



Article

# Detention of the Child in the Light of International Law- A Commentary on Article 37 of the United Nation Convention on the Rights of the Child

Dr. Eva Manco<sup>\*</sup>

## Abstract

Article 37 of the United Nations Conventions on the Rights of the Child (CRC) concerns the establishment of leading principles regarding the detention of the child. Articles 37(b), (c) and (d) establish a broad range of standards in regard to deprivation of liberty of children expressed as legal requirements related to the use of deprivation of liberty, provisions regarding the treatment of children deprived of their liberty, and procedural and substantive rights for every child deprived of liberty. This article provides a detailed commentary on the normative aspects of Article 37 (b), (c) and (d) CRC, providing for a legal child-oriented framework on the issue surrounding the detention and deprivation of liberty of children.

## I. Introduction

Article 37 of the United Nations Convention on the Rights of the Child (CRC) concerns the establishment of leading principles regarding the detention of the child. Articles 37(b), (c) and (d) establish a broad range of standards in regard to deprivation of liberty of children expressed as legal requirements related to the use of deprivation of liberty, provisions regarding the treatment of children deprived of their liberty, and procedural and substantive rights for every child deprived of liberty. Article 37 (b), (c) and (d) CRC read:

*State Parties shall ensure that:*

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*(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;*

*(c) 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. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;*

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<sup>\*</sup> Doctor in Law University of Sheffield, LLM University of Nottingham, Freelance Social Researcher, Email: [evamanco@yahoo.com](mailto:evamanco@yahoo.com)

*(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.*

The aim of the author is to explore in detail the normative aspects dealing with the deprivation of liberty of children. The review begins with a brief outline of the drafting history, to be followed by an analysis of the respective paragraphs. The review proceeds systematically through paragraphs (b), (c) and (d), providing an insight into their respective issues. In order to deprive a child of liberty, a double test of lawfulness and non-arbitrariness for justification, must be met as well as complying with the principle of last resort and for an appropriate period of time. Beside the above mentioned principles, this section considers the treatment of children deprived of liberty ‘with humanity and respect for the inherent dignity of the human person in a manner which takes into account the needs of persons of his or her age’ and enforcement of ‘the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances’. The requirement to separate children deprived of liberty from adults, unless it is considered in the child’s best interest not to do so, will also be explored in full. Finally, the chapter focuses on the review of deprivation of liberty. This paragraph focuses on procedural safeguards contained in Article 37(d), highlighting their specific child development orientation.

## II. Deprivation of liberty of children in the context of juvenile justice: (Article 37(b), (c), (d))

‘It is said that no one truly knows a nation until one has been inside its jails. A nation should not be judged by how it treats its highest citizens, but its lowest ones.’

Nelson Mandela<sup>1</sup>

Despite the different contexts,<sup>2</sup> in this chapter the deprivation of liberty is approached exclusively in relation to children in conflict with the law.

Several studies have acknowledged that ‘once placed in police lock-ups or detention facilities, children are frequently subjected to severe corporal punishment, torture, isolation, restraints, sexual assaults, harassment, and humiliation’.<sup>3</sup> Although prohibited by the provisions of the United Nations Convention on the Rights of a Child (CRC), one may encounter children in detention centres, under investigation or on trial, sharing a facility with children or sometimes adults convicted of a crime. Consequently, there are detained children, that are abused and exploited by adults or other children deprived of liberty.<sup>4</sup> In addition, girls in detention facilities are a group vulnerable to physical and sexual abuse, mainly when supervised by male staff.<sup>5</sup> Levels of self-harm among detained children highlight the pervasive impact of isolation and

<sup>1</sup> Nelson Mandela, *Long Walk to Freedom*, Little Brown, London, 1994, p.187 quoted in Lazarus 2004 page 1

<sup>2</sup> Children are deprived of their liberty for a variety of reasons and in a variety of ways. Few are placed in residential care because they have no parents, or because they suffer violence at home. For many children, family disintegration, social and economic conditions, including poverty, constitute reasonable grounds to institutionalise them. Others are institutionalised in hospital due to the widespread stigmatisation of particular physical or mental disabilities, psychiatric or other severe illness, as well as the lack of support provided to parents. Few are detained merely because of their immigration status. Many children working or living on the streets end up in detention regardless of whether or not they have committed an offence, simply because they are assumed to be anti-social elements. At least one million children worldwide are deprived of their liberty as they are alleged to have come into conflict with the law.

<sup>3</sup> ‘Easy Targets: Violence Against Children Worldwide’. *Human Rights Watch 2001*, <http://www.hrw.org/sites/default/files/reports/violence2001.pdf> (accessed on 20/4/09), Stan Meuwese, ‘Kids behind bars. A study on Children in conflict with the Law: Towards Investing in Prevention, Stopping Incarceration and Meeting International Standards’, Amsterdam: *Defence for Children International*, 2003,

<sup>4</sup> Ibid,

<sup>5</sup> Paulo Sergio Pinheiro, “*World Report on violence against children*”. United Nations Secretary-General’s Study on Violence against Children, Geneva, Switzerland, 2006, p.16, para.62

incarceration on the well-being of children who are, in most cases, also dealing with the results of abuse and neglect.<sup>6</sup>

Violence is only one aspect of institutionalisation. Locked behind bars, children are excluded from a family environment, excluded from school, excluded from their community, and excluded from society. Their situation is ‘unknown; unknown to the general public, to politicians, and even to Non-Governmental Organisations (NGOs)’.<sup>7</sup> Very often, authorities are reluctant to provide disaggregated statistical data on their treatment.<sup>8</sup> Deprived of their liberty, children are forgotten and out of sight, as they are the ‘unwanted child’ of state human rights obligation.<sup>9</sup>

In its attempts to protect the best interests of children, international law has developed a set of standards regarding juvenile deprivation of liberty. Studies emphasise that ‘the effects of institutionalisation can include poor physical health, severe developmental delays, disability, and potentially irreversible psychological damage’.<sup>10</sup> Furthermore, ‘a century of experience with training schools and youth prisons demonstrates that they constitute the one extensively evaluated and clearly ineffective method to treat delinquents’.<sup>11</sup> In discussions about deprivation of liberty, it is important to bear in mind that it means ‘locking up’ young people who have no clear idea of the ‘pains of imprisonment’.<sup>12</sup> Besides the physical, social and psychological effect upon juveniles, the effects of deprivation of liberty should be expanded to an evaluation of the financial cost encountered by State Parties in running institutions with high walls, bars, locked doors and barbed wire.<sup>13</sup>

However, children deprived of their liberty are as entitled to rights and fundamental liberties as adults. International law provides a legal umbrella which is meant to recognise their rights, to protect them against torture, cruel, inhuman, and degrading treatment (i.e. Article 37(a) CRC) and to guarantee treatment with humanity and respect for the inherent dignity of the human person, taking into account the needs of the person of his or her age. The CRC is an umbrella of a family of children’s rights instruments, which is composed of an elaborate body of universal and regional treaties, non-binding declarations, resolutions, rules, and guidelines. The CRC provisions incorporate standards already embodied in the Beijing Rules.<sup>14</sup> In addition, the 1990 UN Rules

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<sup>6</sup> Martin & Parry-Williams, p. 34, Pinheiro 2006, pp. 199-200 Both Pinheiro, and Martin and Parry-Williams in ‘The Right not to Loose Hope’ point out the ‘heightened risk of self-mutilation and suicidal behaviour’ among juvenile deprived of liberty. The evidence provided by them mostly relate to UK and US. Thus, in the USA, 110 youth suicides are reported to have occurred nationwide in juvenile facilities from 1995 to 1999 alone. In the UK, the Howard League reports that there were 17 suicides of children in prison between 1995 and 2004 and 28 deaths of children in penal custody in total since 1990. Providing a further worldwide picture is difficult as general international penal statistics, like Space 1 of Council of Europe, do not break the suicide rates into age, sex. ([http://www.coe.int/T/E/Legal\\_affairs/Legal\\_cooperation/Prisons\\_and\\_alternatives/Statistics\\_SPACE\\_1](http://www.coe.int/T/E/Legal_affairs/Legal_cooperation/Prisons_and_alternatives/Statistics_SPACE_1))

<sup>7</sup> Meuwese 2003, p.9

<sup>8</sup> Although the data and information is crucial for the monitoring and evaluation of progress achieved on their treatment, very often the Committee had point the lack of practical information related to the treatment of children in conflict with the law in the country reports.

<sup>9</sup> Bruce Abramson, ‘Juvenile Justice: The ‘Unwanted Child’: Why the potential of the Convention on the Rights of the Child is not being realized, and what we can do about it’ – (manuscript) in International Network on Juvenile Justice/Defence for Children International, ‘Violence Against Girls in Conflict with the Law’. Human Rights Watch, <http://www.hrw.org/legacy/english/docs/2007/02/20/global15345.htm> (accessed 20/10/2009), p.1

<sup>10</sup> Pinheiro 2006, p.189 Martin & Parry-Williams, p. 34.

<sup>11</sup> Feld BC (1998) quoted on Pinheiro 2006, p. 200

<sup>12</sup> Michael Vindzio. ‘Is there a deterrent effect of pains of imprisonment? The impact of ‘social costs’ of first incarceration on the hazard rate of recidivism’, *Punishment Society*, Vol 8; Issue 3, 2006, p.342

<sup>13</sup> Feld recognizes that the influx of younger offenders poses management, programming, and control challenges for correctional administrators. Young peoples’ dietary and exercise needs differ from those of older inmates. Barry C. Feld, *Juvenile and Criminal Justice Systems’ Responses to Youth Violence*. *Crime and Justice*, Vol 24, 1998, pp.189–261

<sup>14</sup> United Nations Standard Minimum Rules for the Administration of Juvenile Justice G.A. res. 40/33, annex, 40 U.N. GAOR Supp. (No. 53) at 207, U.N. Doc. A/40/53 (1985)

for the Protection of Juveniles Deprived of Their Liberty (JDLs)<sup>15</sup> supplement the provisions of the CRC, particularly with regard to what children deprived of their liberty are entitled to. The Beijing Rules and JDLs, together with CRC, serve as a comprehensive, internationally accepted framework to be incorporated by states ‘with a view to counteracting the detrimental effects of detention’, and to provide guidance to professionals involved in the management of the juvenile justice system.<sup>16</sup> It must be noted that the juvenile justice framework operates in conjunction with other relevant human rights provisions and is applicable to all juveniles deprived of their liberty. The other human rights provision refers to the International Covenant on Civil and Political Rights (ICCPR),<sup>17</sup> the UN Standard Minimum Rules for the Treatment of Prisoners (SMR)<sup>18</sup> and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (UN Body of Principles).<sup>19</sup> The CRC and JDLs do not purport to establish an array of rights for children deprived of their liberty, as the international instruments mentioned above supplement the CRC and JDLs by providing broader legal protection or stronger supervisory mechanisms to enforce the rights of juveniles deprived of liberty.<sup>20</sup>

## II.1 Drafting History

Overall drafting of Article 37(b), (c), and (d) resembles a ‘test drive’ with regard to incorporation of safeguards for deprivation of liberty.<sup>21</sup> While being absent in the first 1978 proposal for the draft Convention, the issue of deprivation of liberty would be first introduced only in the 1986 Working Group, while Canada presented the revised text of Article 19 at the time.<sup>22</sup> The issue of deprivation of liberty was considered within a draft article encompassing a wide range of guarantees, from due process and fair trial standards, to torture prohibition.<sup>23</sup> Each issue considered in the draft was based upon a provision taken directly from other international human rights treaties.<sup>24</sup> Yet, Canada’s proposal generated much debate. An informal working party was established to redraft the proposal and to attempt consolidating many delegations’ views’.<sup>25</sup> The revised proposal made reference to ‘the relevant provisions of other international instruments’ in paragraph 2 and required states ‘(a) as a minimum to ensure to the child in every appropriate respect, the same legal rights as an adult accused or found guilty of infringing the penal law’.<sup>26</sup> In

<sup>15</sup> United Nations Rules for the Protection of Juveniles Deprived of their Liberty, G.A. res. 45/113, annex, 45 U.N. GAOR Supp. (No. 49A) at 205, U.N. Doc. A/45/49 (1990)

<sup>16</sup> UN Committee on the Rights of Child, General Comment No. 10: Children’s rights in Juvenile Justice, CRC/C/GC/10, 2 February 2007 <http://www2.ohchr.org/english/bodies/crc/comments.htm> (accessed on 14.02.2015) - General Comment No.10 - para.2-3, more in the fundamental principles of JDLs.

<sup>17</sup> International Covenant on Civil and Political Rights, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976

<sup>18</sup> Standard Minimum Rules for the Treatment of Prisoners, adopted Aug. 30, 1955, by the First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/CONF/611, annex I, E.S.C. res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11, U.N. Doc. E/3048 (1957), amended E.S.C. res. 2076, 62 U.N. ESCOR Supp. (No. 1) at 35, U.N. Doc. E/5988 (1977)

<sup>19</sup> Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988)

<sup>20</sup> For example prisoners in Europe are having the opportunity to invoke the ECHR and its enforcement mechanism on seeking to improve prison conditions. Even children, in several occasions have challenged their treatment and condition of deprivation of liberty (for more please see Geraldine Van Bueren. ‘Article 40: Criminal Justice’ in *A Commentary on the United Nations Conventions on the Rights of the Child*, eds. A. Alen, J. Vande Lanotte, E. Verhellen, F Ang. E. Berghmans and M. Verheyde, Leiden: Martinuss Nijhoff, 2006)

<sup>21</sup> William Schabas, and Helmut Sax, ‘A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition of Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty’ in *A Commentary on the United Nations Conventions on the Rights of the Child*, in *A Commentary on the United Nations Conventions on the Rights of the Child*, eds. A. Alen, J. Vande Lanotte, E. Verhellen, F Ang. E. Berghmans and M. Verheyde, Leiden: Martinuss Nijhoff Publishers, 2006, p. 52

<sup>22</sup> UN Doc. E/CN.4/1986/39, para.90

<sup>23</sup> *Ibid*

<sup>24</sup> *Ibid* look on the explanatory notes

<sup>25</sup> *Ibid* para. 92

<sup>26</sup> *Ibid* para. 93

addition, this proposal introduced a new element regarding detention pending trial, newly incorporated in Rule 13(1) of the 1985 Beijing Rules, reading ‘(b) detention awaiting trial shall be used only as a measure of last resort, for the shortest possible period of time’.<sup>27</sup> It also contained a new approach regarding deprivation of liberty, by declaring that ‘no child is unnecessarily institutionalised’,<sup>28</sup> and explicitly defining in a separate paragraph (3) that ‘Penal law and the penitentiary system shall not be used as a substitute for child welfare and facilities’.<sup>29</sup> Again, this proposal would be subject to debate and more revision, resulting in another revised text that omitted the ‘measure of last resort and shortest appropriate time’ rule.<sup>30</sup> In addition, a debate on an alternative wording would terminate with the deletion of the ‘unnecessarily institutionalised’ requirement as well.<sup>31</sup> By the end of the 1986 Working Group Session, there was a draft text containing provisions on deprivation of liberty, within a very lengthy Article 19 (Article 37 after).

While the 1988 Working Group adopted the draft text as agreed by the 1986 Working Group Session, the 1989 Working Group session undertook a significant revision of Article 19 (Article 37 after). In the 1989 Working Group, two other lengthy versions of Article 19 were proposed beside the Working Group text, one by the Crime, Prevention and Criminal Justice Branch of the Centre for Social Development and Humanitarian Affairs, United Nations Office at Vienna, and the other by delegation of Venezuela. Faced with a total lack of consensus, the chairman of the 1989 Working Group appointed an open-ended drafting group<sup>32</sup> that split the draft Article 19 into two separate provisions.<sup>33</sup> Members of the drafting group explained that the split was necessary to accommodate, on the one hand, the comments formulated by the Human Rights Committee regarding the deprivation of liberty and ‘to show the respect due to human dignity, recognition of the needs of the children and the concern to assure them legal and other assistance’.<sup>34</sup> On the other hand, the split was necessary to incorporate some ideas that were the result ‘of the initiatives taken in the United Nations’.<sup>35</sup> Thus, the proposed draft provided safeguards regarding both deprivation of liberty (paragraph 2) and the state of deprivation of liberty (paragraph 3), as well as establishing the right of review of that state of deprivation of liberty (paragraph 4). The proposal was complemented with the introduction of ‘*a chapeau*’, which required State Parties to ‘ensure’ the guarantees provided by the Article.<sup>36</sup>

While a consensus emerged quickly regarding the first phrase of paragraph 2 (‘No child shall be deprived of his or her liberty unlawfully or arbitrarily’), it proved more difficult for the second one to be accepted. Discussion on the second sentence focused around two issues. The first related to the reference of using deprivation of liberty ‘for the shortest possible period of time’. During the debate, deletion of the phrase<sup>37</sup> or even of the entire sentence was proposed.<sup>38</sup> Following the debate, the Senegalese representative highlighted the reason for referring to ‘shortest possible period of time’, which was to encourage judges ‘to consider the use of other educational or correctional measures than deprivation of liberty and to ensure that, if at all, custodial measures would only be used as a measure of last resort’.<sup>39</sup> In a spirit of compromise,

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<sup>27</sup> Ibid

<sup>28</sup> Cf. Rule 17 of the 1985 Beijing Rules

<sup>29</sup> UN Doc. E/CN.4/1986/39, para.93

<sup>30</sup> UN Doc. E/CN.4/1986/39, para.99

<sup>31</sup> UN Doc. E/CN.4/1986/39, para.117

<sup>32</sup> UN Doc. E/CN.4/1989/48, para. 536

<sup>33</sup> UN Doc. E/CN.4/1989/WG.1/WP.67/Rev.1

<sup>34</sup> UN Doc. E/CN.4/1989/48, para. 537

<sup>35</sup> Ibid

<sup>36</sup> Ibid para. 538-539

<sup>37</sup> Ibid para. 549 and 551

<sup>38</sup> Ibid para. 550

<sup>39</sup> Ibid para. 550

the delegation arguing about the ‘shortest possible period of time’ backed down, and gave consensus to retain the phrase ‘for the shortest *appropriate* period of time’.

The second focused on the consistency of using the term ‘deprivation of liberty’. Several delegations expressed their concern with regard to ‘deprivation of liberty’, as the term, besides detention, arrest or imprisonment, encompassed other types of deprivation of liberty applied to juveniles such as educational or Borstal institution.<sup>40</sup> As a result of this debate, the ‘remarkable terminological consistency’<sup>41</sup> was lost in order to achieve a compromise text determining that: ‘The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.’

The text of paragraph 3 did not give rise to controversy, as ‘there was virtually no new language included’.<sup>42</sup> No debate took place regarding the insertion of the condition ‘save in exceptional circumstances’.<sup>43</sup> Therefore, no explanation might be presented about the reason of working group placing a condition to the right to maintain the family life.

Replacing the term ‘all children’ with ‘every child’ and removing the brackets around the words ‘or other competent independent and impartial authority’ to correspond with relevant provisions of the International Covenant on Civil and Political Rights refined the text of paragraph 4.<sup>44</sup>

In conclusion, the drafting process of Article 37(b), (c) and (d) reflected the evolution of new initiatives taken in the United Nations to reduce deprivation of liberty of children as far as possible. The informal drafting group explicitly emphasised that adoption of less formal solutions compared to other international human rights instruments derived from the necessity to accommodate both the needs of the child to ‘grow up in an atmosphere of love and understanding’ and the respect of his/her human rights and legal guarantees.<sup>45</sup>

## II.2 Legality and Non-Arbitrariness

The first sentence of Article 37(b) explicitly provides that: ‘No child shall be deprived of his or her liberty unlawfully or arbitrarily.’ Unfortunately, the **Committee** does not explicitly consider ‘lawfulness’ and ‘non-arbitrary’ as different requirements.<sup>46</sup> While discussing the ‘Basic Principles’ of deprivation of liberty, it enunciates the principles without providing any further explanation of the requirement to comply with them. Presented with the lacuna created by the Committee in defining the first sentence of Article 37(b), it would be necessary to refer to Article 9(1) of the ICCPR, which served as the basis for this provision.<sup>47</sup>

Article 5(1) of the ECHR has an almost identical provision, safeguarding the right to liberty and security of person. Despite the different formulation employed by Article 9(1) and Article 5(1), the wording stipulates that deprivation of liberty is permissible only when it is ‘in accordance with a procedure prescribed/established by law’ and when this is not arbitrary.<sup>48</sup> Both requirements are recognised as distinct notions, i.e. ‘lawfulness’ and ‘arbitrariness’, and have to

<sup>40</sup> Ibid para. 556

<sup>41</sup> Schabas & Sax p. 54

<sup>42</sup> UN Doc.E/CN.4/1989/48, para. 561

<sup>43</sup> Ibid para. 562

<sup>44</sup> Ibid para. 563

<sup>45</sup> Ibid para. 537

<sup>46</sup> General Comment No.10, para. 28a

<sup>47</sup> Sharon Detrick, ‘*A commentary on the United Nations Convention on the Rights of the Child*’, M. Nijhoff Publishers, The Hague, 1999, p.629, Schabas & Sax 2006 p.76

<sup>48</sup> Manfred Nowak, ‘*UN Covenant on Civil and Political Rights. CCPR Commentary*’ (2nd rev. ed.). Kehlmann Rhein: Engel, 2005, Article 9 para.25 p.223, David J Harris, Michael O’Boyle, Ed P Bates, and Carla Buckley, *Law of the European Convention on Human Rights*, 2<sup>nd</sup> eds, Oxford University Press, 2009 (Harris et al. 2009), Article 5 p.133

be satisfied in a cumulative way. Thus, the component of ‘lawfulness’ (principle of legality) is aimed at the lawfulness of both procedure and substance set primarily under domestic law for deprivation of liberty.<sup>49</sup> Prohibition of arbitrariness, however, should be considered as ‘a safeguard against the injustices of states, because it applies not only to the laws but also to statutory regulations, and to all acts performed by the executive’.<sup>50</sup>

In relation to Article 9(1) of the ICCPR, the word ‘law’ in the phrase ‘established by law’ should be understood in the sense of a parliamentary statute or equivalent, or an unwritten norm of common law accessible to individuals who are subject to the relevant jurisdiction.<sup>51</sup> An administrative act for deprivation of liberty satisfies the lawfulness requirement only if it is carried out according to a procedure clearly prescribed and regulated by law.<sup>52</sup> Consequently, the deprivation of a person’s liberty, carried out according to procedures not having a basis in domestic law, and which result in unacknowledged detention or are a consequence of illegal arrest, violates the principle of legality.<sup>53</sup>

In the context of Article 5(1), the European Court of Human Rights (ECtHR) has taken a wide view in considering the notion of law as well as in defining the requirements of ‘lawfulness’. Thus, the term ‘law’ is a concept referring to both statutory law and case law, as well as ‘a rule of international law or common law so long as it purports to authorise the interference.’<sup>54</sup> The requirement of ‘lawfulness’ means that not only must the state have a basis in national law for its interference, but the law concerned must also satisfy the test of legal certainty and ‘quality of law’.<sup>55</sup> The ‘quality of law’ test requires that all ‘law’ concerned must be accessible, sufficiently precise and foreseeable.<sup>56</sup>

In relation to Article 37(b) of the CRC, the principle of legality acquires another dimension beside that discussed above. The requirement of ‘lawfulness’ means that as well as the State Parties having a basis in national law, the law concerned must provide that this interference with personal liberty of children ‘shall be used only as a measure of last resort and for the shortest appropriate period of time’.<sup>57</sup>

The prohibition of arbitrariness was adopted as an alternative to an exhaustive listing of all permissible cases of deprivation of liberty.<sup>58</sup> As Nowak notes, the prohibition of arbitrariness by Article 9(1) of the ICCPR concerns domestic law, as well as the acts of enforcement authorities, which are going to impose deprivation of liberty.<sup>59</sup> This in turn means that any deprivation of liberty provided for by law cannot be unjust, unpredictable, manifestly disproportionate, discriminatory, or inappropriate to the circumstances of the case.<sup>60</sup> ‘Arbitrariness’ includes cases of detention initially lawful and non-arbitrary, which might become arbitrary after prolonged continuation without justification.<sup>61</sup> It even encompasses cases such as political arrest or detention, incommunicado detention, enforced disappearance, or kidnapping by secret service agents, which are obvious cases of arbitrary detention from the very beginning.<sup>62</sup>

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<sup>49</sup> Ibid

<sup>50</sup> Detrick 1999, p.630

<sup>51</sup> Nowak 2005, Article 9 para.27 p.224

<sup>52</sup> Ibid Nowak refers to cases of *Bolanos v. Ecuador* or *Domukovsky et al. v. Georgia*

<sup>53</sup> Ibid

<sup>54</sup> Harris et al, 2009 p. 344

<sup>55</sup> Ibid p.133

<sup>56</sup> Ibid p.134.

<sup>57</sup> This new dimension of principle of legality would be further discussed in detail at the subsequent section.

<sup>58</sup> Nowak 2005 Article 9 para.29 p.224, Detrick 1999, p. 629-630

<sup>59</sup> Nowak 2005. Article 9 para.28 p.224

<sup>60</sup> Ibid para.30

<sup>61</sup> Ibid para.33

<sup>62</sup> Ibid para. 34

Similarly, in relation to Article 5(1) of the ECHR,<sup>63</sup> the prohibition of arbitrariness ‘extends beyond lack of conformity with national law’.<sup>64</sup> Article 5(1) of the ECHR requires that ‘any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness’.<sup>65</sup> The notion of ‘arbitrariness’ is built upon a concrete situation emerging from case law,<sup>66</sup> since Article 5(1) sub-paragraphs (a) to (f) contain an ‘exhaustive’ list of circumstances in which the state may detain an individual in the public interest. The list has a direct impact on the deprivation of liberty of children. Thus, Article 5(1)(d) of the ECHR permits ‘the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority’. Consequently, the detention for the purpose of educational supervision is not arbitrary, while the detention of a minor accused of a crime during the preparation of psychiatric report necessary to the taking of a decision in his case is permitted, as is detention pending the making of a court order placing a child in care.<sup>67</sup>

### II.3 Principle of last resort and for appropriate period of time

The second sentence of Article 37(b) of the CRC lays down one of the most important principles relating to the deprivation of liberty of children, that of ‘last resort and shortest appropriate period of time’. The principle is applicable only in the context of juvenile justice.<sup>68</sup> According to Van Bueren, adoption of such ‘weaker standards’, compared to those laid down in Rule 13(1) of the Beijing Rules and Rule 17 JDLs, reflects the position of the international community which has not yet accepted an absolute prohibition on the imprisonment of children.<sup>69</sup> Introduced as an exclusive child-specific requirement,<sup>70</sup> the principle is based on scientific research exposing the negative impact of imprisonment not only to juveniles, but also to their families, their victims (compensation) and society at large (recidivism).<sup>71</sup> The principle simply imposes a duty on State Parties to continuously explore the variety of dispositions operating as alternatives to institutionalisation and to establish facilities offering less restrictive environment.<sup>72</sup> In addition, the principles imply that whole juvenile justice systems should provide, by law, an indication of the competencies of authorities and time limits for the use of arrest, detention, and imprisonment. Striking a balance toward the juveniles and their best interests, the principle of ‘last resort and shortest appropriate period of time’ might come into conflict with the public interest and principle

<sup>63</sup> (European) Convention for the Protection of Human Rights and Fundamental Freedom, ETS 5, 213 U.N.T.S. 222, entered into force Sept. 3, 1953, as amended by Protocols Nos 3, 5, and 8 which entered into force on 21 September 1970, 20 December 1971 and 1 January 1990 respectively

<sup>64</sup> Harris et al. p.136

<sup>65</sup> Ibid

<sup>66</sup> Ibid

<sup>67</sup> Ibid

<sup>68</sup> Indeed the drafting history clearly indicates that the principle’s limitation only to the juvenile criminal justice context was a solution to the objection of states for second sentence of Article 37 (b). Some countries to safeguard their discretion regarding other forms of deprivation of liberty, were objecting the attempt to broaden the ambit of the sentence beyond the juvenile justice context. (Please see more on Detrick 1999, pp.477, Van Bueren 1998, p.209)

<sup>69</sup> Vann Bueren refers with the term ‘weaker standards’ to the word’s adoption: ‘the arrest, detention or imprisonment’ rather than ‘deprivation of liberty’ and ‘for the shortest appropriate period of time’ rather ‘for the shortest possible period of time’. To her views such wording rather than maintaining the higher standards introduced during the first reading of the draft, lower the position of principle. Van Bueren 1998, p.206.

<sup>70</sup> Application of the principle of last resort for shortest appropriate of time of in all stages of administration of justice is found only in Article 37(b) CRC. Article (3) ICCPR determines that only pre-trial detention should be an exception and as short as possible.

<sup>71</sup> Sonja Snacken, A Reductionist Penal Policy and European Human Rights Standards, *European Journal on Criminal Policy and Research*, Vol.12, Issue 2, 2006, pp.143–164, pp.161. Snacken (2006) present this statement discussing what is questioned by the principle of imprisonment as a last resort in regard to deprivation of liberty for adults. At the introduction of this chapter was presenting the violence as one aspect of juvenile institutionalisation.

<sup>72</sup> Beijing Rules, Explanatory note to Rule 19.1 para. 2 According to this requirement priority should be given to so-called ‘open’ institution over ‘closed’ institution. The use of open institution is favoured as well by JDL’s. Moreover, the Committee on General Comment No.10 strongly favours the use of alternative dispositions rather than court convictions and deprivation of liberty.

of proportionality. When arrest, detention, and imprisonment are imposed, authorities involved in the administration of juvenile justice must have regard to the whole picture of the case in consideration. Consequently, the authorities dealing with a case involving a juvenile must prove that the use of arrest, detention and imprisonment, including the duration of deprivation of liberty and the use of alternative sanctions or granting less time of imprisonment than provided by law, are sufficient to attain a balance between the legitimate aim of punishment of juvenile for the wrongdoing and the needs of public safety. The principle of proportionality serves as an instrument for curbing punitive sanctions, mostly expressed in terms of just deserts, to be extended in terms that cannot be justified by the gravity of the offence.<sup>73</sup> By the same token, the principle of last resort and for the shortest appropriate period of time should be used to justify interventions that are in proportion to the offence implying an individualised decision. More precisely, the principle requires not only that alternative options should be considered or excluded rather than imposing deprivation of liberty, but, if deprivation of liberty is the only appropriate option, that an ‘appropriate’ time frame is considered. Therefore, the principle of last resort and shortest appropriate time reinforces the principle of proportionality with regard to juveniles in conflict with the law and replaces more retributive principles.<sup>74</sup> More precisely, the use of deprivation of liberty as last resort might be read as a way of ‘having a more humane penal policy and keeping a better balance between the requirements of crime control and human rights’.<sup>75</sup>

The Committee was likewise concerned with the requirement of last resort in General Comment No.10, and avoided the interpretation of for ‘the shortest appropriate period of time’. The drafting history of provision sheds light around the meaning for ‘the shortest appropriate period of time’. To draft the principle ‘of the shortest appropriate period of time’ is not necessarily compatible with the ‘shortest possible penalty’.<sup>76</sup> There are arguments that the requirement of the shortest appropriate period of time might be ‘potentially paradoxical itself, since shortest and appropriate do not necessarily serve the same interest’.<sup>77</sup> It is understood that the shortest and appropriate time does complement each other. The ‘shortest appropriate time’ principle aims to curb the detention as short as possible and for the appropriate period of time, meaning the time frame necessary to fulfil the requirements specified by the relevant authorities in the sentence. Having presented the basic principles enshrined in Article 40(1) with regard to the administration of juvenile justice, the necessary time frame might be interpreted as the time required to prepare for returning to society, to promote re-integration and assuming a constructive role in society of the juvenile. To this end, it is to the discretion of State Parties finding alternatives to review and evaluating whether the length of sentences are short and appropriate enough to attain the aims of sentence.

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<sup>73</sup> Commentary of Rule 5, Beijing Rules

<sup>74</sup> Snacken (2006) pp.161. In addition Snacken recognises that a proper balance between the two principles is better achieved by revolving the role of defendant and prosecutor. According to her, ‘in every sentencing or early release case, the choice of sanction should be the object of a debate, in which it is up to the prosecutor to demonstrate that a longer prison sentence is necessary or that a fine or a community sanction is insufficient.

<sup>75</sup> Snacken (2006) pp.162. According to Snacken European institutions such as the Council of Europe or the European Union, advocate that imprisonment be used as infrequently as possible and seek to stimulate non-custodial sanctions and measures. She support her view in several recommendations of the Council of Europe, such as the Recommendation R(80)11 on Pre-trial detention, R(87)3 and R(2006)2 on the European Prison Rules, R(92) 16 on the European Rules on community sanctions and measures, R(99)22 concerning prison overcrowding and prison population inflation, and in the standards and recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (11th general Report on the CPT’s activities, CPT/Inf (2001) 16, Strasbourg, September 2001). At the level of the European Union, the European Parliament expresses it in the Resolution on conditions of detention and the use of alternative sanctions of 17 December 1999. (Snacken 2006, pp.145)

<sup>76</sup> Van Bueren 1998, p.214. Schabas and Sax 2006, p.85 Van Bueren’s statement is based upon drafting history of the provision. The meaning of shortest possible penalty, proposed by Senegal’s delegation, was rejected from the working group. (UN Doc. E/CN.4/1989/WG.1/L.4)

<sup>77</sup> Tony Liefwaard, ‘*Deprivation of liberty of children in light of international human rights law and standards*’. Intersentia, 2008), pp.224. Although Liefwaard notes the paradox, does not provide an analysis to support the discussion.

## II.4 Quality of Treatment of children deprived of their liberty

The third paragraph of Article 37(c) deals with the quality of treatment of children deprived of liberty. The provision further clarifies the prohibition of ill-treatment foreseen in article 37(a) and requires State Parties to treat every child deprived of liberty ‘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’. The reference to the ‘needs of persons’ and ‘child’s age’ is a clear application of the evolving capacities of the child principle, which is one of the umbrella principles underlining the exercise of all the rights in the CRC.<sup>78</sup> From the evolving capacity of the child principle stems the acknowledgment that children deprived of liberty should not be regarded as a homogenous group of individuals, but rather individual members of the group who require that their conditions and treatment respond to their personal development.<sup>79</sup> The provision is based on Article 10 of the ICCPR and consequently ‘imposes on State Parties a positive obligation towards persons who are vulnerable because of their status as persons deprived of liberty.’<sup>80</sup>

In particular, ‘unless it is considered in the child’s best interest not to do so’, Article 37(c) imposes two strict obligations upon State Parties; ‘to separate children in detention from adults’ and ‘to guarantee to the child the right to maintain contact with his or her family through correspondence and visits save in exceptional circumstances’. In addition, from the evolving capacity of the child principle stems the acknowledgment of the Committee that Article 37(c) builds up a comprehensive set of obligation for states parties to be read alongside Article 20 CRC (continuation of upbringing); Article 3 CRC (best interest of the child); Article 9 CRC (contact with family and providing family with information); Article 12 (about the right to be heard); Article 28 and 29 about the right of education; and Article 24 (about the right to health).<sup>81</sup> Furthermore, Article 37(c) should be read along with the child development-oriented obligation for State Parties to ensure the treatment of ‘every child deprived of liberty’ is ‘in a manner consistent with the promotion of the child’s sense of dignity and worth, in order to reinforce a child’s respect for human rights and fundamental freedoms of others and also takes into account the desirability of promoting a child’s reintegration and the child assuming a constructive role in society’.<sup>82</sup>

Article 3, paragraph 3 of the CRC imposes an obligation on State Parties to ensure that all institutions responsible for the care or protection of children should ‘conform with the standards established by competent authorities’.<sup>83</sup> Reading the provision raises an important issue with regard to whether the standard established by competent authorities means compatible with relevant international standards. To the Committee, reliance on international standards is not presumption.<sup>84</sup> The Committee strongly emphasises that the basic provisions of law and procedures for children deprived of liberty are required to be according to the meaning given in

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<sup>78</sup> Van Bueren 1998, p.219 and 50-51

<sup>79</sup> Van Bueren acknowledges that the principle ‘evolving capacities of the child’ reflects children’s different rates of development. Therefore she notes that if the international law on the rights of the child is to be effective it must be able to respond to these developments. According to Van Bueren the principle requires that the evolving nature of childhood is also considered to enable children gradually to take responsibility for different areas of their own lives. Van Bueren 1998 p. 50

<sup>80</sup> Detrick 1999, p.633

<sup>81</sup> General Comment No.10, para.28c and para.3. In paragraphs 28c the Committee emphasizes that ‘inter alia’ a set of principles and rules ‘need to be observed in all the cases of deprivation of liberty’, and specifically enumerates the rights deriving from other article of the CRC.

<sup>82</sup> Article 40(1) of the CRC

<sup>83</sup> Article 3(3) CRC

<sup>84</sup> Van Bueren affirms that the relevant applicable standards would presumably include the international standards. Van Bueren presumes this, pointing out the paucity of CRC’s provision to set out any reference on the reliance of standards. Van Bueren 1998, p.217

General Comment No. 10.<sup>85</sup> Accordingly, the reliance on international standards is clearly expressed, while the Committee recommends State Parties to fully implement and incorporate JDLs, the Beijing Rules, and the United Nations Standard Minimum Rules for the Treatment of Prisoners (SMR) at domestic level.<sup>86</sup>

It is not clear why the Committee refers to SMR.<sup>87</sup> The SMR in Part II does not refer to juvenile prisoners. The absence is also reflected in the language adopted by the SMR. Generally speaking, the rules are written to be adapted to adult institutions. They do not take into account the specific needs of young people. According to Van Bueren, there is an element of ambiguity in applying SMR to children.<sup>88</sup> The ambiguity derives from the division introduced in Rule 5 in regard to institutions designed for children deprived of liberty. On one hand, the SMR excludes ‘the management of institutions set aside for young person such as Borstal institutions or correctional schools’ and, on the other hand, the rules ‘are equally applicable in such institutions’.<sup>89</sup> In addition, the SMR is evasive with regard to applicability of the rules. The first Phrase of Rule 5(2) categorise the rules by determining their applicability only to ‘young prisoners who come within the jurisdiction of juvenile courts’.<sup>90</sup> The second phrase does not provide a proper indication about whether the category of young persons who should not be sentenced to imprisonment includes those attending Borstal institutions or correctional schools.

#### II.4.1 Equal rights

The HRC points out that ‘Article 10, paragraph 1 of the ICCPR, imposes on state parties a positive obligation towards persons who are particularly vulnerable because of their status as persons deprived of liberty’. According to the HRC, juveniles ‘deprived of their liberty enjoy all the human rights set forth’. Thus, juveniles deprived of liberty are entitled to all those civil, economic, political, social or cultural rights, under national or international law, compatible with the deprivation of liberty.<sup>91</sup> Nothing can affect or deny the enjoyment of the rights of the juvenile, including the deprivation of liberty. Other provisions of CRC reinforce the enjoyment of such rights. Thus, Article 41 CRC states ‘nothing in the present Convention shall affect any provisions which are more conducive to the realization of the rights of the child’. Article 2(1) imposes an obligation on State Parties ‘to respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's... status’.

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<sup>85</sup> General Comment, No.10, para. 32, The General comments are issued under the recommendatory function of the Committee. To Alston and Steiner, one of the functions of General Comments is to be a mean by which the Committee makes general interpretations on an issue that arises out of the provisions of the CRC. (Steiner 2000, p.52, Alston (2001), p.764)

<sup>86</sup> As earlier discussed, although the General Comments do not carry formal authority to bind states parties, they do provide an authoritative interpretation on the meaning and scope of a CRC provision.

<sup>87</sup> The SMR were first adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1955, and were later approved by the UN Economic and Social Council (ECOSOC) through resolutions adopted in 1957 and 1977. The SMR are built in two parts. Part I of the rules covers many facets of general management of institutions dealing with all categories of prisoners. In addition, it sets out minimum standards in relation to areas as diverse as accommodation, personal hygiene, clothing, food, access to medical services, discipline and punishment and work. Part II of the SMR contains guidelines and principles applicable only to special categories of prisoners: prisoners under sentence, including insane and mentally abnormal prisoners, prisoners under arrest or awaiting trial, civil prisoners and persons arrested or imprisoned without charge.

<sup>88</sup> Van Bueren 1998, p. 207

<sup>89</sup> SMR, Rule 5(1)

<sup>90</sup> SMR, Rule 5(2)

<sup>91</sup> JDLs Rule 13

Unavoidably, the circumstances of deprivation of liberty restrict the ‘enjoyment of human rights, due to a closed environment’.<sup>92</sup> However, as Bal argues, ‘the deprivation of liberty should be restricted to an *ultimum remedium*’.<sup>93</sup> Therefore, ‘assuming that a deprivation of liberty is justified as a sanction for the violation of moral norms’, the restriction imposed because of a closed environment ‘should not go any further than the necessary isolation from society’.<sup>94</sup> Thus, closed conditions and circumstances, the consequences of the deprivation of liberty, should ensure that ‘other fundamental rights remain unimpeded like the right to family life, labour, education, free expression and gathering etc’.<sup>95</sup>

Safeguarding the human rights of juveniles deprived of liberty is considered to be of such paramount importance to demand establishment of ‘a duly constituted body’, with the main task to visit detention places, carry out inspections and provide outside scrutiny for the detention facilities.<sup>96</sup> As the protection of the individual rights of juveniles is so important, the activity of ‘duly constituted body’ should be regulated at three levels; international, national laws, and regulation of detention facilities.<sup>97</sup> This domestic law should provide for two principal functions of the controlling body. The first function charges the body with the monitoring of the effective application of the rules for the treatment of juveniles deprived of liberty. The second function enables juveniles to address their complaints to the monitoring body ‘if the rules are ignored and to obtain adequate compensation in the event of a violation’.<sup>98</sup> It should be mentioned that there is no indication within international human rights instruments regarding the authority undertaking the control, leaving it to the discretion of State Parties to decide on the form of monitoring. Rule 14 JDLs requires the monitoring body to be ‘constituted’. The HRC expressed its view on the monitoring body through demanding in state reports specific information about ‘concrete measures’ undertaken by the State Parties to effectively monitor application of the rules regarding the treatment of persons deprived of their liberty.<sup>99</sup>

Enjoyment of equal human rights is expressed through the requirement to provide meaningful activities and programmes, helping juveniles deprived of liberty to improve their situation, and developing them as a whole person, fostering their sense of responsibility, helping them to improve their confidence and belief in themselves, and equipping the juvenile with the resources and skills they need for life after their release and developing their potential as constructive members of society.<sup>100</sup>

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<sup>92</sup> Peter Bal, (1994) ‘Discourse ethics and human rights in criminal procedure’, *Philosophy and Social Criticism* Vol.20, Issue 4, pp.71-99, quoted on Stephen Livingstone, ‘Prisoners' Rights in the Context of the European Convention on Human Rights’, *Punishment & Society*, Vol. 2, No. 3, 2000, p.309-324, p.311

<sup>93</sup> *Ibid* p.131

<sup>94</sup> *Ibid* pp.311 Bal starts the discussion by arguing that legitimacy of law is in need of moral standards. Supporting the view of Habermas (1992), Bal states that the role of moral issues is particularly vital for criminal law. This is due to the fact that for criminal law the weight of moral content is dependent on reaction to norm violations, i.e. the moral indignation and the imposed sanctions. The ‘norm violation’ refers to violation of moral values upon which many definition of crime have been based on (common sense). Bal acknowledges that from a liberal perspective, criminal law should not enforce moral values. However, Bal concludes that whatever concepts of social harm of protectable goods one adheres to, they necessarily imply some kind of moral choice. (Bal 1994, p.71)

<sup>95</sup> *Ibid* pp.311. In addition, Rule 12 of JDLs implies that ‘the deprivation of liberty should be effected in conditions and circumstances which ensure respect for the human rights of juveniles’.

<sup>96</sup> JDLs Rule 14

<sup>97</sup> *Ibid*

<sup>98</sup> UN Human Rights Committee, *General Comment No. 21: Article 10 (Humane treatment of Persons Deprived of Their Liberty)*, 10 April 1992, para. 6 and 7

<sup>99</sup> HRC General Comment No.21 para.6. There is no indication by the HRC whether the monitoring of effective application of the rules regarding the treatment of persons deprived of their liberty is performed by the system required to supervise penitentiary establishments, the specific measures to prevent torture and cruel, inhuman or degrading treatment. Having presented this ambiguity the term ‘body’ was adopted when talking about monitoring system.

<sup>100</sup> JDLs Rule 12 second sentence

#### II.4.2 The right to be treated with humanity and dignity

The first sentence of Article 37(c) states 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’. It should be mentioned that treatment with humanity and respect for inherent dignity establishes a connection between the rights of a person to liberty and personal integrity.<sup>101</sup> Van Bueren notes that Article 37 (c), within the same phrase, links ‘all three concepts: dignity, family contacts and separation’.<sup>102</sup> Therefore, Article 37(c) recognises the developmental needs of the juvenile, the significance of the environment in which juvenile is placed, and the significant role of the family in the juvenile’s life. Consequently, Article 37(c) establishes a relationship between the treatment with humanity and respect for the inherent dignity and the personal integrity of a juvenile.

Here, the UN Rules for the Protection of Juveniles Deprived of Their Liberty (the JDLs) come into play as they provide a set of principles and standards conceived and designed to protect ‘juveniles deprived of their liberty in all forms’ and are ‘consistent with human rights and fundamental freedoms’.<sup>103</sup> The JDLs under Section IV (management of juvenile facilities) regulate the selection of facility and a number of administrative aspects related to admission and registration, classification and placement, records and files, child information, and transfers. They impose an obligation upon the institutions not only to cater fully for all physical health and material conditions such as housing, clothing, nutrition, health care, and education, but also to guarantee adequate elements of a child’s mental, spiritual, moral, and social ‘health’. This is done through the involvement of children in a variety of programmes, such as educational, vocational training, and leisure/recreation, that aim to influence their wholesome development and behaviour and change this for the better. The JDLs address measures that seek to maintain order in institutions, provide details about their implications, and establish a monitoring mechanism through inspection, supervision, and complaints procedures.

Article 40, paragraph 1 of the CRC enshrines that the objective of deprivation of liberty is to foster the reinforcement of the juvenile’s respect for human rights and fundamental freedoms for others and the reintegration of the juvenile into society, where they can assume a constructive role. In addition, treatment offered to the juvenile should be ‘consistent with the child’s sense of dignity and worth’.<sup>104</sup> The way a juvenile is treated is of particular significance for the realisation of the main objectives of the deprivation of liberty – education and social integration. The quality of treatment is closely linked to arrangements designed for the benefit of juveniles, either at an individual or institutional level, aiming ‘to assist their return to society, family life, education or employment after release’. A clear challenge facing each juvenile institution is to develop the institutional climate and provide the treatment that should lessen the prejudice against such children, whilst also taking into account the child’s needs and support for the child’s development. To this end, regimes tailored to each child’s specific characteristics or backgrounds are required to meet their specific needs. Rule 30 JDLs recommends that institutions for juveniles should be sufficiently small in order to preserve this individual approach as far as possible.<sup>105</sup>

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<sup>101</sup> Liefard 2008 when discussing Article 37 CRC adopts the same approach made by Novak in regard of Article 10 ICCPR (pp. 227-228). The conclusion is based on the fact that the HRC recognises the complimentary function of the right to the prohibition of torture and cruel treatment or punishment, which in turn has the fundamental objective of ‘protection of an individual’s dignity and physical and mental integrity. (General Comment No 20, para. 2)

<sup>102</sup> Van Bueren 1998, p. 219

<sup>103</sup> JDLs Rule 3 United Nations.

<sup>104</sup> General Comment No.10, para. 4(e)

<sup>105</sup> Rule 63(3) and (4) SMR clarify further the concept of ‘sufficiently small’. The rule emphasise the importance of small number of prisoners in order not to hinder the individualisation of treatment. In one hand the population of institutions should not exceed five hundred. On the other hand, it is undesirable to maintain prisons, which are so small that proper facilities cannot be provided.

Achievement of the objectives of deprivation of liberty involves efforts made by a detention institution to minimise ‘any differences between prison life and life in the community’.<sup>106</sup> This implies that the management authorities of a prison should seek to establish a close connection with the community, in order to provide juveniles in their care with opportunities to change, develop, and reintegrate within the community rather than excluding them from being a part of it.<sup>107</sup> Increasing the connection between juveniles and their families with the community largely depends on the location of the facility. This, in turn, presumes that institutions are built in places where access is not an issue and the contact between the juvenile and their family is easily maintained. Rule 31 JDLs determines that physical environment of the facility is as relevant as the location. In other words, Rule 31 JDL implies the internal design of a facility should comply with the rehabilitative aim of residential treatment and the social and educational needs of juveniles held there.

The institutions taking care of juveniles deprived of liberty should provide an environment that recognises that the persons who work and juveniles who live within the institution are still human beings; their common humanity should be observed and they should behave in a way which respects their rights and special needs (in this case, children’s needs). To a large degree, effective and efficient staff in any organisation or institution is a product of the management style and philosophy employed in the institutions, the available resources, and the knowledge, motivation, expertise, and correctional philosophy of the staff. At an institutional level, this in turn implies careful selection and recruitment in meeting the demands in quantity for in every field or job.<sup>108</sup> To a large extent, the suitability of personnel should encompass the requirement of a professional team with appropriate skills for communicating and establishing positive contacts with juveniles, different services engaged in the care of juveniles, as well as a team of people manifesting great personal integrity and humanity to carry out the work in a professional manner.<sup>109</sup> Finally, management of the institution must use all the appropriate means and lead both the personnel and the public, to recognise that work in prisons is a key public service of ‘great importance’.<sup>110</sup>

The suitability of personnel is closely related to training as a way of obtaining further knowledge, which is important not only to enable the professionals to carry out their responsibilities effectively, but also to ensure that they enforce both international and domestic legislation.<sup>111</sup> Training for the personnel of detention facilities housing children includes subjects such as ‘child psychology, child welfare and international standards and norms of human rights and the rights of the child, including the present JDLs’.<sup>112</sup> Besides addressing the practical aspects of the professional’s role, the subjects considered during training should be read in their depth to enable personnel to adequately respond to the individual needs of juveniles.<sup>113</sup> Personnel should also rigorously fight against any form of corruption, respect international standards – especially JDLs – and report any violation, by respecting the juvenile’s right to privacy and safeguarding each

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<sup>106</sup> Rule 60 (1) SMR.

<sup>107</sup> Rule 61 SMR

<sup>108</sup> Rule 81 JDLs and Rule 82 JDLs. For institutional settings this mean that personnel should include ‘a sufficient number of specialists such as educators, vocational instructors, counsellors, social workers, psychiatrists and psychologists and trade instructors’

<sup>109</sup> Rule 82 JDLs and Rule 84 JDLs. Cooperation is specially introduced to JDLs rules. The intention is to secure an educative and socio-therapeutic environment to respond in an effective manner to individual needs of children.

<sup>110</sup> Rule 46(2) SMR

<sup>111</sup> Rule 85 JDLs

<sup>112</sup> Ibid

<sup>113</sup> Rule 85 JDLs. Rule 47 (2) SMR, requires that, the personnel receive the adequate training in their general and specific duties, before entering on duty. Although highlighting the importance of well-training in general terms, the Committee on the relevance of providing the professionals with legislative and professional information to ensure an effective administration of juvenile justice (General Comment No.10, para.33)

juvenile's physical and mental health.<sup>114</sup> According to rule 87 JDL, the principle task of personnel is to ensure juveniles' physical and mental well-being, and to protect them from any form of violence and exploitation. Overall, the objective of all tasks performed by personnel should be the minimisation of any differences between life inside and outside the detention facility, which tend to reduce respect for the dignity of juveniles as human beings.<sup>115</sup>

### II.4.3 Separation

The requirement to separate children from adults can be considered fundamental to international human rights law.<sup>116</sup> It is found in most of the human rights standards, set at both the international and regional level. This requirement requires State Parties to separate children deprived of liberty without specifying categories of 'accused juvenile persons' (in Article 10(2)(b) ICCPR) and juvenile offenders (in article 10(3) ICCPR).<sup>117</sup>

The requirement to separate children from adults derives from the assumption that children must be protected from harmful influences and risky situations and against the risk of being abused, exploited or influenced in a harmful way by adults, as well as a juvenile's need to be surrounded by a protective environment that provides them every opportunity to avoid further conflict and develop positive life skills.<sup>118</sup> The segregation of juveniles deprived of liberty engages and links the evolving capacities of the child according to their need – 'full account of their particular needs, status and special requirements; their age – 'according to their age'; and their maturity – 'personality, sex and type of offence, as well as mental and physical health'.<sup>119</sup>

The applicability of the separation principle is further clarified in relevant international instruments. While the Committee strictly recommends State Parties to establish 'separate facilities',<sup>120</sup> Rule 13.4 of the Beijing Rules does allow for some flexibility in covering situations when the housing of children in 'a separate institution' is not possible, suggesting to State Parties that they should house the children 'in a separate part of institution'. The Committee seemed to be in favour of a strict separation because of the fact that a separate establishment was specially designed to be child-oriented in levels of staff, personnel, policies, and practices.<sup>121</sup> The separation requirement is not limited to placement of juveniles in cells, but extends to transport vehicles as well.<sup>122</sup> While Article 10 (2)(b) and (3) ICCPR stipulate a mandatory separation of children from adult prisoners,<sup>123</sup> Article 37(c) CRC permits 'the non-separation of child from adult prisoners in child's best interest'. The permitted exception in child's best interest is granted in cases of adults belonging to the same child's family, or carefully selected adults who, under controlled conditions, 'may be brought together with juveniles as part of a special programme

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<sup>114</sup> Rule 87 JDLs

<sup>115</sup> Ibid

<sup>116</sup> Liefard 2008, p. 264 According to article 17(2)(b) of the African Charter on the Rights and Welfare of the Child, the States parties 'shall ... ensure that children are separated from adults in their place of detention or imprisonment'. Article 5(5) of the American Convention on Human Rights stipulates in this respect that minors 'while subject to criminal proceedings shall be separated from adults and brought before specialized tribunals, as speedily as possible, so that they may be treated in accordance with their status as minors'. The lack of such provision on ECHR is compensated on the European Prison Rules. Thus, Rule 11.1 of the European Prison Rules 'Children under the age of 18 years should not be detained in a prison for adults, but in an establishment specially designed for the purposes'.

<sup>117</sup> Identically, Rule 8(d) of SMR provides that 'young prisoners shall be kept separate from adults'.

<sup>118</sup> General Comments N.10 paragraph 28(c), Rule 28 JDLs

<sup>119</sup> Article 37 (c) and JDLs Rule 28 first sentence

<sup>120</sup> General Comment No. 10, paragraph 28 (c)

<sup>121</sup> Ibid

<sup>122</sup> Rule 13.4 does not prevent States from taking other measures against the negative influences of adult offenders, which are at least as effective as the measures mentioned in the rule.

<sup>123</sup> According to HRC, 'the separation of accused juveniles from adults 'is a mandatory provision of the Covenant' General Comment No.21 para. 13

that has been shown to be beneficial for the juveniles concerned'.<sup>124</sup> Van Bueren recognises that 'by allowing State Parties' to make an exception on the separation of 'children and adults in the child's best interest, the CRC provides a state with an impetus to admit to the existence of child prisoners in adult institutions and to recognize their entitlements'.<sup>125</sup> The provision of Article 37(c), by introducing non-separation in the best interests of the child, takes on board the view of State Parties that an absolute prohibition on separation is inappropriate.<sup>126</sup> Schabas and Sax argue that the incorporation of the best interest clause in Article 37(c) CRC qualifies the permitted exception on separation of children to satisfy child well-being rather than to accommodate exception for budgetary reason by State Parties.<sup>127</sup> The Committee adopts a similar approach when emphasising that 'the permitted exception to the separation of children from adults stated in article 37(c) CRC' go beyond a narrow interpretation of the child's best interest 'for the convenience of the State Parties'.<sup>128</sup> This interpretation implies, in practical terms, that reasons such as inadequate facilities, lack of financial resources, or ignored status of juvenile inmates do not fall within the ambit of the child's best interests.

Three issues deserve special consideration with regard to the principle of separation, because of the problems that might occur in practice. The first issue relates to children deprived of their liberty who turn eighteen. There are two subcategories; the young adult who was a child while committing the offence, and the young adult who turns eighteen while serving a sentence. The Committee proclaims that 'every child alleged as, accused of, or recognized as having infringed the penal law *has the right* (emphasis added) to be treated in accordance with the provisions of article 40 CRC'.<sup>129</sup> The age at the time of the alleged commission of the offence entitles him or her 'to be treated under the rules of juvenile justice',<sup>130</sup> once the child turns eighteen while prosecuted. In practical terms, this requirement entitles children and young adults to benefit from the protections provided in Article 37(b) and (c) CRC and Article 40 CRC. It is an approach that leads to the conclusion that young adults, who were children at the time of an alleged offence, should be housed in facilities designed for children, rather than adult centres or prisons. In addition, the Committee emphasises that if it was deemed to be in their interest and not contrary to the best interest of younger children, the principle of separation implied the possibility to continue the child's stays in the facility for children once he or she turns 18.<sup>131</sup> However, a transfer to adult facilities might take place if the presence of a young adult was negatively affecting and jeopardising the best interests of juveniles housed with them. One solution to avoid the issue of placement for these two categories would be to establish special units for young adults within a juvenile facility. The Committee has clearly urged State Parties to consider the possibility of considering any initiatives that permits treatment of children at the upper age limit for juvenile justice to benefit from the rules and regulations of administering juvenile justice.<sup>132</sup> Interestingly, the Council of Europe goes further than the Committee, and makes it obligatory for State Parties to allow all the 'juveniles who reach the age of majority and young adults dealt with as if they were juveniles' to remain 'in institutions for juvenile offenders or in specialised institutions for young adults'.<sup>133</sup> The rationale behind the requirement is to ensure that a subsequent transfer to a prison for adults does not undermine positive educational results that

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<sup>124</sup> JDLs Rule 29

<sup>125</sup> Geraldine Van Bueren, *The international law on the rights of the child*, M. Nijhoff Dordrecht, London, 1998, p222

<sup>126</sup> Several States parties have found it necessary to enter reservations to the provision of Article 10 (2)(b) and (3) ICCPR, in regard of their obligation to separate children from adults in the course of detention or imprisonment

<sup>127</sup> Schabas & Sax 2006, p.92

<sup>128</sup> General Comment No.10, paragraph 28(c)

<sup>129</sup> General Comment No.10, paragraph 21

<sup>130</sup> *Ibid supra* note 96

<sup>131</sup> General Comment No.10, para. 28(c)

<sup>132</sup> General Comment No.10, paragraph 21

<sup>133</sup> Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2008)11 of the Committee of Ministers to member states on the European Rules for juvenile offenders subject to sanctions or measures*, Adopted by the Committee of Ministers on 5 November 2008 at the 1040th meeting of the Ministers' Deputies), para. 59.3,

might be achieved by serving the sentence in the same institution. Such a transfer might take place only if it is prompted by the interest of the child.<sup>134</sup>

The second issue to be considered is the separation of females from males. In many countries, women and girls in prison and other places of detention are victims of gender-based violence.<sup>135</sup> As women constitute a small minority of the prison population, State Parties may have even fewer specialised custodial facilities for them, which often makes it more difficult to guarantee the segregation of juvenile females from adults. Therefore, juvenile females are often detained with older women, with no attention to their needs or their vulnerability to violence.<sup>136</sup> Article 37(c) and JDLs are silent with regard to separation based on sex; however, the Beijing Rule 26.4 recognises and addresses the special needs of juvenile females. According to the commentary on Rule 26.4, adoption of a position with regard to separation of females from males is prompted by ‘the fact that female offenders normally receive less attention than their male counterparts’ and that they have ‘particular problems and needs while in custody’. Although the CRC and other international instruments do not specify the separation of males from females, other international human rights instruments impose an obligation on State Parties to comply with gender separation. Thus, the SMR states firmly in Rule 8 that ‘men and women shall so far as possible be detained in separate institutions’. Even when there is no possibility of separate institutions, the facility should be designed in a way to provide entire separation of women.<sup>137</sup> The necessity of having a strict separation derives from the fact that women are treated ‘in a system primarily designed for men’.<sup>138</sup> In addition, HRC emphasises that it is preferred that women in detention are only supervised by females to prevent incidents of ill-treatment of women in prisons by male staff.<sup>139</sup> As several reports highlight the risk of physical and sexual abuse of girls in detention facilities,<sup>140</sup> the HRC stresses the importance of specific reporting by State Parties regarding the compliance to the separation juvenile females from adults and their access to rehabilitation and education programmes and to conjugal and family visits.<sup>141</sup>

The third issue relates to the separation of children pending trial from convicted children. Article 37(c) does not explicitly contain a clause requiring such separation. To the Committee, ‘the presumption of innocence is a fundamental principle for the protection of human rights of children in conflict with the law’.<sup>142</sup> Therefore, the Committee does not explicitly consider the issue of separation between untried/convicted juveniles, as it is strongly persuaded that the use of pre-trial detention as punishment violates the presumption of innocence.<sup>143</sup> The Committee urges State Parties to avoid pre-trial detention as much as possible and to ‘take adequate legislative and other measures to reduce the use of pre-trial detention’. The Committee approaches the requirement of Rule 13 of the Beijing Rules, which require the use of detention pending trial ‘only as a measure of last resort and for the shortest possible period of time’ because of the

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<sup>134</sup> Ibid Supra note 100

<sup>135</sup> ‘Violence Against Girls in Conflict with the Law’ *Human Rights Watch*, 2005

<sup>136</sup> Pinheiro 2006 2006, p.195

<sup>137</sup> Rule 8 of SMR

<sup>138</sup> ‘Violence against women and girls in prison – Submission to the Study of the Secretary-General of the United Nations on Violence against Women’. *Quaker United Nations Office*, Geneva, 2005, pp. 1. Although the conditions of detention may not be discriminatory *per se*, not taking into account the special needs of women in a system primarily designed for men results in detention having a discriminatory impact on women.

<sup>139</sup> General Comment No. 28, para. 15,

<sup>140</sup> Since 2002, Human Rights Watch investigations of police violence and juvenile justice systems have documented abuses against girls in Brazil, Egypt, the Democratic Republic of Congo, Papua New Guinea, and the United States. <http://www.hrw.org/legacy/english/docs/2007/02/20/global15345.htm> Two QUNO studies: ‘Violence against girls in detention’ and ‘Violence against women and girls in prison’ highlight some of the physical and abuse of girls in detention facilities. <http://www.quno.org/humanrights/women-in-prison/womenPrisonLinks.htm#QUNOPUB>

<sup>141</sup> Ibid note 106

<sup>142</sup> General Comment No.10, para. 23(b)

<sup>143</sup> General Comment No.10, para. 28(a) According to the principle of presumption of innocence pre-trial detention may not have a punitive nature and may not be imposed for punitive reason. Generally speaking the Committee is not in favour of detention to be used as a pre-trial measure.

danger of ‘criminal contamination’ that it presents to juveniles. However, Rule 13 of the Beijing Rules goes beyond the mere request for compliance with the principle of last measure and for the shortest appropriate time, as it covers situations when detention cannot be avoided, and entitles juveniles under detention pending trial ‘to all the rights and guarantees’ provided in SMR and article 9 and 10, paragraphs 2(b) and 3 ICCPR. Article 10, paragraphs 2 and 3 of ICCPR explicitly articulate an obligation on State Parties to take into account the status of these two groups and to impose separation and different treatment. In this light, Rule 8(b) SMR provides that ‘untried prisoners shall be kept separate from convicted prisoners’. The segregation of the two categories is considered of such importance that it deserves an entire section of SMR, to provide detailed guidance regarding treatment of untried prisoners. Thus, Section C SMR entitles the untried prisoners to benefit from a ‘special regime of treatment’, which respects their presumption of innocence.<sup>144</sup> The approach of Article 10, paragraph 2(b) and paragraph 3 ICCPR and SMR is recapitulated in a more concise way in JDLs. Thus, Rule 17 JDLs strongly reiterates the separation of ‘untried’ from convicted juveniles, implying differentiated treatment for untried juveniles because of their status of being presumed innocent.

Van Bueren notes that Article 37(c) ‘has a broader ambit than article 10(2)(b) and (3) ICCPR’. She believes that ‘it applies to all deprivation of liberty and not only to children facing or found guilty of criminal charges’.<sup>145</sup> However, Van Bueren and Liefwaard agree that the separation issues discussed above need to be considered in selecting the most appropriate placement for children deprived of liberty.<sup>146</sup>

#### **II.4.4 The right of the child to remain in contact with his or her family**

The second aspect of the right to be treated with humanity and with respect for inherent dignity is linked to the right of a child deprived of liberty ‘to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances’. The clause of ‘exceptional circumstances’ was included for the benefit of states to permit them to exercise discretion in whether to derogate from the principle ‘in the best interest of the child in cases where family members continue to exert damaging influences on the child’.<sup>147</sup> The Committee emphasises that ‘exceptional circumstances’ should not be interpreted restrictively and used to the convenience of State Parties. The Committee set out that domestic legislation should indicate clearly the conditions when the right is restricted or denied and not leave it to the discretion of competent authorities to make such decision.<sup>148</sup> Despite the deceptiveness of ‘exceptional circumstances’ looking to not comply with a child’s best interests, Van Bueren argues that they ‘should be exercised only in accordance with a child’s best interest’.<sup>149</sup> This interpretation is based upon categorically prohibition on restriction or denial of contact with the family for any purpose of Rule 67 JDLs. According to Van Bueren, ‘for any purposes’ even includes the situation of restricting family contacts ‘as a means of securing a child’s cooperation’.<sup>150</sup> The last context is of great importance as it protects the child from coercion or making a confession or a self-incriminatory testimony.

International treaties still regard the family as providing society with an organised unit upon which the structure of society is based.<sup>151</sup> Besides being a child’s right to humane treatment, receiving visits by family members contributes to one of the principal aims of juvenile justice and

<sup>144</sup> SMR Rule 84 (3)

<sup>145</sup> Van Bueren 1998, p. 222

<sup>146</sup> Van Bueren 1998, p.222, Liefwaard, p. 274

<sup>147</sup> Van Bueren 1998, p.219

<sup>148</sup> General Comment No.10, paragraph 28(c)

<sup>149</sup> Van Bueren 1998, p. 220

<sup>150</sup> *ibid* supra note 116.

<sup>151</sup> Van Bueren 1998, p. 77

that of preparing juveniles for their return to society.<sup>152</sup> In light of this, it is important to provide and facilitate ‘regular and frequent visits’ of family members ‘in circumstances that respect the need of the juvenile for privacy, contact and unrestricted communication with the family’. Regularity and frequency refers to visit taking place once a week and not less than once a month.<sup>153</sup> However, a child’s entitlement to maintain contact with their family is not only limited to receiving visitors. In order to achieve the objective of reintegration into society, juveniles have a right to pay a visit to their home and family.<sup>154</sup> The principal condition to guarantee compliance on maintaining contact with the family is the placement of a child in a facility that ‘is as close as possible to the place of residence of his/her family’.<sup>155</sup> The Committee has not commented on what should happen if family visits are not possible because of a facility being located a considerable distance from the habitual residence, nor has it elaborated how, and on which grounds, the institution might assist a juvenile and his family who are not able to maintain contact because of financial circumstances.

Besides family visits, Article 37(c) provides for correspondence either via post or telephone. Furthermore, Rules 59 to 62 of JDLs set out more detailed information regarding contact and correspondence with the family. Although Rule 61 JDLs imposes a duty on the institution to assist the juvenile ‘as necessary’ to enjoy the right of correspondence, State Parties have interpreted this as meaning ‘at least twice a week’ with this, in many cases, the maximum to be fulfilled.<sup>156</sup>

Neither the CRC provision nor the respective JDLs rules provide a clause to oblige an institution to assist a juvenile with the appropriate financial and welfare support to maintain family contact.<sup>157</sup> The international standards do not cover the situation where State Parties cannot guarantee postal or telephone services. The instruments mentioned above also do not call for institutional arrangements of more suitable hours when the family members are not able to visit the juvenile during the established time frame laid down by the institution.

A child’s right to maintain contact with his or her family should be read in conjunction with other rights set out in the CRC. On the one hand, Article 9(4) CRC imposes a positive obligation on State Parties to provide ‘essential information concerning the whereabouts of the members of the family’.<sup>158</sup> On the other hand, provision of information is left at the discretion of State Parties. They are recommended to provide the information only ‘upon request’ and after taking into consideration ‘the detrimental effects’ that such submission might have ‘to the well-being of the child’.

Compared to CRC, the JDLs set up clear rules on the range of information to be provided. Thus, Rule 22 imposes a requirement upon authorities to provide information to parents and guardians or closest relative of the juvenile about admission, place, transfer and release of the juvenile without delay. However, Rule 56 JDLs adds a new element, as it includes the right to be informed

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<sup>152</sup> Rule 59, JDLs

<sup>153</sup> Rule 60 JDLs

<sup>154</sup> Rule 59, JDLs

<sup>155</sup> General Comment No.10, para. 28(c)

<sup>156</sup> Rule 61 JDLs entitles to a juvenile ‘the right to communicate in writing or by telephone at least twice a week with the person of his or her choice, unless legally restricted’. Contrary to JDLs, Recommendation CM/Rec(2008)11 para. 83, provides for communication by an unrestricted number of letters and, as often as possible, by telephone or other forms of communication. These latter forms may include contacts through the Internet, by e-mail for example.

<sup>157</sup> Besides assisting juveniles in maintaining adequate contact with the outside world, Rule 85.1 Recommendation 59.3 establishes a duty on institution to provide juveniles with the appropriate means to do so.

<sup>158</sup> Article 9(4) CRC

‘of the state of health of the juvenile on request’,<sup>159</sup> or ‘in the event of any important changes in the health of the juvenile’. The latter element implies *inter alia* information ‘on illness requiring transfer of the juvenile to an outside medical facility, or a condition requiring clinical care within the detention facility for more than 48 hours.’<sup>160</sup> Section I of JDLs adopts Rule 44 SMR, which deals with the information provided to juvenile with regard to illness, injury, and death of a family member from the facility authorities. Rule 56 and Rule 58 establish a reciprocal share of information between facility and family on the death, serious illness, or injury of juvenile, or any immediate family member. Rule 58 expands the scope of Rule 44(2) SMR, as it imposes an explicit requirement on authorities that the juvenile be permitted ‘to attend the funeral of the deceased or go to the bedside of a critically ill relative’.<sup>161</sup> However, none of the international instruments clarify whether a person deprived of liberty is allowed to leave the institutions for other humanitarian reasons, such as weddings or the birth of a juvenile’s own child.

## II.5 Review of deprivation of liberty-assistance and prompt decision

Article 37(d) contains procedural safeguards for children deprived of liberty by spelling out ‘the right to prompt access to legal and other assistance’, ‘the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority’, and the right ‘to a prompt decision on any such action’. Despite some textual differences, most implications of Article 9(4) of the ICCPR apply to Article 37(d).<sup>162</sup>

What should be noted is the fact that Article 37(d) stipulates that these procedural safeguards apply to ‘every child’ deprived of liberty, making no distinction between different forms or contexts of deprivation of liberty.

CRC does require that ‘every child deprived of his or her liberty shall have the right to prompt access to assistance’, which is not necessarily under all circumstances legal, but it must be appropriate in the preparation of his or her defence.<sup>163</sup> The formulation reflects the nature of a state’s legal procedures once a person violates the penal law.<sup>164</sup> To entitle a child to the right of assistance in preparation of defence, a right not particularly contained in Article 9(4) ICCPR and Article 5(4) ECHR, is a clear expression of the evolving capacities of the child principle.<sup>165</sup>

Article 37(d) is the *habeas corpus* provision for children deprived of liberty. It provides a crucial safeguard, which is, in essence, a child’s right to have the detention reviewed in court without delay. The term ‘review’ relates ‘exclusively to the ‘lawfulness’ of deprivation of liberty, i.e. the compatibility of the detention with domestic and international law’,<sup>166</sup> independently of the right to appeal in criminal matters.<sup>167</sup> Granting to a ‘court or other competent, independent and impartial authority’ *habeas corpus* status accommodates all differences among justice systems. In addition, it implies that a judicial review procedure should be available in cases where the deprivation of liberty is an administrative decision.<sup>168</sup> The immediate release of the child

<sup>159</sup> Rule 44(2) SMR requests the authorities to permit prisoner ‘whenever the circumstances allow, going to the bedside of critically ill relative. Rule 56(1) JDLs requests the authorities to provide to a juvenile the opportunity not only during the illness, but also attending the funeral in case of death.

<sup>160</sup> Rule 56, JDLs

<sup>161</sup> Rule 59, JDLs

<sup>162</sup> Schabas & Sax 2006, p. 94 in addition the provision incorporates most implication of Article 5(4) of the ECHR as well.

<sup>163</sup> Article 37 (d) and Article 40(2)(b)(ii) of CRC,

<sup>164</sup> Van Bueren 1998,p.178

<sup>165</sup> This right would be further discussed while considering the element of fair trial in the next chapter.

<sup>166</sup> Nowak 2005, Article 9 para.51, p. 236

<sup>167</sup> ECtHR has concluded that ‘the review, which must be obtained ‘speedily’, is not an appeal but must examine the procedural and substantive conditions which are essential for the ‘lawfulness’, in the Convention terms, of the deprivation of liberty’. Harris et al 2009, p.182

<sup>168</sup> General Comment No.10 para. 28b

concerned must be ordered, if the ‘court or other competent, independent and impartial authority’ concludes that detention is ‘unlawful’.

The core rule is that the decision on the legality must be taken ‘promptly’. By referencing ‘promptly’ rather than ‘without delay’ of Article 9(4) ICCPR or ‘speedily’ of Article 5(4) ECHR, Article 37(d) incorporates the ‘avoidance of unnecessary delay’ requirement of Rule 20 of the Beijing Rules. The ‘promptly’ requirement highlights a specific child development-orientation as it conveys the message that ‘a speedy conduct of formal procedures in juvenile cases is a paramount concern.’<sup>169</sup> The Committee on the General Comment No. 10 emphasised this message by clarifying the meaning of ‘prompt decision’. Thus, it determines a term of ‘within 24 hours’ ‘to examine the legality of (or the continuation of) deprivation of liberty’ of ‘every child arrested and deprived of his/her liberty’.<sup>170</sup> Furthermore, the Committee recommends a regular review of pre-trial detention at reasonable intervals, preferably every two weeks, even if the original basis for detention is a court order.<sup>171</sup> Finally, the Committee suggested to State Parties the establishment of a time limit ‘e.g. within or no later than two weeks after the challenge is made’ in regard to render the decision once that deprivation of liberty decision is challenged.<sup>172</sup>

### III. Conclusion

Article 37 CRC provides for a strong and clear legal child-oriented framework on the issue surrounding the detention and deprivation of liberty of children. A general reading of Article 37 clearly indicates that two distinct issues are addressed; first, procedural and substantive rights of deprivation liberty, as contained in first sentence of paragraph (b) and paragraph (d); and second, in respect of the protection of liberty of the child and states’ obligations regarding the treatment of children deprived of their liberty, as contained in second sentence of paragraph (b) and paragraph (c).

While combining specific elements of its direct ancestors, Articles 9 and 10 ICCPR, into one article, Article 37 CRC adds and refines several elements that are more specific to a child development-orientation. Although the second sentence of Article 37(b) represents a restrictive approach compared to JDLs by subjecting the period of time to ‘appropriate’, the requirement of last resort and shortest appropriate period of time is a unique expression of the evolving capacities of the child. While it is important to note that Article 37(c), referencing to the ‘needs of persons’ and ‘child’s age’, is a clear application of the evolving capacities of the child, it explicitly addresses the right of ‘every child deprived of liberty’ to be treated with humanity and respect for the inherent dignity of the human person. Finally, Article 37(d), among other things, extends the child elements by adopting the right to prompt access to legal and other appropriate assistance, demanding a ‘prompt decision’ on reviewing the legality of deprivation of liberty.

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<sup>169</sup> The Commentary on Rule 20 of the Beijing Rules.

<sup>170</sup> General Comment No.10 para. 28b

<sup>171</sup> Ibid

<sup>172</sup> Ibid