the legitimacy and authority of the staff is accepted (Van der Laan & Eichelsheim, 2013). Research conducted in Germany concerning violence in detention shows that the level of aggression and feelings of loss of autonomy can be effectively reduced when juveniles experience that they are treated fairly (Neubacher, 2014). According to Tyler (2003; 2006), elements of a fair treatment constitute a respectful treatment, the opportunity to participate in the situation by explaining one’s perspective and understanding the argumentation behind a certain decision. Research shows that experiencing unfair treatment in a detention setting relates to feelings of stress, anxiety and fear. At the contrary fair treatment by staff contributes to diminished feelings of fear and

<sup>4</sup> The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) is the non-judicial monitoring body under the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Council of Europe; *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment*, 26 November 1987, ETS 126.

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perceiving the environment as safer (Van der Laan & Eichelsheim, 2013).

Being able to understand the decisions taken by judicial authorities or the staff of an institution requires the provision of age specific information to children. Liefwaard, Reef and Hazelzet (2014, p. 23) argue that fair treatment should be supported by 'clear and child-friendly procedures and policies, monitoring bodies and complaint mechanisms'. Moreover, fair and child-friendly treatment of children deprived of liberty can serve as a prominent tool in the prevention of violence in institutions (Liefwaard, Reef & Hazelzet, 2014). However, child-friendly treatment and distribution of information should have regard for the age and level of maturity of children deprived of liberty.

Numerous studies have been conducted regarding the understanding of children of legal proceedings (Driver & Brank, 2009; Weijers & Grisso, 2009; Grisso, 2000; Cooper, 1997). From these studies, it can roughly be concluded that adolescents between the ages of 14 and 16 have the capacity to understand court procedures (Grisso, 2000; Scott & Steinberg, 2008). Moreover, several aspects of adolescent development influence their level of understanding. Adolescents' behaviour is influenced by factors such as susceptibility to peer pressure (Steinberg & Scott, 2003; Scott & Steinberg, 2008; Gardner & Steinberg, 2005; Steinberg, 2011), the different assessment of risks compared to adults (Greene, Krcmar, Walters, Rubin & Hale, 2000; Schmidt, Repucci & Woolard, 2003; Steinberg & Cauffman, 1996), the lesser capacity to see the long-term effects of behaviour (Cauffman & Steinberg, 2000; Scott & Steinberg, 2008) and less life experience (Steinberg & Scott, 2003). This implies that the reasoning skills and maturity of judgment of adolescents are not fully matured (Scott & Steinberg, 2008; Steinberg & Schwartz, 2000). This could hamper the full understanding of rules and proceedings that apply to them. Buss (2017) notices that studies on children's understanding of their rights, focuses heavily on their ability to understand the words included in these rights, instead of focussing on the true appreciation and the consequences of cer-

tain decisions. Therefore, language should not only be made more child-friendly, efforts should be made to make the child understand what he is consenting for or deciding about (Buss, 2017). Even though the studies referred to concern (formal) court proceedings, it is likely that the findings are relevant for rules and procedures in institutions.

Regarding children's appreciation of rules and proceedings it is important that they receive adequate support and information. The staff of an institution plays an important part in providing information regarding the daily activities and house rules of the institution. Van der Laan and Eichelsheim (2013) found that fair treatment by the staff contributed to less dangerous situations and a diminished risk of aggressive incidents. However, with regard to legal information lawyers can play an important role in informing and explaining children their rights and legal procedures (Buss, 2000).

## **5. Implementation in practice of the right to information**

In nearly every member state of the European Union children involved in civil and administrative proceedings have the statutory right to receive information about their rights. In some countries, children also have the right to receive this information at their first contact with the judicial system or other competent authorities (i.e. police, immigration, social, educational or healthcare services). Some countries have developed certain child-sensitive measures, such as the requirement that information about rights and procedures should be provided in a child-friendly manner and that court decisions should be communicated in a manner adapted to the child's understanding (Kennan & Kilkelly, 2015). With regard to juvenile justice procedures, child suspects generally have the statutory right to receive information about their rights and the procedures, provided upon their first contact with the authorities (usually the police). However, in the majority of European member states no legislative obligation exists to provide this information in a child-friendly manner (Kennan & Kilkelly, 2015), let alone

that such obligations exist with regard to children deprived of their liberty. Knowledge and research about informing children deprived of liberty about their rights and the procedures is very limited. Therefore, in the following part, two specific countries will be looked at: Belgium and the Netherlands, focussing specifically on police custody in the context of juvenile justice and institutional placement as part of a civil youth care measure (i.e. a form of alternative care) or in a juvenile detention facility. Belgium serves as an example of having a national regulation, which is rather concrete and child-specific. The Netherlands form an interesting example to learn about how specific regulations designed for children placed in a youth custodial institution work in practice. This paragraph will be concluded with a brief overview of recent research outcomes concerning children's experiences regarding the provision of information while deprived of liberty.

#### *Two examples: Belgium and the Netherlands*

In Belgium, when children involved in offending are taken in custody police officers should inform the child in a language that he understands about his rights and the reasons for placement in custody; the maximum duration of the custody; the procedures that need to be followed as a result of the custody; and the possibility for the police to resort to coercive measures. Police officers must confirm that this information has been provided, by submitting it into a register of detainees. This means that individual police officers can be held accountable when not providing this information to the child suspect (Kennan & Kilkelly, 2015).

Rules concerning the legal position of minors subjected to youth care are laid down in a separate law applicable in the Flemish community (Decree concerning the legal position of the minor in youth care, 2006).<sup>5</sup> In Belgium (Flanders), the youth court judge can order educational measures, which also include placement in a (closed) institution (Chris-

tiaens et al., 2010). When children receive a youth care measure they have the right to receive clear and adequate information they understand about youth care and if applicable the rules that apply in the institution (art. 11). They also have the right to communication in a language that they understand and that is adapted to their age and maturity (art. 12). Upon admission in an institution, every child should receive a booklet including all the rules governing the institution. Institutions in Belgium have developed a child-friendly version of the house rules. The booklet is written in understandable language and explanations are provided of terminology. Moreover, it is stated that children can turn to staff members with further questions (Kinderrechtencommissariaat, 2010). Recently, the external monitoring of youth care services as well as the external handling of complaints was given a legal basis.<sup>6</sup> Herewith a firmer basis is laid down for the complaints procedure in institutions, ensuring compatibility with international standards concerning the legal position of children deprived of liberty (see Kinderrechtencommissariaat, 2014). Moreover, explicit references are made in the law to the duty to inform children on their right to lodge complaints, which aims to safeguard the right to information (art. 11 (1) Decree concerning the legal position of the minor in youth care). In the Netherlands, children who are held in custody by the police are provided with information through a brochure, titled '*You are suspected of a criminal offence*' (version March 2016), developed by the Information Department of the Ministry of Security and Justice. The brochure contains information about the rights of children who are interrogated by the police, especially the right to legal representation. It is digitally available in twenty languages and can be printed at every police station. It is, however, questionable whether the three-page, small font brochure is easy to read and understand, especially for younger adolescents and in the stressful circumstances they find themselves in. On a po-

<sup>5</sup> Decreet van 7 mei 2004 betreffende de Rechtspositie van de Minderjarige in de Integrale Jeugdhulp (DRP), in force as of 1 juli 2006.

<sup>6</sup> Decreet van 12 juli 2013 betreffende de integrale jeugdhulp, article 78 (2).



sitive note, a recent study reveals that lawyers, prosecutors and judges, who come into contact with juvenile suspects, indicate that they ask whether the child received information on the proceedings and whether he has additional questions (Barendsen & Vegter, 2016). The setting, though, needs to be of a non-hostile and preferably less informal nature, in order for children to feel comfortable enough to ask the professional questions and further clarifications (Rap, 2013).

Specific legislative obligations with regard to the right to information of children deprived of their liberty in youth custodial institutions (i.e. institutions meant to house children in the context of juvenile justice) exist as well in the Netherlands. Each child admitted to a juvenile detention facility must receive information on his rights and duties, in writing and in a language he understands; he must receive this information upon admission. In particular, this information must inform the child about the right to complaint and appeal and to make requests (art. 60 Dutch Youth Custodial Institutions Act).<sup>7</sup> The Youth Custodial Institutions Act does not prescribe the way in which information should be provided. However, written information should always be available in the form of brochures or leaflets.<sup>8</sup> In addition, the Act provides that children must receive information in writing when certain specific decisions are made (e.g. in case of disciplinary procedures); this information must include the right to lodge a complaint regarding the decision made (art. 62). Research by Bruning, Liefwaard and Volf (2005) shows that children indicate that they can go to staff members when they have additional questions about their rights. However, it is argued that staff members or mentors may not be the right persons to inform children about their rights, because they are not legally educated and they do not hold a neutral position. Moreover, staff may not point children at their rights, because they perceive rights as potential risk or they do not value the significance of rights for children (Brun-

ing, Liefwaard & Volf, 2004). It is recommendable to give independent legal advisors (e.g. legal aid clinics) access to the institution, to provide children with information and advice (Bruning, Liefwaard & Volf, 2005).

### *Views and experiences of young people*

As stated before, being deprived of liberty and especially arriving for the first time in an institution is a stressful event for children. Although the legal position of children deprived of liberty is carefully laid down in laws or regulations in some countries, in practice children may not receive the appropriate information or they might not be in the position to understand the provided information. In general, children involved in the justice system (i.e. education, public or private family law or juvenile justice, but who are not necessarily deprived of their liberty) indicate that they want to receive more information about their rights (Kilkelly, 2010). In recent years, studies were conducted about the experiences of young people specifically with regard to admission procedures in institutions and the provision of information.

First, several studies indicate that when information is provided upon admission it is experienced by children as too much information at once and difficult to understand, because it is not written in a way that they can understand it (The Howard League for Penal Reform, 2011; The Ombudsman for Sweden, 2013; Barendsen & Vegter, 2016). Young people rely heavily on the information they receive from peers, instead of the information that is provided by the authorities (Ombudsman for Children and Young people Ireland, 2011; Kinderrechtencommissariaat, 2010; Bruning, Liefwaard & Volf, 2005). Informal communications with peers and observations guide them in understanding the rules that apply in the institution (Ombudsman for Children and Young people Ireland, 2011). Moreover, children have limited knowledge concerning their legal rights and potential legal remedies. Research in the Netherlands

<sup>7</sup> Beginselenwet Justitiële Jeugdinrichtingen, in force as of 2 November 2000.

<sup>8</sup> *Kamerstukken II* 1997/98, 26016, nr. 3 (MvT), p. 63.



shows for example that children were not adequately informed about their right to complaint; children indicated that they primarily received information about this from other children (Bruning, Liefwaard & Volf, 2005; see also the Ombudsman for Sweden, 2013). Children in custody often view the law as something that is there to punish them. They are often particularly reluctant to pursue their rights due to the threat of restraint that is routinely used to make them do what they are told (The Howard League for Penal Reform, 2011). This underscores the importance of the provision of child-friendly information on the existence of remedies and compliant mechanisms. These procedures should be speedy, confidential and safe. This means, among other things, that children should be protected against retaliation, when they lodge a complaint (Liefwaard, 2017).

## 6. Concluding observations

Children deprived of liberty, regardless of the context in which their deprivation of liberty takes place, are entitled to continue to enjoy their fundamental rights and freedoms. This aims to safeguard essential basic services, to protect children against violence, forms of ill-treatment and unfair treatment and to promote their reintegration. Procedural rights, in particular the right to information, form an essential part of the legal position of children deprived of liberty and can also be regarded as a prerequisite for the effective protection of their rights. This article provided insight in the significance of adequate information and presented some information on legislation and practice in (certain) EU countries in this regard. Actually, too little is known about the right to information – in theory and practice – in the specific context of deprivation of liberty, let alone that we sufficiently understand what kind of information is provided to children and how that relates to their needs while being deprived of their liberty, also given the specific context in which the deprivation of liberty takes place. The UN Global Study on Deprivation of Liberty, which is currently conducted, should therefore specifically focus on the rights and actual means children

have – in theory and practice – to acquire relevant information in order to fully benefit from the rights protection they are entitled to under international children's rights. What we do know is that providing information to children without them understanding it, is meaningless. Empowerment of children deprived of liberty therefore requires to educate children about their rights and the effective enforcement of these rights.

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# IMAGINING HYBRIDITY TO ACHIEVE RESTORATIVE JUSTICE FOR CHILDREN: A PALESTINIAN STUDY<sup>1</sup>

**Kristen Hope**



**Kristen Hope, MSc**

*Research and Advocacy Advisor, Juvenile Justice Programme, Terre des hommes Foundation*

## **Abstract**

The prominent and growing body of evidence around the damaging effects of detention on children's physical and mental health has emphasised the urgency for viable implementation of alternatives to liberty-depriving mechanisms and non-custodial measures within juvenile justice systems, as articulated in binding international treaties and non-binding instruments. These efforts resonate strongly with reflections around the theory and practice of restorative justice for children, particularly in terms of offering opportunities for repairing harm experienced at the level of the offender, the victim and the community. However, the encounter between child rights and restorative justice philosophy is not seamless, as it provokes important questions around the roles and relationships amongst state and non-state actors in processes that contribute to healing and meaningful resolution.

This article seeks to explore some of the tensions around the articulation between the state and the community in the field of juvenile justice, particularly with respect to non-custodial measures and restorative practices, in contexts of legal pluralism which include customary justice mechanisms. To that end, the article will draw on a case study from Palestine, where a new

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juvenile law was passed in 2016 and which provided a backdrop for poignant discussions about assumptions underlying the concept of rule of law, the idea of ‘community’ and the relevance of customary justice traditions in the 21<sup>st</sup> century.

**Keywords:** juvenile; justice; children; restorative; alternatives; legal pluralism; Palestine.

## 1. Introduction

In the late 1970’s, Norwegian criminologist Nils Christie argued that the state and criminal justice institutions “steal” conflicts from those most directly affected, namely the offender, the victim and the community (Christie, 1977). Consequently, it was claimed that these central stakeholders are left feeling that justice does not meet their needs and that the process of ‘justice’ deepens social wounds rather than contribute to healing and meaningful resolution (Zehr, 2002). These reflections are credited with providing a springboard for the development of the theory of restorative justice, which proposes an alternative to the dominant retributive and welfare models of justice by shifting the focus from punishment to healing and displacing the dominance of the state through the assertion that the justice process belongs not to the state, but to the community (Braithewaite, 1999).

In the field of child protection generally and juvenile justice more specifically, the influence of the principles of restorative justice, including the valorisation of the community, is visible in a number of areas (Wessels, 2009). This is particularly apparent with respect to non-custodial measures. In view of the prominent and growing body of evidence around the damaging effects of detention on children’s physical and mental health (Aizer and Doyle, 2013; Holman and Zeidenberg, 2006), both binding international treaties and non-binding instruments advise that deprivation of liberty should be used only as a last resort and for the shortest possible period of time, and stipulate that non-custodial measures should be made available for children at any stage of the justice proceedings through diversion or alternatives to detention (United

Nations, 1989; United Nations, 1985).

Non-custodial measures should not, in themselves, be categorised as de-facto ‘restorative’, because some alternatives to detention may still reflect punitive tendencies.<sup>2</sup> Nevertheless, the fact that they divert conflicts away from criminal justice proceedings and offer concrete alternatives to detention and stigmatisation suggests a step in a restorative direction (UNODC, 2006). Moreover, the spirit of restorative philosophy is identifiable in international instruments supporting non-custodial measures. For example, the Tokyo Rules emphasise the involvement of the offender, the victim and the wider community, in order to contribute to repairing the harm done to each of these three parties. They also clearly set out the importance of the community, whereby the Rules: “are intended to promote greater community involvement in the management of criminal justice, specifically in the treatment of offenders, as well as to promote among offenders a sense of responsibility towards society” (United Nations, 1990).

Unsurprisingly, these ideas raise many questions regarding the role of the state, which has primacy not only within orthodox legal thinking but also within the international human rights framework, as well as assumptions underpinning the concept of ‘community’. How can one imagine a mechanism for conflict resolution that requests limited or minimal involvement of established state structures, such as the judiciary and law enforcement? What happens if the perception of justice in the community does not conform to international human rights standards? How can the state, as the duty-bearer for individuals as rights holders and as bearing obligations under international law, ensure adequate

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<sup>2</sup> For example, paragraph 8 of the Tokyo Rules outlines thirteen sentencing dispositions, including verbal sanctions, status penalties, and community service orders, but does not venture to suggest more restorative techniques that could be used to repair the harm done to the victim, offender or community, such as family group conferencing or mediation techniques so common in restorative approaches.

oversight of conflict resolution mechanisms within the community? How can the aspirations for community-based resolution take into account the nuances of ‘community’: the fact that a community is anything but homogeneous, but as a contested space characterised by complex power relations, multiple interests, and varying degrees of vulnerability? And, importantly, what are the implications for thinking about these questions in contexts that do not seamlessly fit within the boundaries of ‘rule of law’, for example in contexts of legal pluralism where multiple legal systems operate simultaneously, or where the monopoly of the state is compromised by conflict? These questions are particularly salient for juvenile justice practitioners around the globe, whose reflections may challenge taken-for-granted assumptions about the sanctity of rights, the hegemony of the state, or even the meaning of the concept of justice itself.

This article seeks to explore some of the tensions around the articulation between the state and the community in the field of juvenile justice, particularly with respect to non-custodial measures and restorative practices, in contexts of legal pluralism. It will do so by placing the philosophy of restorative justice in discussion with, on one hand, guidance from international human rights instruments, and on the other hand, community-based justice practices, for example traditional and customary justice mechanisms. To that end, the article will draw on a case study from Palestine, where a new juvenile law was passed in 2016 and which provided a backdrop for poignant discussions about assumptions underlying the concept of rule of law, the idea of ‘community’ and the relevance of customary justice traditions in the 21<sup>st</sup> century. The article integrates the views of state and non-state justice stakeholders consulted during a series of workshops and interviews held in the West Bank (Bethlehem) and Gaza (Gaza city) between April and September 2016.<sup>3</sup>

## **2. Restorative justice, non-custodial measures and customary justice: from global to local**

The treatment of children in contact with the law, whether as victims, offenders or witnesses, has too often failed to comply with the fundamental principles of children’s right to live, survival and development. This is despite a plethora of international standards and instruments that provide a basis for streamlining good practices to uphold children’s dignity and worth, act in their best interest, and contribute to their reintegration into society. Numerous political, economic and social factors influence governments’ shortcomings in providing a child-friendly justice system, however perhaps the most pervasive is the dominant culture of punishment and retribution that exists in many countries across the globe and the perceived threat of juvenile delinquency, often exacerbated by media or political agendas, which in turn increases social pressure for criminalisation of children and youth in conflict with the law (SRSGVAC, 2013). This narrative is no better exemplified by the continued use of liberty depriving measures for children, most commonly for children who are awaiting trial, often for children held for minor offences and are first-time offenders (UNODC and SRSGVAC, 2012). While detailed statistics about the scale of child detention on a global scale are still lacking, it is estimated that over one million children are detained worldwide (Pinheiro, 2006).

Meanwhile, the global popularity of restorative justice for children as an alternative to the retributive model has grown significantly over the past decade, even though the effectiveness of restorative measures is still debated. Earlier evaluations of restorative practices, such as family group conferencing in Australia and Europe, have reached subdued conclusions (Carroll, 1994; Miers, 2001), while more recent studies demonstrate that restorative justice contributes to, *inter alia*, reduced recidivism, increased satisfaction

<sup>3</sup> Workshops and interviews conducted in the scope of a juvenile justice programme implemented by Terre des hommes Foundation ([www.tdh.ch](http://www.tdh.ch)) in Palestine.

of victims and offenders, reduced psychosocial stress and trauma, and reduced costs compared to criminal justice (Sherman and Strang, 2007). Such findings have supported the spread of restorative justice in the field of juvenile justice, as seen in the First World Congress on Restorative Juvenile Justice in 2009 which resulted in the adoption of the Lima Declaration on Restorative Juvenile Justice. The document defines restorative juvenile justice as “a way of treating children in conflict with the law with the aim of repairing the individual, relational and social harm caused by the committed offence.”<sup>4</sup> Subsequently, the Special Rapporteur to the Secretary General on Violence Against Children has reiterated this call by urging States to develop and use “effective alternative mechanisms to formal criminal proceedings that are child- and gender sensitive, [including] diversion, restorative justice processes, mediation, and community-based programmes” (SRSGVAC, 2013, p.3).

In parallel to the evidence-base, the appeal of restorative justice in developing countries may be that it opens up the possibility to engage with legal pluralism due to the fact that the roots of restorative philosophies emerge in many indigenous and customary justice traditions around the globe (Braithewaite, 1999). The United Nations reference text for restorative justice, the Basic Principles on the Use of Restorative Justice in Criminal matters, explicitly acknowledges that restorative initiatives “often draw upon traditional and indigenous forms of justice which view crimes as fundamentally harmful to people.” (ECOSOC, 2002) Zehr argues that: “In societies where western legal systems have replaced and/or suppressed traditional justice and conflict-resolution processes, restorative justice is providing a framework to re-examine and sometimes re-activate or adapt these traditions” (Zehr, 2002, p.3).

Available statistics indicate that developing countries consistently record low numbers of children coming into contact with police and formal criminal justice proceedings compared to numbers in developed countries

(UNODC, 2011). Though numerous factors are doubtlessly at play for this, research to date suggests that this is largely a consequence of non-formal and customary justice systems playing an important role in resolving disputes before they reach formal channels (Campistol et al, 2017).

From a child protection perspective, major concerns exist around the fact that the best interests of the child may be superseded by the drive to preserve community harmony. One overarching concern is that “deeply held attitudes regarding the role of children can present a major challenge for engaging with IJS [informal justice systems] in some communities, children are viewed as property under customary norms” (UNDP et al, 2012, p.15). Widespread mistrust or fear of formal processes leads to the quasi-ubiquitous preference to resolve disputes at the level of the community and avoid formal processes. However, families are often unable or unwilling to appreciate how this tendency might also lead to unjust treatment of certain children, particularly victims, or to “burying” certain crimes that may threaten the social fabric of the community, such as sexual abuse. Moreover, in many cases, children are unable to speak for themselves, so their interests will either go unrepresented or be represented by another person, perhaps a relative of the child, who may have an interest in the case (UNDP et al, 2012). Children’s vulnerability increases where the best interest of the child does not coincide with that of his parents or guardians or his or her close family (Hope and Colliou, 2016).

Nevertheless, the benefits of customary mechanisms, such as the swift and inexpensive processes, and the fact that they divert children from detention, has led to some degree of acceptance of the need to engage with customary processes. The United Nations Guidance Note of the Secretary General acknowledges that informal justice may be “less intimidating and closer to children both physically and in terms of their concerns” (United Nations, 2008, p.4). Consequently, States are encouraged by international

<sup>4</sup> Available at: <http://www.tdh.ch/en/documents/lima-declaration-on-restorative-juvenile-justice>. Accessed 30 April 2015.

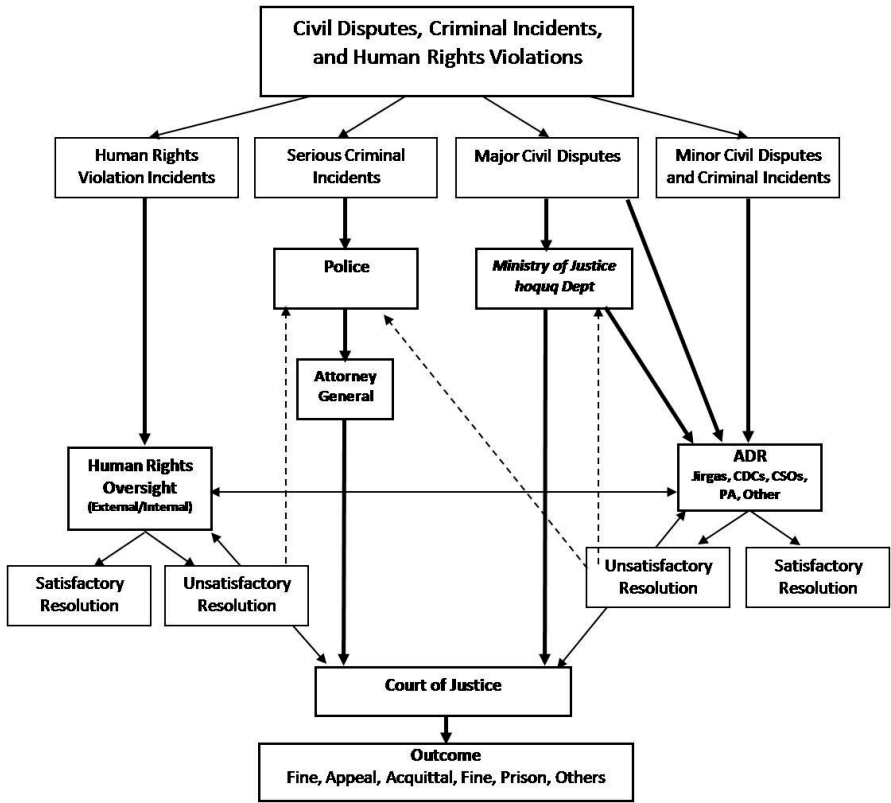
guidance to protect children from hardship in customary justice systems by ensuring that customary actors adhere to the same principles of child-friendly justice as formal systems. However, as previously mentioned, it is possible to identify a certain contradiction between, on one hand, reinforcing community-based mechanisms and, on the other hand, imposing a normative framework for what those community processes should look like, whether along restorative lines or plainly in line with international human rights norms. Ultimately, the benefits of community-based justice systems can only ostensibly be actualised with a certain degree of oversight from the state. Many scholars have grappled with what, concretely, that could look like in practice.

The “hybrid model of Afghan justice” is one attempt to flesh out the articulation between the state and community-based and customary justice mechanisms. Following a poignant analysis of the failings of the justice sector reform in Afghanistan following the US-led invasion and the fall of the Taliban in 2001,

Ali Wardak and John Braithewaite (2013) have developed this model to allow for engagement with Afghan customary justice mechanisms, such as the *jirga* and *shuras*<sup>5</sup>, that builds on their restorative characteristics while reforming them to be more inclusive and respectful of human rights standards is the way forwards. They present this model as: A synergy between state and non-state justice systems and a female-dominated human rights unit as a check and balance on rights abuses by both courts and jirgas, while courts and jirgas were each also checks and balances on the other (Wardak and Braithewaite, 2013, p.203).

The hybrid model reflects many elements of the ECOSOC resolution 2002/12, such as the possibility of seeking to appeal a decision if the outcome does not satisfy one of the parties. At the same time, its operationalisation would require a segment of legislation to ensure that other principles of restorative justice, such as voluntary involvement, and child protection safeguards including confidentiality and consent, are upheld.

Figure 1: The hybrid model of Afghan Justice (Wardak and Braithewaite, 2013)



<sup>5</sup> ‘Jirgas’ are the key decision-making and dispute-resolution institutions in Pashtu areas, and ‘shuras’ are approximate equivalents in non-Pashtu areas.



Initially, the idea of a hybrid model was viewed as a threat by many members of the Afghan judiciary because it was seen as undermining the role of the state.<sup>6</sup> However, since 2010 the Afghan government has been attempting to formalise the operation of customary justice actors by drafting the Law on Dispute Resolution Shuras and Jirgas, which aims to regulate the affairs of dispute resolution councils in Afghanistan by setting criteria for who can participate in decision-making and how the process should proceed, as well as promoting links between Jirgas and formal justice institutions. At the beginning of 2017, the law is still under revision. Meanwhile, non-governmental initiatives exist that seek to include customary components into their justice sector reform strategies.

What is interesting about the hybrid model is its potential to provide a framework for analysing justice sector reform in other countries that exhibit comparable characteristics, such as a long-standing tradition of customary justice or periods of social and political upheaval and conflict, resulting in weakened state structures, and, in turn, a disillusionment on behalf of the population regarding the government's ability to deliver justice. The following section will provide a snapshot of historical developments that are key to understanding the current legislative situation in Palestine, which impacts significantly on justice for children.

### 3. Snapshot of justice in Palestine

Customary justice systems have a rich history in the Middle East and North Africa (MENA), which draw extensively from Islamic traditions (Keshavjee, 2013). The study of plural legal systems of the Middle East and North Africa dates back to colonial times and spans a wide range of disciplinary areas, from Islamic studies through ethnosociology to legal anthropology (Thielmann, 1999). Islamic

*Shari'a* law emphasises the importance of different types of dispute resolution outside of formal legal channels, the two main ones being *sulh* (reconciliation) and *tahkim* (arbitration) (Al Ramahi, 2008; Othman, 2007). A substantial body of scholarship has sought to analyse the relationship between Islamic *Shari'a* law and, on one hand, colonial and post-colonial design of national legal systems along secular and liberal lines (Brown, 1997; Sfeir, 1998; Ziadeh, 1987) and, on the other hand, international human rights (An-Naim, 1990; Baderin, 2005).

The legal system in Palestine consists of a complicated mixture of laws which have been introduced during different political regimes, from Ottoman Rule, the British Mandate, and the period of Egyptian administration in the Gaza Strip and Jordanian administration in the West Bank (NRC, 2012). These myriad systems have led to a lack of unified legal framework across Palestine, characterised by many gaps and inconsistencies in current legislation (WCLAC and DCAF, 2012). The history of the development of Palestinian laws is also a history of interaction with and formalisation of customary practices, which in Palestine primarily covers the work of tribal judges, *islah men*, and *mukhtars*.<sup>7</sup> For example, The British Mandate contributed to the regulation of informal justice through several laws, although these regulations were not holistic in terms of regulating the proceedings, penalties and courts, and this lack of consistency allowed for a wide range of customary practices to flourish (Tdh, forthcoming).

Between the beginning of the First Intifada to the signing of the Oslo accords and subsequent birth of the Palestinian National Authority (PNA) in 1994, customary justice actors played a significant role in keeping the order and settling disputes in the Palestinian society. People were reluctant to make recourse to the formal justice under the authority of the Israeli occupation, which aimed to

<sup>6</sup> Wardak, personal communication, April 2016.

<sup>7</sup> *Islah men* are a category of customary actors who earn their roles in customary justice by virtue of their good reputation in the community. In contrast, the position of *mukhtar* ("the chosen one") involves a senior member of the most powerful families selected to represent rural communities and neighbourhoods in their communication with the government. *Mukhtars* are involved in customary proceeding either as mediators or as representatives of the party to whom they are related. They settle disputes within their own family or disputes in which a member of their family is a party.



fully control and organize the justice apparatus. This resulted in a state of competition between the national tribal justice and the formal justice structures imposed by the occupation (Birzeit, 2006). The Palestine Liberation Organization and other active organizations made calls for Palestinians to boycott the occupation and its apparatuses, which succeeded in promoting the role of tribal justice and became part of the national struggle movement (ibid).

Meanwhile, the PNA took a pragmatic approach to the customary justice actors: it formalized them, bestowing both recognition and regulation (Tdh, forthcoming). In 1994, Presidential Decree no. 161 of 1994 was issued which established the Department of Tribal Affairs and National Conciliation Committees in the governorates. Moreover, according to Articles 16, 17 and 18 of the Palestinian Law of Penal Procedures, in cases of infractions and misdemeanours punishable by a fine, parties are able to seek reconciliation. In this case, the public prosecution is obligated to accept the reconciliation and record it. In Gaza, Public Relations Officers were assigned to police stations across Gaza, whose role is to create a link between formal actors and customary actors.

The success of Hamas in the 2006 presidential elections constituted another turning point in the history of Palestinian justice. In 2007, political rivalry between Fatah and Hamas led to a political split, with Fatah left controlling the West Bank and Hamas controlling Gaza. This led to the fragmentation of formal institutions and well as the executive power. Since 2007, the legal systems have continued to diverge in each territory: the Palestinian President in the West Bank has continued to issue law-decrees, while the Hamas majority in the Palestinian Legislative Council (PLC) in the Gaza Strip began to issue laws without holding preliminary sessions (PCHR, 2008). The effects of the 2007 political division between Hamas and Fatah have resonated strongly in Gaza. In turn, this has led to a significant revival of the activities of customary justice actors in Gaza. Meanwhile, the division has also impacted on the shape of the main customary justice bodies, in the sense

that each committee was reformed to include those with whom they agree politically and those who are different have been excluded. Most customary justice actors in Gaza are affiliated to political parties. The overall situation has had repercussions on the Palestinian public in both Gaza and the West Bank, which has started to lose trust in the role of the tribal conciliation committees (UNDP, 2009). Despite this, recent years have seen continued efforts to formalise the roles of customary actors, for example through the Department of Tribal Affairs issuing identity cards to *mukhtars*, tribal judges and *islah* men, or UN-supported schemes to train female customary actors in Gaza.

In February 2016, a new law for juvenile justice was signed by the head of the President of the State of Palestine, Mahmoud Abbas. After years of waiting, the law was hailed by government and civil society actors as a great achievement because it fulfils Palestine's obligations of reforming its national legislation in line with the Convention on the Rights of the Child, which Palestine signed in 2014. It enshrines the primacy of the best interests of the child (Article 1), prohibits harsh treatment and gives priority to educational and rehabilitative measures (Article 7), establishes a juvenile police force (Article 15), and articulates a strong opposition to detention and placing strict limitations on maximum duration (Article 20). It falls short, however, of specifying a range of community-based non-custodial measures and stipulates that juveniles should be placed pending trial in social care institutions.

The law also contains provisions for mediation (Article 23), which are acknowledged as portraying good intentions towards restorative practices. However, it falls short of specifying if and how the restorative aspects of customary processes could be harnessed in the activation of mediation. In the months following the law, the idea of the hybrid model was shared with various state, civil society and customary actors in order to open up these discussions. To that end, over the course of 2016 Terre des hommes organised several consultations with relevant actors, the results of which are described below.

#### 4. Imagining hybridity for children in Palestine: perceptions of state and non-state actors

During the various encounters, a variety of opinions were articulated regarding the potential for involving customary actors in mediation for children. Overall, formal actors harboured the most unfavourable opinions, and were quick to express dismay and frustration that this possibility was being entertained because they saw it as taking a step backward from ‘progress’ made in the justice system.

*“In Palestine, one of our major problems is tribalism, and what goes behind it: tribalism, sexism etc. In our quest to defeat tribalism and adopt modern views, working with tribes can set back the progress made.”* – Palestinian lawyer, Bethlehem, April 2016

Others were quick to remind that giving importance to customary actors could undermine the very principle of rule of law which Palestine is attempting to actualise in order to gain formal recognition as a state on the international stage.

*“In Palestine, you need to take into consideration the occupation and a context of state-building. Danger of creating a parallel system that makes it more difficult that makes the state weaker.”* – Palestinian prosecutor, Bethlehem, April 2016.

In Gaza, however, while governmental stakeholders expressed reservations about the roles of customary actors, their opinions were more nuanced. They tended to also see the potential benefits of involving customary actors in diverting children from detention and criminal proceedings.

*“Customary actors may not always act in the best interests of the child. They may put pressure on offenders to confess or victims to drop charges. But either way, children’s stays in the juvenile rehabilitation centres pending trial are always shorter in cases where there is a solh [reconciliation]”* – Civil servant in the Ministry of Social Affairs, Gaza City, September 2016.

*“When a juvenile comes to the police station, we always try to bring in their families to try to discuss the situation. We also benefit from the role of Public Relations Officers, who*

*have a list of mukhtars that can be activated to solve the issue quickly”* – Police officer, Gaza City, September 2016

Unsurprisingly, customary actors in both Gaza and the West Bank expressed most support for the idea that they could become more formally involved in mediation processes, even if this required diverging from the traditions of customary procedures.

*“We have traditions that may violate children’s rights. For example, some areas of tribal law can be oppressive to girls: in cases of abuse, often the offender is not punished because the family of the victim does not want it, they prefer to close the matter and hide the issue. But our work with [local human rights organisation] has helped us to better understand the views of children and minors. I would welcome more training, and if I had a formal certification as a mediator, this would allow probation officers and others to accept my role”* – Mukhtar, Bethlehem, September 2016.

*“Women used to come to me and complain that their husband beat them, and I would say ‘That’s ok, it’s normal, just go home to him’. We live in a patriarchal society: our traditions and norms prevented us from doing differently. But following my training [supported by UN agency], I began to think differently about the roles and responsibilities of men and women in relationships, and the possibility of women achieving justice differently.”* – Female mukhtar, Gaza, September 2016

These statements portray the ways in which the landscape of custom and actors active in customary dispute resolution is changing. This is not solely due to the moral or philosophical underpinnings of child rights discourse, there is also an element of self-interest: many several actors recognise the opportunity for reform as a means of being seen as more legitimate by the formal system. Importantly, giving importance to such statements is not to underestimate the persistence of more traditional and conservative perspectives that are harmful, particularly around crimes involving girls and women and related to concepts of ‘honour’ (Welchman, 2007). It is, rather, to take seriously the fact that customary justice is not a fixed, unmoving set of

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practices, but has undergone processes of change throughout history and continue to harbour possibilities for transformation.

Finally, the views of NGO and civil society actors were consistently somewhere in the middle between full endorsement of hybridity and outright rejection of customary actors. In the West Bank, civil society largely focused on the way in which restorativeness could become possible within the formal system in the scope of the new law. However, in Gaza, actors were transparent about the fact that new legislation passed in Ramallah is not activated in Gaza due to the ongoing political split between Hamas and Fatah. Ostensibly, this will also be the case for the new juvenile law in Gaza. The implications of this are that, although the operationalisation of the law in the West Bank will be slow due to limited funds available to activating the human and material resources (such as a specialised juvenile police department), any legislative reform of juvenile justice in Gaza will unfold piece by piece. NGO and civil society actors in Gaza expressed their intention to attempt to push forward individual aspects of the law, or to re-interpret existing laws in the spirit of the new law, such as provisions for alternatives to detention in the Juvenile Offenders Ordinance of 1937.

Overall, when analysing the views expressed above, it is clear that the political situation in Palestine impacts on how negative reactions of the formal actors need to be taken in the context of the feeling that justice institutions are part and parcel of the Palestinian state-building process. The development of Palestinian justice institutions, particularly for young people, were an expression of their commitment to the ratification of international treaties (such as the Convention on the Rights of the Child) which, for them, is a centre-piece to their bid for international recognition of Palestinian statehood. In contrast, the positive reactions of state and non-state stakeholders in Gaza can possibly be explained by the knowledge that the new juvenile law will not materialise in Gazan legislation any time soon. The implication is that it is more likely that community structures in Gaza will remain active and that there is an

increased possibility that customary actors could become involved in mediation and, consequently, activating non-custodial measures for children. The role of the Public Relations Officers appear to be a lynchpin of these activities, and could possibly lead to male and female *mukhtars* being trained as mediators. In parallel, in the West Bank, it is probable that the remit of mediation will remain firmly among state actors, namely through the roles of Child Protection Councillors (former Probation Officers) established by the new law. Importantly, practices of mediation will need to be analysed in order to establish the extent to which they are restorative for the children involved.

Meanwhile, a full shift towards more restorative processes would require moving beyond the idea that non-custodial measures, and diversion from detention, are adequate. The process would be incomplete without, in parallel, deliberate emphasis on the concepts underlying restorative philosophy and concerted piloting of restorative models. For example, Terre des hommes has been piloting the involvement of customary actors in case conferencing and in the implementation of alternatives to detention, which are promising initiatives that require further research.

## 5. Concluding thoughts

A cursory analysis of the discussions presented in this paper regarding the challenges and opportunities in the implementation of restorative legislation for children in Palestine could confirm the adage that the weaknesses of the formal system lead to the strengths of the informal system. However, it is our view that the richness of the ongoing debates and discussions allow us to move beyond such a simplistic and perhaps reductive interpretation, but rather open up numerous spaces for thinking about the state and community / formal and customary not as inherently discrete or mutually exclusive, but as part and parcel to developing a nuanced view of the lived realities of people who negotiate these systems. Such insights build on a praxiological approach (Dupret, 2005), and suggest the following areas for further reflection:

- The interface between formal and customary justice systems: Customary actors rarely work in an environment that is completely independent of government control. Rather, the different ways in which customary laws and processes have been appropriated and accommodated by the state are reflected in the current organisations and structures that govern customary proceedings in Palestine.
- The shift in paradigm: Far from embodying archaic practices residing upon ancient value-systems and oral history, customary justice in the 21<sup>st</sup> century MENA region may best be described as distinctively ‘modern’ examples of legal pluralism (Dupret, 2005). This should provide a basis for questioning the replication of a Western justice model in the name of achieving national sovereignty, and open up discussion about the possibilities of a hybrid model that simultaneously meets the needs of Palestinian statehood and the different needs of children and families in Gaza and the West Bank.
- The nascent possibility for transformation: Amongst customary actors that have been in contact with NGOs in the context of rights-based juvenile justice programming, there is an acknowledgement of the harmful aspects of customary practices for children and there is, to varying degrees, a willingness to reform (Aguettant, 2017).

At the same time, it is essential to bear in mind that these insights are not complete conclusions, because views and voices of other important stakeholders, such as children and parents who go through the system, have not been integrated into this analysis. The discussions here are only a starting point for further reflections: developing a more rich picture requires further research around the existing initiatives that promote synergy between formal and customary actors, with particular attention directed to gathering the views of adults and children who navigate within these plural legal systems.

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# DESISTANCE APPROACHES IN WORKING WITH CHILDREN DEPRIVED OF THEIR LIBERTY

**Rachel Horan**



**Rachel Horan, Dr.**

*CPsychol, Csci., AFBPsS, Director of The Averment Group*

## **Abstract**

Children deprived of their liberty as a result of offending have complex needs. The content of intervention delivered with these children whilst they are deprived of their liberty needs to meet the complexity of their need, their risk and support their positive reintegration into communities.

This position paper explores the literature regarding psychosocial maturity, psycho-social development, psychological development, their interplay and their link to offending and offending cessation to highlight the need for integrated and holistic intervention with children deprived of their liberty.

In this position paper, I consider desistance theory in relation to adolescent development. I explore the process of desistance for incarcerated adolescents, looking particularly at the content and approach of interventions that are delivered to these young people within a custodial establishment. The inter-play between human and social capital development and the process of desistance for an incarcerated adolescent is explored. It is argued that criminal justice practice that confers safeguarding and upholds the rights of every child deprived of their liberty as a result of offending should include desistance led approaches. This will support children's desistance from crime and build their social and human capital and will complement empirically supported, risk led approaches that develop skills.

I suggest that such an integration of approach will better uphold a child's rights, minimising the labelling of children and adolescents who do offend to enable their move on and away from incarceration towards a positive future.

**Keywords:** Desistance, Adolescent, Offenders, Intervention, Deprivation of liberty, Imprisonment, Labeling, Children's rights, Psycho-social approaches.

## 1. Background

The UN Rules for the Protection of Juveniles Deprived of their Liberty 1990 define the deprivation of liberty of children to be “any form of detention or imprisonment, or the placement of a person under the age of 18 (i.e. a child or adolescent) 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” (United Nations, 1990). The United Nations Convention on the Rights of the Child (UNCRC) requires that a child’s welfare and wellbeing is promoted and safeguarded (United Nations, 1989). For those children who are deprived of their liberty, the UNCRC also requires that imprisonment of children 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” and that “every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age” (United Nations, 1989).

These standards clearly specify necessary and minimum requirements. However, children deprived of liberty are still exposed to increased risks of abuse, violence, acute social discrimination and denial of their civil, political, economic, social and cultural rights; certain disadvantaged groups are more affected than others; and society is affected at large as deprivation of liberty tends to increase social exclusion, recidivism rates, and public expenditure (Global Study on Children Deprived of Liberty, 2016). In response to these challenges, the Global Study on Children Deprived of Liberty is underway. This far-reaching study explores the scale and conditions of children deprived of liberty, identifying good practices and making recommendations for effective measures to prevent human rights violations against children in detention and reduce the number of children deprived of liberty. Its results are expected in 2017. We do not need to wait for its findings to identify and bring together new developments towards effective practice in providing ap-

propriate intervention to children deprived of their liberty as a result of anti-social behaviour and offending. Our practice with these children should be undertaken in a manner which takes into account the needs of his or her age and in doing so, should safeguard, reduce social exclusion, recidivism rates, and also public expenditure.

## 2. The complexity of needs of children deprived of their liberty

The needs of children in custody are multifarious. It is widely agreed that children in custody often come from complex and challenging backgrounds. Long before they get into trouble and become caught up in the criminal justice system, many young offenders are used to punishment – not as a measured, proportionate response to wrongdoing but as random acts of cruelty or abuse often born of frustration and ignorance and what has not been part of their lives is consistent care, clear guidelines, a sense of wellbeing and an understanding of reparation and a means to make amends (British Medical Association, 2014). Spending time in custody can have profound effects on a child’s future. Furthermore, once released from custody, children are often returned to the same complex and challenging environments they were in before they entered custody, which although often unavoidable, unpins the importance of providing effective rehabilitation within custody, ideally combined with effective resettlement (Kidston, 2013). Planned and supportive reintegration from secure care and custody back into society is vitally important to reduce reoffending (Scottish Government, 2016).

From a young person’s perspective, the picture is equally critical. Prisons are uncomfortable, stressful and difficult environments. In an independent report by Her Majesty’s Inspectorate of Prisons in the UK, the findings of surveys of incarcerated children suggest a very absent sense of either wellbeing, consistent care, clear guidelines or effective rehabilitation amongst children. The proportion of boys engaged in a job (16 percent), vocational training (11 percent) and offending

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behaviour programmes (16 percent) was found to be lower in 2015–16 than at any point since 2010–11 (Her Majesty's Inspectorate of Prisons, 2016).

### **3. Psychological and Developmental Needs of Children**

Children go through many changes as they move towards adulthood. Adolescence is a complex period of developmental transition which involves multiple physical and psychological changes. As well as physical and sexual maturation, adolescence includes movement toward social and economic independence, identity development, the acquisition of skills needed to carry out adult relationships and roles, and the capacity for abstract reasoning (World Health Organisation, 2016). It is well known that while adolescence is a time of sensitive change and potential, it is also a time of enhanced vulnerability during which social contexts exert powerful influences (World Health Organisation, 2016). The deprivation of an adolescent's liberty is a powerful social context and influence. However, incarceration fails to meet the developmental and criminogenic needs of youth offenders and is limited in its ability to provide appropriate rehabilitation (Lambie and Randall, 2013).

The stresses of adolescence, for example establishing a stable, integrated identity, is a central task of development that can be disrupted by an onerous, overly restrictive, institutional environment (Greve, Enzmann, & Hosser, 2001). It is also suggested that the deprivation of liberty will impair a child's self-esteem. This impairment can be expected to be stronger the younger the child is at the time of their first imprisonment, because their self is still "under construction" at earlier stages of development and thus more vulnerable to threatening and disturbing influences (Greve & Enzmann, 2003).

Chung, Little & Steinberg, (2005) importantly identify that juvenile justice policy and practice seldom considers the psychosocial needs of late adolescents, focusing instead on the primary goal of deterrence from future criminal behaviour and secondarily, facilitat-

ing the educational and occupational success of youths who are exiting the justice system. As a consequence, current justice systems tend to emphasise punishment.

Steinberg, Chung & Little, (2004) suggest that adolescents need to reach some level of psychosocial preparedness to successfully take on adult roles and responsibilities and a necessary level of maturity to do so. The authors importantly identify a specific and understudied component of human capital; psychosocial capital. Steinberg et al., (2004) argue that the psychosocial development of youthful offenders is disrupted, or "arrested," by their experiences within the justice system and interventions designed to facilitate the successful re-entry of young offenders into the community must be informed by what we know about healthy psychosocial development in late adolescence. In order to achieve psychosocial capital, intervention that addresses individual, family and social risk factors will better support the development of a stable and integrated identity and enable the development of stronger reasoning skills, logical and moral thinking, and become more capable of abstract thinking and making rational judgements (Erikson, 1968).

### **4. A typology of children and adolescents who offend**

To consider intervention approach, it is also important to consider a useful typology that has acquired some academic consensus. Moffitt (1993) distinguishes "life-course-persistent offenders" from "adolescence-limited offenders" in her proposed typology. Adolescence-limited offenders are those whose antisocial behaviour stops in adolescence; life-course persistent offenders are a small proportion of individuals whose antisocial behaviour persists into adulthood. Moffitt's dual taxonomy model (1993; 2006) proposes that different aetiologies and developmental courses define the onset of offending with life-course persistent antisocial behaviour beginning in early childhood and continuing throughout adulthood, whilst offenders with adolescent-onset antisocial behaviour desist in young adulthood. Research indicates that

early onset and adolescent onset offenders differ, and that the onset of antisocial behaviour is inversely related to the developmental course and severity of the delinquent career (DeLisi, Neppl, Lohman, Vaughn & Skook, 2013). Early-onset delinquents are more likely than later-onset delinquents to be more serious and persistent offenders (e.g., Moffitt, 1993). It is likely that the intervention needs and response of these two groups will be very different.

However, more recent studies (Fairchild, VanGoozen & Goodyer, 2013) have questioned any distinction between early onset and adolescent onset offenders by showing similar neurophysiological profiles in both childhood and adolescent onset conduct disorder. Burt, Donnellan, Iacono & McGue, (2011) studied a prospective sample of male twins, assessed at the ages of 11, 14, 17, and 24 years and suggest behavioural sub-types of antisocial behavior (i.e., physical aggression versus non-aggressive rule-breaking) could be a stronger predictor of later antisocial outcomes than is its age-of-onset.

Overall, looking towards how best we can construct intervention approaches towards adolescence-limited and life-course-persistent offenders, Losel (1995) suggests that children and adolescents who are deprived of their liberty are most likely to belong in the group of life-course-persistent offenders. It is likely that they will also be those whose offending has begun earlier, given the likely seriousness or persistence of their offending which would have led to their custodial sentence. This group are well beyond any stages of early intervention, but it is important to add, as a consequence, that perhaps the best intervention for this group is early intervention at a much earlier age, well before their custodial sentence, to prevent its imposition.

## **5. A child's response to being deprived of their liberty**

In order to explore intervention and approach for incarcerated adolescents, it is also important to consider how young people responds to a custodial environment. Two common theoretical explanations, importation and

deprivation, purport to include juvenile prisoners. Deprivation theory argues that the conditions of prison itself impacts the behaviour of inmates as a specific response to the losses suffered or the "pains of imprisonment" experienced at a prison (Sykes, 1958). In response, importation theory asserts that the culture, beliefs, and characteristics of inmates prior to incarceration determines their behaviour within prison as it had determined their behaviour on the streets (Irwin, 1970). Across the literature there is much support for a combined theoretical model of importation and deprivation factors for explaining children's institutional adjustment (Gover, Mackenzie & Armstrong, 2000).

Such a combined approach is provided in the Deprivation of Development Theory proposed by Matsuda (2009) who examined the impact of incarceration on the likelihood of recommitment of young offenders aged 14 to 21 years on admittance. Matsuda (2009) followed 9,892 offenders from their sentencing court, through their incarceration, and for five years after release finding that offenders housed in juvenile facilities, regardless of the court of determination, show a decrease in recidivism as they mature, but offenders who were housed in adult prisons showed no decrease in offending by age. Matsuda (2009) suggests that the unique experience in prison may influence the normal development of young offenders and hinder normal desistance from crime. Matsuda's (2009) Deprivation of Development Theory integrates importation and deprivation theories within an adolescent development context, asserting that importation and deprivation factors will have negative effects on post-release behaviour if they interfere with the development to adulthood. This framework uses understanding of development to inform what markers of adulthood are important for desistance in crime and at what ages these transitions may occur.

## **6. Intervention approach with children and adolescents deprived of their liberty**

The Risk-Need-Responsivity model (RNR) (Andrews, Bonta & Hoge, 1990) is the eminent model of approach in offender interven-



tion and has extensive empirical support and must therefore be considered in discussion of intervention with children deprived of their liberty. This cognitive behavioural approach is comprised of three core principles. The risk principle provides direction to match the level of service to the offender's risk to re-offend. The need principle assesses criminogenic needs and targets them in treatment. The responsivity principle maximises the offender's ability to learn from a rehabilitative intervention by providing cognitive behavioural treatment and tailoring the intervention to the learning style, motivation, abilities and strengths of the offender. The RNR model is suggested as relevant for all offender populations, including juvenile offenders (Dowden and Andrews, 1999).

However, despite the strong empirical base of the RNR model, it has some suggested limitations. Ward, Mesler & Yates (2007) note that its focus on risk reduction may cause difficulties in motivating offenders to change. Additionally, Ward et al. note that the focus on risk reduction, using a model which is essentially psychometric in nature, may in turn lead to important variables in the change process being ignored. They include the individual's sense of personal identity and agency, the impact of the therapeutic alliance upon rehabilitation, the importance of non-criminogenic needs (e.g., personal distress and/or low self-esteem), and contextual or ecological factors (Ward et al., 2007). However, such criticism could be a reflection of how RNR has been operationalised in practice, rather than its underlying conceptual components (Polaschek, 2012). The responsivity principle, integrating the learning style, motivation, abilities and strengths of the offender does confer some psycho-social elements. We want adolescents who are deprived of their liberty to be able to move positively towards their futures. However, we must also effectively risk manage both the child deprived of their liberty and the wider community. I suggest that the RNR model and its focus on risk could be complemented by additional focus on positive human change and development to take into account the unique needs of children deprived of their liberty and to best support their ad-

justment to a prison environment with a view towards their eventual release and desistance from crime.

## 7. Desistance approaches

Desistance is a burgeoning area of research in intervention and approach with offenders. It is flexible, holistic and person centred and focuses less on RNR led evaluation evidence of 'what works', and instead draws from criminological research on 'how change works' (Maruna and LeBel, 2009). It looks towards a process of change. McNeill (2006) neatly explains that offender management services need to think of themselves less as providers of correctional treatment (that belongs to the expert) and more as supporters of desistance processes (that belong to the desister). Desistance approaches ask what is empirically known about why some individuals persist in criminal behaviour over time and others desist from criminal behaviour and how interventions can support or accelerate approximations of these 'organically' occurring processes (Maruna and LeBel, 2009).

Several theoretical frameworks are available that explain the process of desistance, including maturation and aging, developmental, life-course, rational choice, and social learning theories (Laub and Sampson (2001). Debate continues. The rapidly growing area of neurological research suggests that 'higher executive functions' of the brain including planning, verbal memory and impulse control are among the last areas of the brain to mature and may not be fully developed until halfway through the third decade of life (Johnson et al., 2009). McCulloch and McNeill (2008) emphasise the unimportance of chronological age, suggesting that age can be an indicator of various biological, social and experiential variables and these change and vary from time, place and location. Laub and Sampson (2001) suggest a number of factors that are associated with desistance from crime which include family formation (e.g. getting married or having children) and entering into employment. This life course perspective, otherwise known as the Developmental Life Course perspective (DLC), is an effort to

offer a comprehensive outlook to the study of criminal activity because it considers the multitude of factors that affect offending across different time periods and contexts (Thornberry, 1997). In general, DLC theory concentrates on three main issues: (1) the development of offending and antisocial behaviour, (2) the effect of risk and protective factors at different ages on criminal activity at different ages, and (3) the effects of life events on the course of development and criminal activity throughout the life course (Farrington, 2003). Looking towards substantiating evidence for these theories, evidence indicates that the prevalence of offending decreases with age; however, there is relative variability within age groups and across different types of offenses (Steffensmeier, Allan, Harer & Streifel, 1989) and for some offenders, offending increases with age (Farrington, 1986). Most researchers agree that there are multiple pathways out of crime (Sampson and Laub, 1993). Compelling research has stressed the interplay between the social or structural contexts of desistance, and the more subjective or personal aspects of the process (McNeill, Farrall, Lightowler & Maruna, 2012), which likely resonates with the issues of DLC theory.

Moffitt's (1993; 2003) theory regarding psychological contributors to desistance from antisocial behaviour (adolescence-limited life-course persistent offenders) indicates that growth in psychosocial maturity underlies adolescence-limited offenders' desistance from antisocial behaviour. If adolescence limited offenders are engaging in antisocial behaviour in order to appear and feel more mature, then maturation should lessen their need to engage in antisocial behaviour to achieve this end and will contribute to their desistance (Steinberg, Cauffman & Monahan, 2015). Research identifies that youths whose antisocial behaviour persisted into their early twenties were significantly less psychosocially mature than youths who desisted from antisocial behaviour (Monahan, Steinberg, Cauffman, & Mulvey, 2009). Psychosocial maturation is considered to include the ability to: control one's impulses; consider the implications of one's actions on others; delay grati-

fication in the service of longer term goals; and, resist the influences of peers (Monahan et al., 2009). Moffitt (2003) suggests that unlike life course persisters, adolescent limited offenders do not have the same neurological problems, such as cognitive or learning difficulties, they are able to form relationships, social bonds, do well at school and can arrive at multiple alternative solutions to problems. Given our understanding of the challenges to adolescents deprived of their liberty, particularly their psychosocial development and their adjustment to the custodial environment, and with a view towards reducing the severity of their delinquent careers as early and effectively as possible, the integration of desistance led approaches seems to be a crucial aspect of approach. They could complement RNR approaches. Desistance approaches are gaining international support and are becoming integrated in practice; in the UK, they have informed the National Offender Management Service (NOMS) Commissioning Intentions 2014 (National Offender Management Service, 2014) to shape intervention approach, the Youth Justice Board of England and Wales assessment framework (Youth Justice Board of England and Wales, 2014a) to revise the statutory assessment tool to include desistance considerations and by the Confederation of European Probation (Confederation of European Probation, 2016) in their integrations into practice standards. However, empirical support for the desistance paradigm is not yet as strong as RNR approaches. The desistance literature relies on qualitative research with smaller samples of offenders. This is not surprising; to evaluate desistance approach we must study the interplay of human and social capital within each individual which will makes empirical evidence more elusive.

## **8. Inclusion of desistance approaches**

There is empirical evidence in support of RNR approaches. In comparison, there is growing and emerging support of desistance approaches. Desistance theories have, as a consequence, began to have a growing influence on probation policy and practice with

with adult offenders. By contrast however, there is more limited research and evidence about youth desistance and no unified, accepted definition (Her Majesty's Inspectorate of Probation, 2016).

As summarised by the World Health Organisation (2016), adolescence is both a time of tremendous growth and potential but also a time of considerable risk during which social contexts exert powerful influences. Erikson's (1956; 1963; 1968) identity theory which observes that many of the changes that accompany adolescence are abrupt and discontinuous, rather than smooth and gradual. This can create confusion and instability in the self-concept and adolescents can become unsure of who they are. Erikson (1968) suggest that to resolve this crisis, adolescents must find a way to establish continuity between their pre-pubertal self and the way they look, think, and feel about themselves in adolescence. They must also integrate the various ideas they have about themselves into a unified self-concept and a stable and integrated identity (Erikson, 1968). As a result, it is likely that psychosocial intervention that addresses individual, family and social risk factors will better support the development of a stable and integrated identity. It is also likely that such intervention is particularly important for children deprived of their liberty to prevent delays in identity formation from the prison environment. Approach should also seek to facilitate both the human and social capital of an individual child and also harnesses supportive relationships with significant others. Farrall (2002) noted that whilst RNR approaches do build human capital, including enhancing cognitive skills and employability, their ability to develop and build social capital which resides in the relationships through which individuals achieve participation and inclusion in society is limited. McNeill (2006a) further notes that vitally, it is social capital that is necessary to encourage desistance and how it is not enough to build capacities for change where change depends on opportunities to exercise capacities. For children deprived of their liberty, their ability to build their social capital and achieve participation and inclusion in society is severely chal-

lenged. I suggest that desistance approaches, particularly those delivered by external agencies on an in-reach basis in conjunction with prison staff, directly from the child's community are a necessary complement to RNR and cognitive behavioural methods that will develop their skills and facilitate their educational and occupational success.

Another foremost consideration is the UNCRC requirements of promoting and safeguarding a child's welfare and wellbeing (United Nations, 1989) and that children who are deprived of their liberty should be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age" (United Nations, 1989). The importance of upholding the rights of each child is paramount and the integration of desistance led approaches which focus on positive human change and development within a holistic, evidence based approach is promoting the UNCRC requirements. Desistance approaches uphold a child's rights, minimising the labelling of children and adolescents who do offend and the unintended consequences that such labelling can produce.

## **9. The integration of desistance approaches in practice**

An incarcerated child faces incredible challenges to the development of their social and human agency. Perhaps especially so for those whose offending has started prior to adolescence and those who will likely continue to offend into adulthood, who may have limited social and human capital and be more likely to be deprived of their liberty. How can we best facilitate and promote a desistance orientated perspective for all children deprived of their liberty?

Desistance research has been pitted against traditional cognitive behavioural approaches. I suggest that the two approaches should not be oppositional or mutually exclusive within practice. As Cullen, Myer & Latessa, (2009) rightly note, the importance of RNR cannot be overstated as the field continues to embrace an evidence-based approach, and RNR has been an explicitly evidence-focused

framework from its inception. However, given the emerging evidence of desistance led approaches, I propose an intuitively sensible integrative approach; desistance research providing insight into processes of change and RNR research evidencing the outcomes of change (Horan, 2015). In practice, this would mean a focused core content of skill and capacity building RNR methods that are complemented by motivational and strength-based assessment and intervention approaches that build social capital and also enhance how children deprived of their liberty can work towards a stable, integrated identity. Her Majesty's Inspectorate of Probation (2016) assessed the effectiveness of practice in Youth Offending Teams in England and Wales across eight domains where desistance research has highlighted to be significant in supporting children and young people's journeys away from offending. They found that effective methods for children and young people are age-appropriate, and based on a good understanding of the individual's needs, history and circumstances. Former service users identified the aspects which had been most important in helping them move away from offending to be: a balanced, trusting and consistent working relationship with at least one worker; meaningful personal relationships and a sense of belonging to family; emotional support, practical help and where the worker clearly believed in the capacity of the child or young person to desist from offending; the development of a strong relationship and/or becoming a parent; changing peer and friendship groups; interventions which provided problem solving solutions to use in day-to-day life situations; and, well planned and relevant restorative justice interventions. There does not seem to be a simple answer to the roles and interplay of human and social capital within the desistance process. McNeill (2009) summarises how desistance resides somewhere in the interfaces between developing personal maturity, changing social bonds associated with certain life transitions, and each individual's narrative constructions, (i.e. integrating a life experience into an evolving story of the self) which offenders build around these key events and changes. It

is a complex and individual interaction that will vary through a child's journey to desistance and their attainment of a non-offender identity within a shifted sense of belonging to a moral community (Horan, 2015). We need to flexibly support this process. Assessment is an important starting point of intervention. We need to be able to assess if, and where a young person is on their journey towards desistance, appropriately and individually. This could be done as a supplement to existing, evidence based RNR informed assessment tools with specific attention given to identifying where the individual is within their social context, from the individual's perspective and mapping their journey towards desistance, if any, to date. Their abilities, interests, and personal goals should be identified to personalise a responsive multi-modal intervention. Adolescence is a tumultuous challenge and especially so, for all of the reasons that we have explored, for children who are deprived of their liberty. Assessment will guide and enable consequent intervention and enable their desistance journey to be mapped to provide a necessary guide. Assessment is not a one-off process either. Their progress and pathway will change and involve positive steps and perhaps setbacks. It must be undertaken as a continuous and flexible process and be part of intervention approaches supported by an effective working relationship between the young person and a professional. In the UK, a desistance orientated assessment and intervention planning framework has been recently introduced to the youth justice system, the Asset Plus tool to replace the existing Asset tool (Youth Justice Board, 2014b). It is designed to provide a holistic end-to-end assessment and intervention plan, allowing one record to follow a child or young person in their time throughout the youth justice system (Youth Justice Board, 2014a). It includes RNR and evidence based content as well as desistance theory and the Good Lives Model of strengths based approaches that allow practitioners to rate factors that support and hinder desistance for each young person (Youth Justice Board, 2014a). Looking towards intervention with children deprived of their liberty, it will likely take



time. It should not be limited to the custodial environment but undertaken with the foresight of resettlement support. This is undertaken to some extent in the English youth justice system where Youth Offending Team (YOT) workers provide case management support in sentence planning for children in custody, and also supervise their eventual release, providing some continuity (Youth Justice Board, 2014c). This could be extended to community staff such as YOT workers and involved professionals of wider multi-disciplinary teams, working with custodial establishment staff to deliver any interventions on an in-reach basis to enable their extension and continuity upon release. This will also further support key relationships built and established over time. Desistance is clearly not a speedy process.

It is clearly important that intervention should facilitate the social capital of children deprived of their liberty. This refers to both the relationships that are built between the child and professionals who work with that child during and post their deprivation of liberty and also, relationships the child has with their family, with pro-social peers and with their wider community. Looking at the deprivation of development theory (Matsuda, 2009) which asserts that importation and deprivation factors will have negative effects on post-release behaviour if they interfere with the development to adulthood, we must ensure that a child's unique experience in prison does not influence their normal development or hinder their normal desistance from crime. We should ensure the child's continual involvement in their sentence planning and review to support and stimulate their agency. We should also include their participation in both desistance and strengths based psychosocial intervention as well as skill and capacity building cognitive behavioural work. Identifying pro-social family and community influences is also important to enable the involvement of children's families and communities through effective in-reach work to support their social agency development. In many cases, whilst the families and peer groups of children deprived of their liberty are frequently pro-criminal or inconsistent, posi-

tive influences can often be identified within an expanded assessment approach. Further, targeted parenting and familial intervention could be provided to other family members to develop their pro-social support of the child's desistance. Furthermore, the inclusion of the child's community, be it through voluntary and third sector community groups could also reduce the likelihood of disengagement from their communities. This holistic and inclusive approach will better support their continued psychosocial maturation with a facilitated link to their normal social environments.

We must also consider the prison environment. A child will inevitably interact with their prison environment and their peers within the establishment, so making the environment as pro-social as possible is important and the facilitation of each individual child's desistance and psycho-social maturation is important. Evidence also tells us supporting and developing individual's strengths and resources that they can use to overcome obstacles to desistance - both personal strengths and resources, and strengths and resources in their social networks is an effective addition (Maruna and LeBel, 2009). Desistance led approaches should be universal within an establishment and perhaps rather than working with children in age groups only, practitioners could also work with children in groups defined by their stages towards desistance. This could be undertaken during psycho-social elements of a holistic programme in order to support each child's development of human and social capital. This may also be pertinent to offending behaviour related work, such as cognitive behavioural intervention delivered in a group setting as all group members would be at a similar stage towards desistance and perhaps better support each other's progress and likely take up of intervention. A holistic assessment tool which gives specific attention to identifying where the individual is within their social context that maps their journey towards desistance, if any, would enable the identification of their progress, if any, towards desistance. This would then better guide a responsive multi-modal intervention that includes participation in groups accordant to stages of desistance. These groups



could complement groups arranged according to age so as to ensure that any group work and dynamic also benefits from the influence of children at differing stages of desistance. We must also consider that the majority of incarcerated adolescents who are deprived of their liberty are suggested to be early onset, primarily-life-course persistent adolescents (Losel, 1995); those whose offending persists into adulthood. Are the majority of incarcerated children life-course-persistent children? Should we then assume that the majority of children deprived of their liberty have a 'pathological personality' (Moffit, 1993). If that were the case, then we should perhaps focus on psychiatric intervention as opposed to social processes and psycho-social maturation support? Does such a stance confer UN-CRC requirements that children who are deprived of their liberty should be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age (United Nations, 1989)? Evidence is available in support of the adolescent limited group of offenders within Moffit's (1993) typology but not for the life-course-persistent group. Perhaps Moffit's (1993) distinction is not a helpful consideration for intervention approaches that confer the needs of children deprived of their liberty.

## 10. Conclusion

The UN Rules for the Protection of Juveniles Deprived of their Liberty (United Nations, 1990) clearly define necessary and minimum requirements for children who are deprived of their liberty. These children have multifarious needs and face numerous and complex psychological and social challenge. The Global Study on Children Deprived of Liberty (Global Study on Children Deprived of Liberty, 2016) is seeking to identify good practices and make recommendations for effective measures to prevent human rights violations against children in detention, and reduce the number of children deprived of liberty. This review of available evidence seeks to contribute to understanding by bringing together new developments towards effective

practice to assist professionals to provide appropriate intervention to children deprived of their liberty that confer safeguarding and the rights of every child deprived of their liberty as a result of offending.

It has been discussed how the deprivation of liberty has profound consequences for every imprisoned child. Adolescence is a complex period of developmental transition between childhood and adulthood. An incarcerated adolescent faces incredible challenges to the development of their social and human agency and their interplay is likely crucial.

We must ensure that children deprived of their liberty have the necessary opportunity and support to move on with their lives. It is evident children are not routinely afforded such opportunity, evidenced through their feedback and sense of wellbeing whilst in prison (Her Majesty's Inspectorate of Prisons, 2016). The low rates of participation in education, training, employment and offending behaviour programmes (Her Majesty's Inspectorate of Prisons, 2016) exacerbate this concerning picture.

This position paper has looked towards the literature regarding psychosocial maturity, psycho-social development, psychological development, their interplay and their link to offending and offending cessation to highlight the need for effective and holistic intervention with children deprived of their liberty as a result of offending. It is argued that desistance led approaches should be integral in supporting an 'organically' occurring processes of desistance from crime in an age appropriate and holistic approach to complement RNR approaches. A focus on positive human change and development is a necessary addition to practice, rather than a single focus on risk reduction. Desistance research has highlighted how there are multiple pathways out of crime. The interplay between the social or structural contexts of desistance, and the more subjective or personal aspects, is key to understanding and supporting this process for every child deprived of their liberty as a result of offending. Importantly, desistance approaches lend themselves to a resettlement approach, looking beyond the custodial environment to the child's family,

social and community setting to where they will return; support and intervention should continue beyond a custodial sentence, desistance is not a quick nor easily sustained process for a child deprived of their liberty. The integration of desistance led approaches which focus on positive human change and development within a holistic approach promotes UNCRC requirements and I suggest, better uphold a child's rights, reducing the likelihood of the enduring 'tag' of an offender which will better enable children and adolescents to move on and away from their incarceration towards a positive future.

Most of all, I would like to highlight that accordant to desistance approaches, we should use imprisonment more sparingly because imprisonment frustrates desistance (Weaver and McNeil, 2008). This supports the UNCRC requirements, in that the imprisonment of children should be used only as a measure of last resort and for the shortest appropriate period of time. Weaver and McNeil (2008) identify that stopping offending is much easier where people maintain strong and positive social ties, where they can see beyond their label as a prisoner or an 'offender' and where they can reduce or avoid contacts with other 'offenders', rather than being forced to live alongside them. To achieve reductions in social exclusion, recidivism rates, and public expenditure this would make intuitive sense. Prison makes all of these things much more difficult. For effective intervention for children who commit offences it is clear that their deprivation of liberty should be a last resort. Formal early interventions such as assisting in the strengthening of social bonds are suggested to be crucial in intervening early and preventing children from offending and reducing the likelihood that they would lose their liberty as a consequence of future offending. If desistance could be facilitated at earlier points then there would be considerable financial and holistic benefits to society. Desistance is a burgeoning area of research in intervention and approach with offenders. However, it remains a developing area of understanding and I suggest it is crucial in effective intervention for children deprived of their liberty. However, we do need to better under-

stand the process of desistance and come to agreement as to its pathway for children. This will support improved understanding of the efficacy of such intervention and appropriate evaluation. We must ask how can we best facilitate, as well as promote, a desistance orientated perspective for children deprived of their liberty as a result of offending.

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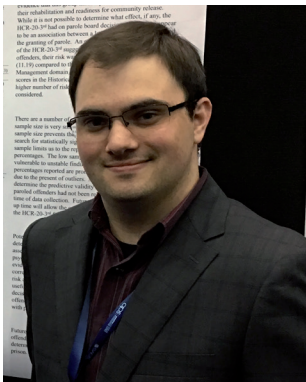
# THE RECIDIVISM OF JUVENILES CONVICTED OF HOMICIDE AND RELEASED AS ADULTS

**Frank DiCataldo, Cory Linder, Jaclyn Neddenriep,  
Maxwell Christensen, Sean Domas and Robert Kinscherff**



**Frank DiCataldo, PhD**

*Associate Professor of Psychology, Roger  
Williams University*



**Maxwell Christensen, MA**

*Roger Williams Univeristy*



**Robert Kinscherff, PhD, JD**

*Associate Vice President and Associate  
Professor (Doctoral Clinical Psychology  
Program), William James College/ Sci-  
ence Faculty, Center on Law, Brian and  
Behavior, Massachusetts General Hospi-  
tal/ Senior Associate, National Center for  
Mental Health and Juvenile Justice*

**Cory Linder**

*University of Denver*

**Jaclyn Neddenriep**

*University of Denver*

**Sean Domas**

*Roger Williams University*

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## Abstract

Recent Supreme Court decisions have limited the severity of sentencing of juveniles convicted of murder due to their immature development, vulnerabilities to poorly-considered actions, and likelihood for violence desistance over their life course. The present study examines the recidivism of a small sample of individuals convicted of a homicide offense as an adolescent and released from prison as adults. The results revealed a low recidivism rate for any criminal conviction and an even lower rate of reconviction for violent recidivism during a 7.8 year follow-up in the community. The older age of participants at the time of release from incarceration is suggested as an important factor in their positive post-release adjustment.

**Keywords:** Juvenile offenders, recidivism, homicide, desistance.

## 1. Introduction

The U.S. Supreme Court has redrawn the constitutional limits for the punishment of youth convicted of murder in recent years. The development of this constitutional doctrine began with *Roper v. Simmons* (2005) which categorically barred the death penalty for persons committing a capital offense prior to age 18. The Court followed in *Graham v. Florida* (2010) with a bar on juvenile Life Without Possibility of Parole (JLWOP) for non-homicide offenses committed by youth under age 18, and in *Miller v. Alabama* (2012) subsequently barred sentencing schemes imposing mandatory JLWOP for juveniles convicted of murder. Most recently, the Court asserted in *Montgomery v. Louisiana* (2016) that the holdings in *Miller* must be applied retroactively to all persons who are currently incarcerated following conviction for a homicide committed as a juvenile and sentenced to a mandatory term of JLWOP. The United States stands alone in the world as the only country that imposes JLWOP (Nellis and Chung, 2013).

In crafting this approach, the Court created a doctrinal foundation in *Roper* by drawing upon research on the developmental characteristics of adolescence. The *Roper* decision set the stage by explicitly referring to “a lack of maturity and an underdeveloped sense of responsibility,” being “more vulnerable and susceptible to negative influences and outside pressures, including peer pressure,” and personalities that are “more transitory and less fixed.” (*Roper v. Simmons*, 2005, pgs. 569-570). The Court concluded that the immatu-

riety of adolescents renders them--as a class and not just in individual instances--less culpable than adults for their crimes and more amenable to rehabilitation and the positive effects of maturation. The Court also observed that “juvenile offenders cannot with reliability be classified among the worst offenders.” (*Roper v. Simmons*, 2005, pg. 569) In subsequent cases, the Court majority would also explicitly refer to emerging developmental neuroscience to buttress its doctrinal point that “children are different” and support its position that JLWOP would be disproportionate punishment for juveniles under the 8<sup>th</sup> Amendment’s prohibition against cruel and unusual punishment.

It is now settled law that juveniles are different than adults and that youth matters as a mitigating factor when calculating punishment. *Roper* ensures that nobody will be executed for a juvenile capital crime. *Graham* established and *Miller* reaffirmed that a state “is not required to guarantee eventual freedom” and so may impose JLWOP after an individual sentencing hearing--but must also provide “some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation.” (*Graham v. Florida*, 2010, pg. 2030)

*Montgomery* cleared the way for the estimated 2,774 (National Conference of State Legislators, 2016) inmates serving JLWOP for crimes committed as juveniles to have their cases reviewed. Most states have moved to abandon or restrict JLWOP and to establish resentencing or parole mechanisms for review of currently incarcerated individuals. Minimum mandatory sentences before parole

eligibility range from fifteen years (Nevada, West Virginia) to very lengthy minimum sentences before parole eligibility that challenge what it means to have “some meaningful opportunity” to demonstrate maturity and rehabilitation (see Miller, Dorn and Hritz, 2015). For example, before being struck down by the state Supreme Court, Nebraska had established a minimum mandatory term of 60 years. Texas and Nebraska have established a minimum mandatory sentence of 40 years before an inmate convicted of a homicide committed as a juvenile would become parole-eligible. This means that a youth convicted at age 15 would be 55 before a first parole hearing. Still, many inmates previously convicted of murder and other serious crimes committed while juveniles and sentenced to JLWOP will not spend the rest of their lives in prison and that future cases of juvenile homicide will be sentenced using factors provided in Miller regarding case-specific mitigating factors as well as adolescent immaturity, diminishing risk with age, and amenability to rehabilitation.

The *Miller* decision provided the following as factors to be considered at the time of sentencing: a) a juvenile’s age and its hallmark features – including immaturity, impetuosity, and a failure to appreciate consequences; b) family and home environment, from which youth are less capable than adults of extricating themselves; c) the circumstances of the offense, including the juvenile’s role and extent to which peer pressure was involved; d) the youth’s incompetence arising from immaturity that may have resulted in disadvantages in dealing with the police or participating in the criminal proceedings; and e) a youth’s potential for rehabilitation.

Many inmates still serving JLWOP have been in prison for decades without any realistic hope of ever being released prior to the Supreme Court decisions in *Miller* and *Montgomery* but will now have their cases reviewed. Pre-*Miller* sentences to JLWOP will need to be remedied through converting them to parole-eligible sentences after a designated minimum time served or through an individualized hearing applying a *Miller* analysis for resentencing to something less

than JLWOP or to JLWOP because the offender is among “the rare juvenile offender whose crime reflects irreparable corruption.” Post-*Miller* prosecutions of capital offenses committed by juveniles will be subject to a *Miller* analysis that anticipates that future JLWOP sentences will be uncommon.

It is difficult to determine at a national level how many JLWOP inmates will be resentenced in a manner that affords them a parole hearing and/or liberty in the next few years given variations in practice across jurisdictions and continuing litigation in many about permissible procedures, minimum mandatory sentences, and how to best apply the so-called “*Miller* factors” retrospectively in resentencing and parole proceedings. A key consideration, among other factors, in these resentencing and parole hearings for pre- and post-*Miller* cases will be the criminal recidivism rates and post-release adjustment of juveniles convicted of murder in the community.

## **2. Previous Research on the Recidivism of Juveniles Charged or Convicted of Murder**

Prior research on adolescents charged or convicted of homicide has focused on identifying historical and clinical factors and the characteristics of their homicide to establish typologies of juvenile homicide offenders (Cornell, Benedek and Benedek, 1987), or identifying variables that distinguish them from violent but non-homicide offenders (DiCataldo and Everett, 2009; Heide, 2003; and Zagar, Busch, Grove, et al., 2009). Early research on the recidivism of juvenile homicide offenders relied on small samples or a few case reviews of mostly parricide offenders (Duncan and Duncan, 1971; Heide, 1992; Post, 1982; Russell, 1984; and Tanay, 1973). More recent empirical studies examined recidivism rates upon release from incarceration using larger samples and longer follow-up times in the community (Hagan, 1997; Heide, Spencer, Thompson et al, 2001; Howell, 1995; Trulson, Caudill, Haerle, et al., 2012 and Vries and Liem, 2011).

Howell (1995) reported on the effectiveness of a 16-week treatment program for juveniles convicted of murder provided in a secure



treatment setting in Texas. A comparison of rearrest and reincarceration rates at one and three-years post-release with a control group of untreated juveniles convicted of murder but not admitted to the program revealed a significantly lower arrest rate for the treated (22%) compared to the untreated group (41%). They also had a significantly lower reincarceration rate (0% vs. 13%). These differences largely disappeared at the three-year follow-up, however. The treatment group had a similar rearrest rate as the untreated group (35% vs. 39%) and a non-statistically significant lower incarceration rate (6% vs. 22%) over a longer follow-up period.

Hagan (1997) examined the recidivism of 20 youth adjudicated for murder or attempted murder committed to a residential treatment juvenile correctional program in Wisconsin. The average length of time at risk in the community during follow-up was not reported but to qualify for the study the youth had to be in the community between five to fifteen years. Twelve (60%) of the murder and attempted murder group were rearrested in the follow-up period. Seven (35%) had committed a violent offense against person and five (25%) had committed a property crime. There were no statistically significant differences in recidivism between the homicide and a non-homicide comparison group consisting of 20 youth convicted of a violent crime and committed to the same program at approximately the same time.

Heide, Spencer, Thompson et al. (2001) reported a similar high rate of reincarceration for 59 youth transferred to adult court and sentenced to adult prison for murder and attempted murder in Florida. The average time served in prison was six years and average time at risk in the community post-release was 11 years. Sixty percent of the released youth were reincarcerated during the follow-up period and 80% of these returned to prison within three years of release from the murder sentence. Unlike previously reviewed research on the recidivism of juvenile homicide offenders which used samples of offenders committed to juvenile correctional settings, the sample in Heide et al. (2001) were transferred to adult criminal court and incarcerated

in adult prisons.

Vries and Liem (2011) report that 59% of 137 Dutch youth adjudicated for homicide between 1992 and 2007 were rearrested in a follow-up averaging 8.5 years; about one-fifth of the rearrests were for a violent offense. Factors associated with recidivism included being male, having a history of criminal offending and having poor self-control.

Myers, Chan, Vo et al. (2010) followed 11 juveniles convicted of sexual homicides. Five (45%) remained arrest-free after 8.9 years but six (55%) were rearrested after 4.4 years. Three for another sexual homicide or a sexually homicidal act.

Finally, Trulson Caudill, Haerle et al. (2012) examined the recidivism rate for 464 juvenile homicide offenders (126 gang-related homicides and 338 whose homicides were not gang-related) who had been committed to a juvenile justice facility. Youth whose homicides were gang-motivated were 51.4% more likely to be rearrested post-release than those not committed for a gang murder, and 89.4% more likely to be arrested for a felony arrest. These studies varied significantly in important ways: (a) some grouped attempted murder arrests or convictions with youth arrested and convicted of a homicide offense; (b) some mixed youth awaiting trial for murder with youth convicted of murder while other studies were exclusively comprised of only youth convicted of murder; (c) some studies used samples of youth tried and sentenced as adults in criminal court while others used samples of youth retained and incarcerated in the juvenile justice system; (d) some used new arrest as the recidivism outcome variable while others used the more conservative estimate of conviction or reincarceration as the recidivism outcome variable; and (e) the studies differed on the length of the follow-up or time at risk after release.

Despite these differences, this set of studies all found that youth convicted of homicide or attempted homicide offense and incarcerated in either the juvenile justice or criminal justice systems have difficulties with successful community re-entry as reflected by relatively high rates of new arrests and/or convictions. Perhaps counter-intuitively, it does not appear

that recidivism risk among juvenile homicide offenders differs significantly from recidivism risk of youth charged or convicted of a violent but non-homicide offense.

Age at time of release for community re-entry may be a significant variable in recidivism risk among juvenile offenders. Adolescents and young adults are generally at higher risk for violence and criminality than older adults (Gottfredson and Hirschi, 1990; Laub and Sampson, 2003). However, even “most youth who commit felonies greatly reduce their offending over time, regardless of the intervention” (Mulvey, 2011, pg. 1). Age at the time of release could be a potentially significant factor when estimating recidivism of juvenile homicide offenders, as appears to be the case for most offenders. Youth sentenced to lengthier terms of incarceration which extend beyond the higher risk phase of their youth (mid-adolescence to their mid-20’s) may have more successful community re-entry than youth who are released when they are still within that higher risk phase of life.

Unfortunately, age at the time of release has not been routinely reported in prior research on recidivism of juveniles charged or convicted of homicide. The focus has been on providing estimates of time at risk in the community. Only Heide et al. (2001) reports an average for time served for her sample (approximately 6 years) suggesting that if sentenced while still a juvenile or a young adult, they would have been released while still in their mid-20s. Howell (1995) and Hagan (1997) do not provide information about time confined or age at release but since their samples were youth sentenced to a juvenile correctional facility and presumably were released at the end of juvenile jurisdiction, typically between the ages of 18 and 21 in most states; although some states have mechanisms for serious juvenile offenders to enter the adult correctional system at the end of juvenile jurisdiction. Vries and Liem (2011) did not include information about the age of release for their Dutch sample.

### 3. The Present Study

This study revisits a sample originally exam-

ined in DiCataldo and Everett (2008) which compared 33 adolescents adjudicated or awaiting trial for murder with 38 adolescents who committed a violent but non-homicidal offense. That study examined whether the two groups differed significantly on family history, early developmental, delinquency history, mental health history, and weapon possession variables. Results indicated that the non-homicide group proved more problematic on many of these variables. Two key factors did distinguish the homicide group from the comparison group: greater availability of a gun and substance abuse at the time of the offense.

The present study is a follow-up with 22 of the 33 juveniles charged with or convicted of a homicide who then went on to serve lengthy periods of incarceration in adult prisons prior to release to the community. Most were released when they were in their late 20’s and early 30’s, when they were beyond the highest risk period for violence and criminality. The later age of release from prison for these juvenile homicide offenders provides an opportunity to investigate whether older age at the time of release impacts recidivism rates generally reported for homicides committed as a juvenile. A reduced recidivism rate for an older, more mature cohort of juvenile homicide offenders may have important public policy implications as states begin to move toward instituting various remedies to address the changes in JLWOP sentences brought about by *Miller* and *Montgomery*.

The following research questions are addressed in this study:

1. What are the general and violent recidivism rates for these juveniles convicted of homicide--most of who have been in the community for several years?
2. What risk factors are associated with recidivism among these juvenile homicide offenders?
3. Does age at the time of release or duration of incarceration have an impact on their likelihood of general and/or violent recidivism?

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## 4. Method

### *Participants*

The thirty-three (33) juvenile homicide offenders from which twenty-two (22) were selected for the present analysis were originally identified by DiCataldo and Everett (2008) who compared these thirty-three (33) juvenile homicide offenders to thirty-eight (38) juveniles who had committed violent but non-homicide offenses. These 33 were either in juvenile detention awaiting adjudication for a homicide offense or had been convicted of a homicide offense and were sentenced to an adult correctional setting between 1995 and 1998. Juveniles convicted of First or Second Degree Murder were typically held in juvenile correctional facilities until transfer to adult correctional facilities at some point between ages 18-21.

Juveniles not waived into adult court and convicted of a homicide offense prior to 1996 were given a determinate adult sentence consisting of the following: First Degree Murder – 15 to 20 years; Second Degree Murder – 10 to 15 years; and Manslaughter – commitment to youth corrections until age 21 and/or commitment to prison for a determinate time. Most individuals in this sample were subjected to this sentencing scheme.

Those waived to adult court prior to 1996 were sentenced to JLWOP for the conviction of Murder, First Degree and to Life with the Possibility of Parole after fifteen years for Murder, Second Degree. Some individuals in the current sample were waived to adult court and sentenced after conviction for Murder, Second Degree to the DOC. None of the participants in the current sample were convicted of Murder, First Degree in adult court as they were not parole eligible and, therefore, not in the community at the time of this study.

After 1996 all juveniles at least 14 years old were automatically waived to adult court and eligible for adult sentencing schemes. A conviction for Murder, First Degree resulted in automatic JLWOP; Murder, Second Degree were automatically sentenced to Life With the Possibility of Parole after 15 years; and Manslaughter resulted in a determinate sentence to a youth correctional agency and/or

the adult correctional system. Juveniles sentenced to JLWOP for Murder, First Degree were not included in this study as they were not in the community at the time of data collection.

### *Procedure*

Each of the 33 juvenile homicide offenders from the original 2008 study was assessed with an extensive semi-structured interview form developed specifically for that research project. The results of that semi-structured interview conducted between 1995 and 1998 was utilized in the present study. The interviews were conducted by master-level clinicians or by a research assistant. All interviewers were trained on the administration of the semi-structured interview form. The interviews typically took about two hours. Historical data was self-reported by the youth but was supplemented with information available in the existing clinical file for each youth maintained in the youth correctional program where they were being held at the time of initial data collection between 1995 and 1998. A copy of the interview form is available from the first author. The study was approved by the Internal Review Board of the Massachusetts Department of Youth Services.

### *Data Collected in 1995-1998*

Demographic data obtained from available police and court records in the youth's program file and the interview included age at time of the homicide, race/ethnicity, and conviction of record (First Degree Murder, Second Degree Murder, Manslaughter). Selection of variables in the semi-structured interview form was guided by the research literature about factors related to violent offending in youth and included information about family background, early childhood, educational history, peer group, mental health/substance abuse problems and treatment, and weapon possession. Delinquency history was obtained from their juvenile CORI at the time of the semi-structured interview between 1995-1998.

Information was obtained from police reports and other legal documents found in the youth correction program records about their

relationship to the victim, the circumstances surrounding the homicide (including the precipitating event), the kind of weapon used, and the motivation for the homicide.

#### *Recidivism, Length of Incarceration and Time at Risk*

Recidivism data was obtained from their adult Criminal Offender Record Information (CORI). Data about each offender's age at the time of their release to the community, duration of incarceration, and time at risk in the community since release was obtained from CORI and parole records.

The current study was approved by the Human Subject Review Board at Roger Williams University and by the Massachusetts Department of Criminal Justice Information Service and Parole Board.

## **5. Results**

Twenty-two (22) of the original 33 juvenile homicide offenders were released from prison through either parole or the completion of a fixed sentence. The remaining 11 offenders were not included in the current study because they were still in prison for their murder conviction because they were serving JLWOP or had been denied parole, had been adjudicated for manslaughter and sentenced to a juvenile justice setting and released at age 21, or their CORI records could not be located. A juvenile homicide perpetrator was later exonerated of his murder conviction and another died while in prison. They were not included in the present study.

#### *Demographic Characteristics and Legal Outcomes*

The 22 members of the juvenile homicide group was comprised of four Caucasian, twelve African Americans, four Latinos, and two participants self-identified as Mixed. Average age at the time of the homicide offense was 16.2 years (SD = 0.94) and average age at release to the community was 29.1 years (SD = 2.9). Participants averaged 12.7 years (SD = 3.1) in prison and average time at risk in the community was 7.8 years (SD = 3.4). Ten participants were not waived to adult court,

were convicted of First Degree Murder and sentenced to a determinate sentence of 15-20 years for a murder committed prior to 1996; ten were not waived to adult court, convicted of Second Degree Murder and sentenced to a determinate sentence of 10-15 years for a murder committed prior to 1996 or where waived to adult court convicted of Second Degree Murder, given a life sentence with parole eligibility and had been paroled; one was convicted for Manslaughter with a sentence to adult prison; and, one participant's conviction of record is unknown. No participants in this study were sentenced to JLWOP.

#### *Recidivism*

Seven (31.8%) of the participants had a post-release conviction for any offense and 15 (68.2%) had no post-release convictions. None of the participants had arrests or convictions for a post-release homicide. The sample was divided into four categories based on frequency and type of post-release adult criminal convictions:

***Serious Violent Persistent Offenders*** – two or more post-release convictions for violent offenses and/or one violent conviction involving the use of a weapon.

***Single Violent Persistent Offenders*** - one post-release conviction for a violent offense without the use of a weapon.

***Violent Desistance Offenders*** – one or more post-release convictions for non-violent offense(s) and no violent offense convictions.

***Total Desistance Offenders*** – No post-release criminal convictions.

The results of the classification based on these definitions are reported in Table 1. Also reported are race/ethnicity and type of conviction for the four groups. Chi-Square comparisons for recidivists comprised of the combined three recidivist groups (N=7) vs. the non-recidivist group (n=15) did not yield any significant differences.



Table 1 Demographic and Legal Characteristics of the Four Juvenile Homicide Offender Groups

	Serious Violent Persistent Offenders	Single Violent Persistent Offenders	Violence Desistance Offenders	Total Desistance Offenders
	N (%)	N (%)	N (%)	N (%)
Group	2 (9.1%)	2 (9.1%)	3 (13.6%)	15 (68.2%)
Race				
African-American	0	0	3 (13.6%)	9 (40.9%)
Caucasian	1 (4.5%)	0	0	3 (13.6%)
Latino	1 (4.5%)	2 (9.1%)	0	1 (4.5%)
Mixed	0	0	0	2 (9.1%)
Offense Type				
Murder, 1 <sup>st</sup>	1 (4.5%)	1 (4.5%)	2 (9.1%)	6 (27.3%)
Murder, 2 <sup>nd</sup>	1 (4.5%)	1 (4.5%)	1 (4.5%)	7 (31.8%)
Manslaughter	0	0	0	1 (4.5%)
Unknown	0	0	0	1 (4.5%)

The largest group was the Total Desistance Offenders who comprised 68.2% (15) of the sample. When combined with the three Violent Desistance Offenders (13.6%), the two groups comprised a total of 18 (81.2%) participants who had not been convicted of a post-release violent offense. A total of four

(18.2%) participants had at least one post-release violent conviction but only two (9.1%) had two or more post-release violent convictions and/or one post-release violent conviction involving use of a weapon. The Serious Violent Persistent Offenders also had the highest mean for post-release total

convictions (7.0) and violent convictions (4.5). The results for age at the time of release, total time committed, time at risk, number of prior offenses and post-release convictions for the four juvenile homicide groups are pre-

sented in Table 2. T-test comparisons of the non-recidivists (N=15) and the combined recidivist groups (N=7) did not yield significant differences.

Table 2 Prior Offense History and Recidivism Post-Release

	Serious	Single	Violent	Total	Sample
	Violent	Violent	Desistance	Desistance	Total
	Persistent	Persistent	Offenders	Offenders	
	Offenders	Offenders			
	M (SD)	M (SD)	M (SD)	M (SD)	M (SD)
Age at Time of	15.9 (.07)	16.3 (1.6)	15.6 (0.8)	16.4 (1.0)	16.2 (0.9)
Offense					
Age at Release	28.8 (3.1)	27.7 (2.4)	27.6 (3.6)	29.7 (2.97)	29.1 (2.9)
Time Committed	12.8 (3.1)	11.4 (3.9)	12.0 (2.8)	12.9 (3.1)	12.7 (3.1)
Time at Risk	8.5 (4.7)	7.1 (2.82)	8.5 (2.70)	7.6 (3.73)	7.8 (3.4)
	N (M, SD)	N (M, SD)	N (M, SD)	N (M, SD)	N (M, SD)
Prior Offenses	6 (3.0, 2.1)	5 (2.5, 0.7)	12 (4.0, 1.2)	45 (3.0, 2.7)	68 (3.1, 2.3)
Convictions	14 (7.0, 5.7)	5 (2.5, 0.7)	20 (6.7, 6.7)	0	39 (5.6, 3.9)
Post-Release					
Violent Convictions	9 (4.5, 3.5)	2 (1.0, 0.0)	0	0	11 (0.5, 1.3)
Post-Release					

### Community, Family, Mental Health, Weapon and Delinquency History Prior to their Release from Adult Incarceration

Self-report data about community, family and mental health variables were obtained while the 22 homicide offenders were juveniles and placed in a youth correctional program following their arrest or conviction for the homicide offense between 1995 and 1998. Only 6 (40%) of the Total Desistance Offenders reported believing there was a crime problem in their community compared to all the members of the other three groups (7; 100%). A

lower percentage of the Total Desistance Offenders group reported feelings safe in their community (73.3%) compared to the other three groups who all reported feeling safe in their community (100%), despite their also reporting a crime problem where they live. Compared to the other three groups, the Total Desistance Offenders, also reported lower rates of criminal history for their fathers (14.3%) and siblings (35.7%), family histories of domestic violence (7.1%), and the murder of a family member (14.3%). Comparable percentages of the Total Desistance

Offenders (57.1%) and Serious Violent Persistent Offenders (50%) reported a history of gun possession but Total Desistance Offenders reported a lower rate of carrying a knife in the community (35.7%) and having routinely kept a gun at home (21.4%) than the other three recidivism groups. A lower percentage of Total Desistance Offenders reported a history of mental health treatment, aggression/ fighting problems and anger control problems

than the other three recidivism groups. Chi-square analyses corrected for the number of tests conducted did not yield any significant differences between the three combined recidivist groups (N=7) and the non-recidivist group (N=15). Results for the four groups on community, family, weapon and mental health variables are presented in Table 3.

Table 3 Community, Family, Weapon and Mental Health Variables

	Serious Violent Persistent Offenders	Single Violent Persistent Offenders	Violent Desistance Offenders	Total Desistance Offenders
	N (%)	N (%)	N (%)	N (%)
Crime Problem in Community	2 (100%)	2 (100%)	3 (100%)	6 (40.0%)
Feel Safe in Community	2 (100%)	2 (100%)	3 (100%)	11 (73.3%)
Father Criminal History	1 (50%)	1 (50%)	2 (66.7%)	2 (14.3%)
Sibling Criminal History	1 (50%)	0	2 (66.7%)	5 (35.7%)
Domestic Violence	1 (50%)	2 (100%)	1 (33.3%)	1 (7.1%)
Family Member Murdered	1 (50%)	1 (50%)	2 (66.7%)	2 (14.3%)
Carried a Knife in Community	2 (100%)	2 (100%)	2 (66.7%)	5 (35.7%)
Gun Possession	1 (50%)	0	3 (100%)	8 (57.1%)
Gun Routinely Kept at home	1 (50%)	0	1 (33.3%)	3 (21.4%)
Mental Health Treatment	1 (50%)	1 (50%)	0	3 (21.4%)
Aggression/Fighting	1 (50%)	1 (50%)	1 (33.3%)	3 (21.4%)

### *Characteristics of the Homicide Offense*

Fourteen (63.6%) of the homicides were committed with a gun. A knife was used in three (13.6%) homicides and a blunt object was used in three (13.6%) homicides. The method used was unknown for two (9.1%) of the homicides. Seventeen (85%) of the homicides included at least one co-defendant in the homicide. Only two homicides were committed by a solo offender (15%). Information about the presence of a co-defendant in two of the homicides was not available. There was no readily discernable pattern among the four groups regarding the weapon used in the homicide or the participation of a co-defendant.

Ratings about the offender's relationship to the victim and the underlying motivation for the homicide were based on information contained in police reports and grand jury transcripts. Nine (40.9%) of the victims were strangers (defined as having known the victim for less than 24 hours). The victim was an acquaintance in two (9.1%) of cases, a rival in nine (40.9%), and a relationship could not be determined in two (9.1%) cases. Ten (45.5%) of the homicides were motivated by conflict with the victim. Five (27.3%) occurred in commission of another felony (most often robbery) and four (18.2%) were unprovoked homicides. Motivation or precipitating event could not be identified for two (9.1%) participants.

## **6. Discussion**

There is limited research regarding post-release adjustment and recidivism of individuals convicted of homicide offenses as adolescents. Recidivism estimates have varied significantly, and the differences in recidivism reported across studies is likely due to the widely varying characteristics of the studies, including definitions of recidivism, duration of post-release follow-up periods, differences in sample populations such as youth committed to a juvenile correction program vs. youth sentenced to adult prisons and age at the time of release to the community. These variations across studies likely have a significant impact on the recidivism rates reported and make

comparisons difficult.

The recidivism rate in the present study utilizing post-release convictions was generally lower than reported rates in previous research. Only 31.8% of the 22 study participants were reconvicted for any re-offense and new convictions for any violent offense was 18.2% over an average 7.8-year post-release follow-up. Only two (9.1%) participants had post-release convictions for two separate violent offenses or one violent offense with a weapon. No one was charged or convicted of a post-release homicide. These juvenile homicide offenders were mid-adolescents at the time of their homicide offense (16.2 years old,  $SD = 0.94$ ) but served relatively long sentences in adult prisons (12.7 years,  $SD=3.1$ ). The participants were released at an average age of 29.1 years ( $SD=2.9$  years) which placed them outside of the late-adolescent to early young adulthood years of greatest risk for criminal offending. Their age at release may account for the low recidivism rate.

The 22 participants were classified into four groups based upon frequency and type of post-release recidivism. The largest group, *Total Desistance Offenders*, comprised 15 (68.2 %) participants who had no post-release convictions for any criminal offense during the follow-up period. Three (13.6%) participants were classified as *Violent Desistance Offenders*, defined as having at least one non-violent crime convictions during the follow-up period. They generally occupied a middle ground position on many of the prior delinquency, family history, community and mental health variables. Two (9.1%) participants were classified as *Single Persistent Offenders* defined as having only one conviction for a violent offense that did not include the use of a weapon, and two (9.1%) participants were classified as *Serious Violent Persistent Offenders*, defined as having been convicted of two or more two violent offenses or one violent offense involving the use of a gun. Compared to *Total Desistance Offenders* and *Violent Desistance Offenders*, *Serious Violent Persistent Offenders* reported a greater history of family criminality (father or siblings), a higher percentage reported having had a murdered family member, a more troubled



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history of mental health and/or substance abuse problems, and problems with aggression, fighting and anger control.

A strength of this study is its longitudinal design. Interviews were conducted with the participants when they were juveniles and prior to their transfer to prison and, therefore, prior to their release into the community. The interview data could yield predictors of recidivism as they were collected prior to the release of participants from incarceration, although the sample is too small to allow for statistical testing of their predictive value.

There are several limitations to the present study. The most significant is the small sample size which calls into question how robust and generalizable the findings are and precludes identification of statistically significant differences among the classification groups. Future studies with larger samples of juvenile homicide offenders are needed to test for meaningful differences among the classification groups. Another limitation was the absence of information from the study participants about their perceptions of their general adjustment, experiences of community re-entry following incarceration, and community supports which could have impacted their recidivism. Future research should examine information about post-release adjustment and level of community re-entry supports to determine their impact on recidivism.

Finally, this study did not include juveniles transferred to adult court and automatically sentenced to JLWOP for First Degree Murder. The study contained juveniles not waived to adult court and/or sentenced to Second Degree Murder or Manslaughter. The juveniles in this study may differ from juveniles sentenced to JLWOP on various psychosocial characteristics, delinquency history, heinousness of their homicide offense and the assessment of their risk for recidivism and amenability for rehabilitation. The selection bias represents another limit on the generalizability of the reported findings. Future research needs to include juveniles waived to adult court and sentenced to JLWOP.

## 7. Implications

The results of this study, comprised of a small cohort of juvenile homicide perpetrators released from prison as adults, revealed an unexpectedly low rate of recidivism over a lengthy follow-up time while “at risk” in the community. The rate and seriousness of recidivism for this sample is generally lower than the rate and severity of recidivism reported in prior research reports. The low sample size prevented the statistical identification of factors predictive of recidivism. The sample’s older age (29.1 years) at the time of their release from prison may account for their relatively crime-free adjustment in the community. Their advanced age at the time of release is generally considered to be beyond the high-risk age for criminal offending (Gottfredson and Hirschi, 1990; and Laub and Sampson, 2003).

Despite its limitations, this study has significant implications for post-*Miller* resentencing proceedings or parole hearings, and for individualized hearings for juveniles convicted of a homicide offense. For persons in resentencing hearings and parole hearings, the findings of this study of low post-release convictions for violent offenses (and no homicides) is relevant to (a) the potential of youthful offenders for rehabilitation; and (b) the protective role of normal developmental maturation against criminal non-violent and violent reoffending as youthful offenders age (even if previously convicted of a homicide). For persons in resentencing hearings, evidence of general institutional adjustment and violent misconduct during incarceration may be more germane to determinations of rehabilitation and risks of violent recidivism than violent acts (including homicide) committed years ago while the individual was still an adolescent.

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